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The Freedom of Information Act and the Ecology of Transparency

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I. INTRODUCTION: THE FLAWS OF FOIA?

Modern enthusiasts for presidential authority are fond of reminding the nation that the authors of the Federalist Papers lauded a single executive as partaking of the virtues of "[d]ecision, activity, secrecy, and despatch."[1] They invoke less fervently another basis of

1 THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see id.* No. 64, at 393 (John Jay) (referring to the necessity of secrecy and dispatch in foreign affairs). For examples deploying Federalist No. 70, see Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 579–80 (2004) (Thomas, J., dissenting); Memorandum from John Yoo, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto Gonzales, Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorist and Nations Supporting Them (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm; Jay S. Bybee, *Advising the President: Separa-*

Federalist approbation, a reason the authors regarded as "one of the weightiest": that alternatives to a single executive would tend "to conceal faults and destroy responsibility."[2] A unitary executive's actions were apt to be more "narrowly watched and more readily suspected" by an informed public opinion than those of a plural executive or a council of advisors.[3]

In the body of the Constitution, the task of informing that narrowly-watching public was left to the structures of divided government. The mutual jealousy of the elective branches of national government provided one assurance of information. State political structures were thought to supply a second: Federalist No. 84 argued that "[t]he executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration," whose "regular and effectual system of intelligence" would allow them to "communicate the same knowledge to the people."[4] But neither the Framers' Constitution nor the Bill of Rights went further. As Justice Stewart observed, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[5]

What the text of the Constitution omits, the last generation has embedded as a part of modern "small c" constitutional practice. In the years since Watergate, America's governing structure has entrenched a Freedom of Information Act (FOIA), crafted to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[6]

But FOIA is itself a subject of contention. Justice Scalia, before ascending to the bench, maintained that the Freedom of Information Act was not only constitutionally optional but practically unnecessary and normatively pernicious. While chief of the Office of Legal Counsel, he coordinated an unsuccessful opposition to amendments strengthening the Freedom of Information Act on grounds of execu-

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tion of Powers and the Federal Advisory Committee Act, 104 YALE L.J. 51, 111 (1994); Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123 (2007).

2 THE FEDERALIST NO. 70, *supra* note 1, at 395.

3 *Id.* at 398.

4 THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 1, at 484.

5 Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

6 NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), *quoted with approval in* John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989), *and* DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 16 (2001); *see, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004) ("[FOIA] defines a structural necessity in a real democracy.").

tive autonomy.[7] Upon his return to academia, then-professor Scalia decried:

> [T]he obsession that gave [those amendments] birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press. . . . It is a romantic notion, but the facts simply do not bear it out. The major exposés of recent times, from CIA mail openings to Watergate to the FBI COINTELPRO operations, owe virtually nothing to the FOIA but are primarily the product of the institutionalized checks and balances within our system of representative democracy.[8]

In recent reflection, FOIA has also been the subject of a complementary criticism: not that it is unnecessary, but rather that it is ineffective. Journalists criticize "a Rube Goldberg apparatus that clanks and wheezes, but rarely turns up the data."[9] Dissenting judges protest that the aftermath of September 11 has led to "uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information . . . [that] eviscerates both FOIA itself and the principles of openness in government that FOIA embodies."[10] Commentators deplore suppression of information by an increasingly secretive administration and the willingness of the judiciary to forego disclosure obligations on the flimsiest of speculations when "national security" has been invoked.[11] Critics have lamented

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7 The Memory Hole, Supreme Court Justice Scalia Fought Against the Freedom of Information Act, http://www.thememoryhole.org/foi/scalia_foia.htm; Nat'l Sec. Archive, Veto Battle 30 Years Ago Set Freedom of Information Norms: Scalia, Rumsfeld, Cheney Opposed Open Government Bill (Apr. 6, 2004), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/.

8 Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 15, 19; *cf.* Ken Auletta, *Fortress Bush; How the White House Keeps the Press Under Control*, NEW YORKER, Jan. 19, 2004, at 53 ("Andrew Card, Bush's chief of staff, . . . said of the press, 'They don't represent the public any more than other people do. In our democracy, the people who represent the public stood for election. . . . I don't believe you have a check-and-balance function.'" (second ellipsis in original)).

9 David Carr, *Let the Sun Shine*, N.Y. TIMES, July 23, 2007, at C1.

10 Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 937 (D.C. Cir. 2003) (Tatel, J., dissenting).

11 *E.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, *passim* (2006); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN L. REV 131, 166–67 (2006); Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN L. REV. 845, 854 (2006); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628, 632, 654 (2005); *cf.* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 60–62 (characterizing FOIA cases as "National Security Maximalism").

that even where FOIA requests disclose abuses, disclosures have scant impact; revelation has not been followed by repudiation.[12]

A third constellation of criticism has discerned a mismatch between the legal regime of transparency and the goals of good governance. FOIA is said to be the "Sistine Chapel of Cost-Benefit Analysis Ignored," burdening public servants in order to benefit "corporate lawyers" and criminal defendants rather than "John Q. Public."[13] Disclosure obligations are deemed to "exact financial, deliberative, and bureaucratic burdens on government, even when disclosure serves no useful purpose," while "vast quantities" of important information "remain secret."[14] Transparency mechanisms, it is said, need reform to "calibrate an optimal process of open government."[15]

This Article assesses these criticisms in the context of the impact of our transparency regime on the "Global War on Terror" (or "Terrorism," hereinafter GWOT).[16] Drawing on prior case studies of transparency and the abuses of anti-terrorism, I argue that each group of critics misconceives important normative and practical issues. FOIA must be understood as functioning within a broader

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12 *See, e.g.*, ALASDAIR ROBERTS, BLACKED OUT 59, 233–37 (2006); Eric Umansky, *Failures of Imagination*, COLUM. JOURNALISM REV., Sept./Oct. 2006, at 16; Tom Egelhardt, *When Facts Fail*, SALON.COM, Feb. 28, 2006, http://www.salon.com/opinion/feature/2006/02/28/engelhardt/print.html; Mark Fenster, Information Does Not Wish to Be Free: Reconsidering Transparency as a Democratic Ideal 17 (May 2003), http://lic.law.ufl.edu/~page/fenst.pdf.

In some sense, this is the obverse of Professor John Yoo's claims that the 2004 election constituted an approval of imperial presidential decisions to engage in torture. *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106.

13 Scalia, *supra* note 8, at 15–16; *see also* MARK TAPSCOTT & NICOLE TAYLOR, FEW JOURNALISTS USE THE FEDERAL FREEDOM OF INFORMATION ACT, http://www.heritage.org/Press/MediaCenter/FOIA.cfm (last visited Sept. 1, 2007) (reporting on a 2001 investigation which found that "40 percent of the [FOIA] requests were from corporations . . . . A mere 5 percent of the requests were from individuals identifying themselves as journalists").

14 Fenster, *supra* note 11, at 913.

15 *Id.* at 936; *see also id.* at 937.

16 Official documents vacillate between referring to a "Global War on Terror," *see, e.g.*, OFF. OF THE SEC'Y OF DEF., FY 2007 EMERGENCY SUPPLEMENTAL REQUEST FOR THE GLOBAL WAR ON TERROR 85 (Feb. 2007), *available at* http://www.defenselink.mil/comptroller/defbudget/fy2008/fy2007_supplemental/FY2008_Global_War_On_Terror_Request/pdfs/operation/14_%20OSD_Supp_OP-5.pdf, and a "Global War on Terrorism," *see, e.g.*, News Release, U.S. Dep't of Def., President Authorizes Two New Medals (Mar. 15, 2003), http://www.defenselink.mil/releases/release.aspx?releaseid=3662. Apparently, the current chairman of the Joint Chiefs, Admiral Michael Mullen, has now prohibited the use of at least the former of the two phrases. *See* Al Kamen, *In Washington and Beyond, Disclosing a Few of Cheney's Locations*, WASH. POST, Oct. 5, 2007, at A19. I will pretermit discussion of the confusion in terminology and its implications regarding the clarity of policy analysis or its absence and refer to the enterprise by its official acronym "GWOT."

ecology of transparency. As part of that system, it has done underappreciated service in the past half-decade and partakes of virtues of resiliency and efficacy that should be acknowledged and preserved.

II. THE ECOLOGY OF TRANSPARENCY: FOIA AND CONSTITUTIVE STRUCTURE

In his claim that the "institutionalized checks and balances" of the constitutional text render FOIA unnecessary, then-professor Scalia's historical claims oversimplified matters considerably—indeed disingenuously. The "institutionalized checks and balances" he mentioned had proven efficacious during the Nixon crisis only with the goad and assistance of extra-institutional actors: leakers, investigative reporters, publishers, and, indeed, civilly disobedient sneak thieves. It is true that FOIA played no role in the Watergate drama, for it was at the time virtually toothless.[17] FOIA was strengthened, along with a network of other structural checks, precisely in the hope that in future crises, it could serve not as the first line of defense, but the last.

In the last half-decade, the efforts of the Bush administration to centralize power and evade countervailing mechanisms of control have been characterized as "worse than Watergate."[18] This may be an overstatement. Still, in the aftermath of September 11, the administration demonstrably undertook initiatives of dubious legality and morality, while the "institutionalized checks and balances" contained in the text of the Constitution remained largely quiescent. Congress was initially paralyzed by the aftershocks of the attacks of September 11, and, after the President's party gained control of the Senate in 2002, by party loyalty. The courts awaited justiciable controversies, delayed by a combination of secrecy and sequestration of potential plaintiffs. When confronted with legal challenges, judges often proved unwilling to exercise the power of judicial review.

One of the few arenas in which efforts to constrain abuses met with success was precisely in the initiatives by actors outside the tripartite constitutional structure to invoke mechanisms of transparency. As I have documented in an earlier article, what then-professor Scalia derided as the "romantic notion" of "do-it-yourself oversight" in

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17 *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658–59 (1984) (describing FOIA before 1974 as "a paper tiger" in light of bureaucratic recalcitrance and lax judicial enforcement).

18 JOHN W. DEAN, WORSE THAN WATERGATE (2004).

fact provided building blocks for accountability regarding abuses during the first five years of political stasis regarding the GWOT.[19]

Justice Scalia's appeal to "institutionalized checks and balances" nonetheless points to an important insight, for the successes of FOIA in calling the GWOT to account have been predicated upon and facilitated by institutions beyond the statute itself. As we will see, to the extent that FOIA has functioned as an effective check, it has been a part of an ecology of transparency that includes the permanent infrastructure of federal civil servants with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing prolonged campaigns for disclosure.

A. "If a Policy Falls in the Forest and No Trees Are Killed": The Creation of Records

Disclosure mechanisms such as FOIA can have no effect in the absence of information to disclose. One could imagine a regime in which government officials seeking to avoid disclosure of their actions destroy all records of them and thereby immunize themselves from subsequent accountability. In prior administrations, these efforts have taken the form of "operational secrecy" and document destruction.[20] In the current environment, we have seen the gambits of "ghost detainees," missing documents, and sanitized e-mail records.[21]

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19 Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141 (2007) [hereinafter Kreimer, *Strategy of Transparency*].

20 *See, e.g.*, Frank Tuerkheimer, *Watergate as History*, 1990 WIS. L. REV. 1323, 1326 (1990) (book review) (discussing the disappearance of two tapes of presidential conversations and "an eighteen-and-a-half minute gap on another—a gap coming at precisely the point where Watergate was discussed"); H.R. REP. NO. 100-433, S. REPT. NO. 100-216, at 319 (1987) (Conf. Rep.) (describing the shredding of documents that revealed questionable conduct by Reagan administration officials); United States v. Stanley, 483 U.S. 669, 688–89 (1987) (quoting a 1959 U.S. Army document stating that liability "for alleged injury due to EA 1729 [LSD]" can be avoided by "[p]roper security and appropriate operational techniques [that] protect the fact of employment of EA 1729." (first set of brackets in original)).

21 *See, e.g.*, Jane Mayer, *Lost in the Jihad: Why Did the Government's Case Against John Walker Lindh Collapse?*, NEW YORKER, Mar. 10, 2003, at 50 (describing a "purged" Justice Department file containing copies of e-mailed advice regarding ethical violations in the interrogation of John Walker Lindh "which had been a thick, staple-bound stack of paper, [but then] had been reduced to several sheets [with] [a]ll the staples . . . removed," and which whistleblower Jesselyn Radack had retrieved with the help of the Justice Department computer help line); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress; Friends Say McCarthy Learned of Denials About Detainees' Treatment*, WASH. POST, May 14, 2006, at A1 ("[T]he CIA's general counsel had worked to secure a secret Justice Department opinion

Most dramatically, investigative journalists recently uncovered the CIA's decision to destroy hundreds of hours of video recordings depicting "enhanced" interrogation of suspected terrorists.[22] But effective bureaucracies run on records, and modern technology has exponentially enhanced the array of information recorded.[23] It is difficult to eradicate entirely the evidence of any widespread policy.

Structural features of the federal government, and of records themselves, raise barriers to keeping initiatives entirely "off the books."[24] Efforts to avoid recordkeeping, or to sanitize files once kept, require unanimous consent of all participants. A secretary who declines to shred his copy of a memorandum, like a computer technician who retains the proscribed backup copy, is as effective in preserving information as is a general or department head. A career federal bureaucracy has endowed the government with a cadre of individuals whose allegiance to the current regime cannot be counted on to eliminate inconvenient information, both because they have been appointed by previous regimes and because they will be working for subsequent ones.[25]

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in 2004 authorizing the agency's creation of 'ghost detainees' . . . ."); Pete Yost, *Judge: Preserve White House E-mails*, TIME, Oct. 19, 2007 (describing the apparent deletion of over 5,000,000 e-mails and recommending an order that backup tapes be preserved); *see also* Radack v. U.S. Dep't of Justice, 402 F. Supp. 2d 99, 102 (D.D.C. 2005) (describing the purged file and Radack's reconstruction of the missing e-mails); Jane Mayer, *The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32 [hereinafter Mayer, *The Memo*] (describing policy of Defense Department General Counsel William Haynes "who frequently warned subordinates to put nothing controversial in writing or in e-mail messages").

22 *See* Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, N.Y. TIMES, Dec. 8, 2007, at A1.

23 The Iran-Contra scandal unraveled in part because of the recovery of e-mail records; Abu Ghraib took shape in the shadow of pervasive digital photography, and the CIA would have had no images to destroy absent the lure of video recording capability.

24 The Office of the Vice President, staffed entirely by political appointees, may, however, constitute a black hole. *Cf.* Cheney v. U.S. Dist. Ctourt, 542 U.S. 367 (2004); Seymour M. Hersh, *The Redirection: Is the Administration's New Policy Benefitting Our Enemies in the War on Terrorism?*, NEW YORKER, Mar. 5, 2007, at 65 ("Iran-Contra was the subject of an informal 'lessons learned' discussion two years ago among veterans of the scandal. . . . [T]he participants found ' . . . . [that future covert operations have] got to be run out of the Vice-President's office' . . . ." (quoting a former senior intelligence official)); Justin Rood, *Cheney Power Grab: Says White House Rules Don't Apply to Him*, THE BLOTTER, June 21, 2007, http://blogs.abcnews.com/theblotter/2007/06/cheney-power-gr.html (reporting a challenge to the claim that the Vice President's office is exempt from reporting and oversight requirements regarding classified materials).

To the extent that government activities are outsourced to the private sector, their records will be beyond the reach of FOIA requests. *See* Fenster, *supra* note 11, at 917–18.

25 *See, e.g.*, DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 11–50 (2008) (reporting that career em-

Equally important, the federal governing structure is multivocal and professionalized. Officials build careers not on fealty to the current administration, but on commitment to a set of departmental goals and professional norms.[26] Such commitments are likely to generate records inconvenient to administrations bent on concealment. Moreover, the State Department, Defense Department, Justice Department, Department of Homeland Security, and CIA have each been provided by statute in the aftermath of Watergate with an independent Inspector General, whose office is specifically tasked with discovering and recording malfeasance.[27] In the current GWOT, the integrity of internal opponents among the ranks of civil servants who have committed to writing their opposition has been a prominent source of documentation of abuse.

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ployees make up about 50% of the government, but the proportion of actual political appointees is much lower than half); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 568 (2003) ("[E]ntrenched personnel may serve as internal monitors of agency activity . . . .").

The desire of career officers to avoid taking undivided responsibility for controversial initiatives often induces them to demand written ratification from superiors. *See, e.g.*, Philippe Sands, *The Green Light*, VANITY FAIR (May 2008), available at 279 ("Diane Beaver was insistent that the decision to implement new interrogation techniques [at Guantanamo in 2002] had to be properly written up and that it needed a paper trail leading to authorization from the top.").

26 *Cf.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2376 (2006) ("[O]ne explanation for the rise of American bureaucracy is precisely that it was a response to the problem of the first overwhelmingly unified party government in American history, and to the threat that government was thought to pose to traditional American political practice.").

27 *See* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1–12 (2000)); 22 U.S.C. § 3929 (2000) (establishing an Inspector General for the State Department and Foreign Service); 50 U.S.C. § 403q (2000) (establishing an Inspector General for the CIA). On the expansion of the network of Inspectors General, see PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 26 (1993).

Inspectors General are presidential appointees, but they must be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability," Inspector General Act of 1978 § 3(a), may be removed only with special notice to Congress, § 3(b), are required to appoint their own assistants, § 3(d), and may demand information, issue subpoenas, and inquire into matters within their jurisdiction without interference from the heads of their departments, § 3(a).

For a discussion of another, not-quite-so-well insulated monitor, see History of the Information Security Oversight Office, http://www.archives.gov/isoo/about/history.html (last visited Sept. 1, 2007) ("President Jimmy Carter established ISOO [Information Security Oversight Office] with the signing of Executive Order 12065, 'National Security Information,' on December 1, 1978."). *See also* Exec. Order No. 12,958, pt. 5, 68 Fed. Reg. 15,315, (Mar. 28, 2003), *available as amended at* http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.html (setting forth the current authority of the ISOO).

B. A Machine that Won't Go Of Itself: FOIA Requesters

The existence of records does not entail their dissemination, for FOIA does not place affirmative disclosure obligations on federal record holders. Rather, the prospect of effective transparency rests on requesters who seek information.[28]

From the beginning of the GWOT, efforts to obtain judicial review have been impeded by the fact that those most directly affected by GWOT excesses were unavailable as plaintiffs in federal court, and those who objected to the abuses on principle were said to lack "standing."[29] FOIA, which gives "any person" the right to seek information, provides a forum in which principled opponents may seek legal leverage.[30] And—a matter not to be taken for granted in international comparison—black-letter First Amendment doctrine precludes the government from retaliating against citizens who ask inconvenient questions.[31]

Legal entitlement to seek information is only the first step, however. To press a recalcitrant administration for disclosure under FOIA requires time, money, and expertise.[32] Officials seeking to avoid disclosure regularly endeavor to levy substantial fees as a pre-

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28 Sally Katzen has noted that OMB Circular A-130 put the onus on federal agencies to disseminate information to the public, but acknowledges the likelihood that civil servants will fail to disclose important information. Sally Katzen, *Do New Technologies Support a Broadening of Public Information Rights?*, *in* A LITTLE KNOWLEDGE: PRIVACY, SECURITY, AND PUBLIC INFORMATION AFTER SEPTEMBER 11, at 103–15 (Peter M. Shane, John Podesta & Richard C. Leone eds., 2004).

29 Most recently, see ACLU v. NSA, 493 F.3d 644, 687 (6th Cir. 2007) (holding that the ACLU and other plaintiffs did not have standing to challenge the Terrorist Surveillance Program).

30 The legal entitlement to obtain information is sufficient to ground an Article III case or controversy. *See* FEC v. Akins, 524 U.S. 11, 24–25 (1998).

31 *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2601 (2007) ("[T]he Government may not retaliate for exercising First Amendment speech rights . . . ." (citing Rankin v. McPherson, 483 U.S. 378, 383–84 (1987))); Hartman v. Moore, 547 U.S. 250 (2006); *cf.* ROBERTS, *supra* note 12, at 119–21 (describing potential retaliation for exercise of transparency efforts). The status of non-citizens, however, is not necessarily as secure. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 492 (1999).

32 *See* Mary Lynn F. Jones, *Dark Ages*, PRESSTIME, May 2006, at 24; Eric Umanksy, *FOIA Eyes Only: The Latest Torture Documents Show the Government Still Isn't Coming Clean*, SLATE, Dec. 31, 2004, http://www.slate.com/id/2111638/ ("The *Wall Street Journal*'s Jess Bravin . . . thought of filing FOIAs but didn't, mainly because of opportunity costs. FOIAs often take years, especially on national security matters; requests languish in bureaucratic blackholes, with the only recourse eventually being a time-consuming lawsuit, a prospect publishers don't relish."); *see also* ROBERTS, *supra* note 12, at 59, 116–20.

condition for processing FOIA requests.[33] Since 1986, FOIA has provided for the waiver of processing fees for non-commercial requests by institutions engaged in "scholarly or scientific research" or by "a representative of the news media,"[34] and waiver of duplication fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."[35] But asserting these waiver rights against the current administration has often required resort to litigation.[36]

Even where government-levied fees are waived, the costs of wresting information from an uncooperative administration can be substantial. Successful efforts by the Associated Press to pry loose information regarding the Combatant Status Review Proceedings in Guantanamo began in November 2004 and extended through tenacious litigation over the course of two years.[37] Attempts by a coalition of civil liberties organizations, librarians, and booksellers to obtain information regarding the use of the "Patriot Act" commenced in August 2002 and generated disclosures only fitfully over the next three years as continued FOIA requests combined with litigation and political pressure.[38] ACLU's "Torture FOIA" campaign began with a request filed in October 2003; the ultimate release of over 100,000 pages of documents required three and a half years of the legal

33 *See, e.g.*, Pietrangelo v. U.S. Dep't of the Army, No. 2:06-CV-170, 2007 U.S. Dist. LEXIS 46495, at *2–*6, *28 (D. Vt. June 27, 2007) (describing an initial demand by the government for $68,350 to process a request for documentation on bronze stars issued in the Iraq war); Dan Christensen, *Freedom of Information Comes at a $372,799 Cost*, DAILY BUS. REV., Jan. 31, 2005, *available at* http://www.law.com/jsp/article.jsp?*id*=1106573749323 ("People for the American Way Foundation has been told it must pay nearly $400,000 before the Department of Justice will process its Freedom of Information Act request [for records regarding post-September 11 efforts to seal detention proceedings for immigrants]."); *see also* People for Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6, 16 (D.D.C. 2006) (reserving the question of fee waiver).

34 5 U.S.C. § 552(a)(4)(A)(ii) (2000). *See* Nat'l Sec. Archive v. U.S. Dep't of Def., 880 F.2d 1381, 1385–86 (D.C. Cir. 1989).

35 5 U.S.C. § 552(a)(4)(A)(iii).

36 *See, e.g.*, Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566-SBC, 2005 U.S. Dist. LEXIS 14025, at *15 (D.D.C. July 7, 2005); Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d. 5, 12 (D.D.C. 2003); Complaint, Nat'l Sec. Archive v. CIA, No. 1:06-CV-01080 (D.D.C. June 14, 2006), *available at* http://www.gwu.edu/~nsarchiv/news/20060614/complaint.pdf (challenging the CIA's systematic refusal to treat the Archive as a representative of the news media).

37 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1164–68.

38 *Id.* at 1168–85.

equivalent of trench warfare.[39] FOIA efforts by the Electronic Privacy Information Center have required long-term and persistent litigation to quarry information regarding surveillance activities from administration files.[40] The effort by a coalition of immigrant rights organizations to obtain the legal basis for the administration's reversal of policy regarding enforcement of immigration laws by local governments consumed three years of litigation.[41]

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39 *Id.* at 1196–1209. More recently, see *Gov't: CIA Not Required to Save Tapes*, CBSNEWS.COM, Jan. 12, 2008, http://www.cbsnews.com/stories/2008/01/12/national/main3704277.shtml, (reporting motions for contempt over the destruction of tapes that were the subject of pending FOIA requests); Mark Mazzetti, *'03 U.S. Memo Approved Harsh Interrogations*, N.Y. TIMES, Apr. 2, 2008, at A1 (reporting declassification and release of an eighty-one page memorandum authorizing abusive interrogation techniques in response to continued ACLU litigation).

40 *E.g.*, Elec. Privacy Info. Ctr. v. Transp. Sec. Admin., No. 03-1846 (CKK), 2006 U.S. Dist. LEXIS 12989, at *10–*11 (D.D.C. Mar. 12, 2006) (detailing the partial release of information regarding a privacy impact statement pursuant to a request filed in September 2003); Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 43 (D.D.C. 2006) (mandating the processing of FOIA request regarding warrantless wiretapping); Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 02-0063 (CKK), 2004 U.S. Dist. LEXIS 28483, at *2–*3 (D.D.C. Mar. 11, 2004) (describing a request filed in July 2001 for disclosure of the use of "Choicepoint" data mining, which culminated in litigation that finally settled in 2006). *See also* Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., No. 04-1625 (PLF/DAR), 2006 U.S. Dist. LEXIS 94615, at *2–*3 (D.D.C. Dec. 22, 2006) (describing a May 14, 2004 request for documents regarding disclosure of census data to law enforcement, which resulted in the production of some documents but required over two years of litigation); Gordon v. FBI, 388 F. Supp. 2d 1028, 1046 (N.D. Cal. 2005) (sustaining some remaining claims of exemption); Elec. Privacy Info. Ctr. v. Transp. Sec. Admin., No. 03-1846 (CKK), 2004 U.S. Dist. LEXIS 29433 (D.D.C. Aug. 2, 2004) (requiring the processing of requests regarding CAPPS II); Gordon v. FBI, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (stating that the government had not come close to meeting its burden in litigation by the ACLU over a FOIA request for information regarding no-fly lists); Elec. Privacy Info. Ctr. v. NASA, No. 2004-CV-00296 (N.D. Cal. Jan. 22, 2004) (discussing an October 2003 request in which EPIC obtained documents revealing that Northwest Airlines had disclosed millions of passenger records, hundreds of which were obtained through negotiation after EPIC filed suit, described in http://www.epic.org/privacy/airtravel/nasa/); Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., No. 03-1255 (D.D.C. 2003), (discussing a case settled in November 2003 after agencies initially ignored EPIC's March 2003 requests from the TSA for privacy assessments of the Computer Assisted Passenger Prescreening System (CAPPS II) and from the Department of Defense for information concerning Pentagon involvement in the controversial airline passenger screening system); Elec. Privacy Info. Ctr. v. Dep't of Transp., No. 02-0475 (D.D.C. 2002) (resulting in disclosures regarding TSA); Electronic Privacy Information Center, Litigation Docket, http://www.epic.org/privacy/litigation/ (last visited Sept. 1, 2007) (describing numerous FOIA cases brought by EPIC, including *Electronic Privacy Information Center v. Department of Defense*, 355 F. Supp. 2d 98 (D.D.C. 2004), dismissed with EPIC's consent after the Defense Intelligence Agency released responsive documents in April 2005).

41 *See* Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005) (upholding an order to comply with FOIA requests filed initially in August and April of 2002), *aff'g* 345 F. Supp. 2d 412 (S.D.N.Y. 2004); *see also* Nat'l Council of La Raza v. Dep't of Justice,

Where an administration seeks to resist disclosure, the efficacy of FOIA depends on requesters sufficiently well-funded and tenacious to deploy the expertise and personnel to overcome the roadblocks. Some such requesters are members of the media—like the Associated Press—whose resources may be available as part of the infrastructure of a news organization. The stock of such organizations is a function, in turn, of the institutional structures that preserve an independent investigative press.[42] For the most part, only news organizations sufficiently large to allow speculative investigation and expenditure of attorneys' fees that might bring reputational gains in the medium-term future are likely to undertake the expenditures necessary to bring FOIA effectively to bear.[43] Such organizations, however, are subject to the vicissitudes of public opinion, the need to remain on good terms with government sources, and the demands of competing priorities for their resources.[44]

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339 F. Supp. 2d 572 (S.D.N.Y. 2004); Nat'l Council of La Raza v. Dep't of Justice, No. 03 Civ. 2559 (LAK), 2004 U.S. Dist. LEXIS 20529 (S.D.N.Y. Oct. 14, 2004) (mem.).

42 These structures encompass freedom from direct government control and punishment. *E.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); Bridges v. California, 314 U.S. 252 (1941); Grosjean v. Am. Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931). The structures also provide some level of diversity and competition, and insulation from harassment by defamation litigation. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). They include as well some assurance that information obtained through investigation can be used in a fashion that will provide the financial returns necessary to private journalism. *E.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001); Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979); N.Y. Times Co. v. United States, 403 U.S. 713 (1971); *cf.* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468–69 (1995). They have also, as a matter of modern practice, involved some level of reticence in deploying government investigative resources against journalists. *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972).

43 *New York Sun* reporter and former ABC news correspondent Josh Gerstein, who litigates pro se, is an exception. *See, e.g.*, Gerstein v. CIA, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006); Gerstein v. CIA, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847 (N.D. Cal. Nov. 29, 2006); Gerstein v. U.S. Dep't of Justice, No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276 (N.D. Cal. Sept. 30, 2005); Josh Gerstein, *Leak Probes Stymied, FBI Memos Show*, N.Y. SUN, Jan. 10, 2007, at 1 (describing a successfully litigated FOIA request for documents regarding leak investigations by the FBI); Josh Gerstein, *FBI Says Files in Leak Cases Are 'Missing,'* N.Y. SUN, Dec. 27, 2006, at 1 (reporting that twenty-two of ninety-four files responsive to a FOIA request were said to be missing by the FBI); Josh Gerstein, *Selective Secrecy*, N.Y. SUN, Oct. 15, 2004, at 11 (discussing arguments made in the author's FOIA litigation); *cf.* Gerstein v. Dep't of Def., No. 03-5193, slip op. at 7–8 (N.D. Cal. Dec. 21, 2004) (denying a FOIA request), *cited in* Nat'l Inst. of Military Justice v. U.S. Dep't of Def., 404 F. Supp. 2d 325, 340 (D.D.C. 2005). Also see the discussion of the Torture Taxi team, *infra* note 85, and Associated Press litigation *supra* note 37.

44 *Cf.* W. LANCE BENNETT ET AL., WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA 148–49 (2007) (describing constraints on establishment press, arising from dependence on long-run relations with official sources); *id.* at 28–29

Whether because of resource constraints, political caution or co-optation, news media have not been prominent at the vanguard of successful FOIA inquiries directed at the GWOT.[45] It has been predominantly the availability of well-financed NGOs, combined with the possibility of assistance from the private bar, that has made FOIA a force to be reckoned with in this arena.[46] The most effective requesters have included the National Security Archives, the ACLU, the Electronic Privacy Information Center, the Electronic Frontier Foundation, the Center for Constitutional Rights, Judicial Watch, and the Center for National Security Studies.[47] The existence of an independent civil society sector, protected by rights of association[48] backed up frequently by the litigation muscle of private law firms that have donated their services pro bono,[49] and nourished by tax exemp-

(observing self-imposed limits); *id.* at 67 (noting cuts in budgets of investigative news units); *id.* at 150–52 (describing official intimidation of critics); ROBERT M. ENTMAN, PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 92–93 (2004) (describing the tendency to rely on official sources, both because of availability and long-term relationships); *id.* at 113–14 (describing the Bush administration's pressure on news media to obtain favorable reporting for the buildup to the Iraq war).

45 *See* John Byrne, *Freedom of Information Logs Shed Light on Media's Military Curiosity*, THE RAW STORY, Nov. 23, 2005, http://rawstory.com/news/2005/Freedom_of_Information_logs_shed_light_1123.html ("[T]he three papers with daily circulations greater than one million—USA Today, the Wall Street Journal and the New York Times—made just 36 requests of the Pentagon between 2000 and February 2005. . . . The Associated Press, the nation's most widely used wire service, made 73 requests. . . . Leading print newspapers was the Los Angeles Times, with 42 inquiries. . . . CBS News led the pack [of television networks] with 32 queries; Fox News followed with 22; and NBC News just was shy of that with 21. . . . CNN . . . made just 11 inquiries. . . . The largest individual requestor was the National Security Archive[, which] . . . . filed 895 requests, representing about 8.4 percent of the total . . . ."); *see generally* Russ Kick, The Memory Hole, FOIA Case Logs, http://www.thememoryhole.org/foi/caselogs/ (2006) (providing agency logs of FOIA requests); *infra* note 238.

46 *See* Michael Doyle, *Missed Information—Reporters Need To Use the Freedom of Information Act More*, WASH. MONTHLY, May 1, 2000, at 38 ("[M]ost reporters never use the law at all. Many FOIA-centered stories in newspapers come, not from reporters' initiative, but from special interests who use the law to dig up information that they then feed to reporters.").

47 *See* ROBERTS, *supra* note 12, at 117–20; Kreimer, *Strategy of Transparency*, *supra* note 19 (describing FOIA campaigns).

48 *See, e.g.*, NAACP v. Button, 371 U.S. 415, 431 (1963); NAACP v. Alabama, 357 U.S. 449, 460 (1958).

49 A private bar, whose self-image includes rejection of government intimidation for representation of government opponents, provides an element of the constitutive public structure that supports FOIA. *See, e.g.*, Pauline Jelinek, *Defense Official Resigns Over Remarks*, WASHINGTONPOST.COM, Feb. 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/02/AR2007020200940.html (reporting the legal community's outrage at an official who suggested boycotting law firms who represented inmates in Guantanamo and a request by the Bar Association of San Francisco that the official be investigated by the California Bar for an ethical violation); Interview by Federal News Radio with Karen J.

tions and 501(c)(3) status, has proved to be the institutional matrix within which successful FOIA inquiries regarding the GWOT have been seeded.

C. FOIA and Spheres of Public Contention

1. Prerequisite Knowledge and Public Contention

a. The Problem of Aladdin's Lamp and the Status of "Deep Secrets"

Professor Alexander Bickel famously observed, with regard to constitutional theory, "No answer is what the wrong question begets."[50] The aphorism applies a fortiori to FOIA requests posed to a recalcitrant administration. For FOIA requests to generate illuminating documents, they must be precisely framed, and framing such requests requires knowledge regarding the activities to be illuminated.

In the GWOT, some of the activities that have been subject to FOIA requests have been publicly announced. The existence of the prison camp at Guantanamo which generated the FOIA efforts to obtain information regarding the treatment and trial of detainees has never been a secret.[51] The Patriot Act, enacted with great fanfare though relatively cursory consideration, provoked a series of FOIA requests and litigation.[52] When the Department of Justice repeatedly relied publicly on an opinion of the Office of Legal Counsel to justify its reversal of position regarding local enforcement of immigration laws, FOIA requests for that opinion followed naturally.[53] When the Defense Department publicly solicited bids for projects in its "Total Information Awareness Program," privacy advocates sought informa-

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Mathis, President, ABA, in Chicago, Ill. (Jan. 11, 2007), *available at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=64 (commenting on the remarks of the Deputy Assistant Secretary of Defense for Detainee Affairs).

50 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103 (1962).

51 The government did attempt to suppress pictures of the hooded and shackled detainees. Joe Williams, *Some Networks Nix Prisoner Video*, N.Y. DAILY NEWS, Jan. 12, 2002, at 8. For discussion of the FOIA litigation seeking information regarding Guantanamo, see Kreimer, *Strategy of Transparency*, *supra* note 19, at 1164–68.

52 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107–56, § 224, 115 Stat. 272, 295 (2001) (codified at 18 U.S.C. § 2510 (2000)) [hereinafter Patriot Act]. For discussion of the FOIA litigation surrounding the Patriot Act, see cases cited *supra* notes 31 and 33, and Kreimer, *Strategy of Transparency*, *supra* note 19, at 1168–85.

53 *See supra* note 41 (discussing litigation by the National Council of La Raza).

tion through FOIA regarding the program and its director, Admiral John Poindexter.[54]

But the existence of many initiatives has been shrouded in secrecy. The use of physically and psychically coercive methods of interrogation was hinted at, but the administration officially denied engaging in "torture."[55] Legal opinions advised officials that the president's power as commander-in-chief superseded legal limitations, and that infliction of abuse short of lethal pain comported with the law, but the opinions were held in tight security.[56] Programs of "extraordinary rendition" covertly seized suspects and ferried them to CIA "black sites" and foreign interrogators.[57] Intelligence agencies engaged in broad and surreptitious surveillance of wire and Internet communications without judicial oversight and in violation of applicable law, while the administration disavowed any program of "warrantless wiretaps."[58]

Such veiled initiatives could not be the subject of FOIA requests until requesters discerned their existence. Indeed, mere hints and suspicions were inadequate; until identified with sufficient specificity that they could be the subject of reasonably precise inquiry, FOIA re-

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54 *See* Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 5 (D.D.C. 2003); Electronic Privacy Information Center, ~~Total~~ "Terrorism" Information Awareness (TIA), http://www.epic.org/privacy/profiling/tia/ (last visited Sept. 1, 2007); Electronic Privacy Information Center, EPIC Analysis of Total Information Awareness Contractor Documents, Feb. 2003, http://www.epic.org/privacy/profiling/tia/doc_analysis.html (last visited Sept. 1, 2007).

55 Kreimer, *Strategy of Transparency*, *supra* note 19, at 1185–96.

56 *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf; Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002); *see also infra* notes 82–83.

57 *E.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 (revealing existence of network of "black site" prisons); Larisa Alexandrovna & David Dastych, *Soviet-Era Compound in Northern Poland Was Site of Secret CIA Interrogation, Detentions*, THE RAW STORY, Mar. 7, 2007, http://www.rawstory.com/news/2007/Sovietera_compound_in_Poland_was_site_0307.html.

58 *E.g.*, President's Radio Address, 41 WKLY. COMP. PRES. DOC. 1880 (Dec. 17, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051217.html; Leslie Cauley & John Diamond, *Telecoms Let NSA Spy on Calls*, USA TODAY, Feb. 6, 2006, at 1A; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1; John Diamond & David Jackson, *Surveillance Program Protects Country, Bush Says*, USATODAY.COM, Jan. 23, 2006, http://www.usatoday.com/news/washington/2006-01-23-bush_x.htm; *cf.* Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. To Block Terror*, N.Y. TIMES, June 23, 2006 (late ed.), at A1.

quests regarding such programs were likely to be fruitless.[59] FOIA mechanisms thus depended on institutions that could reveal the "deep secrets" of GWOT initiatives.[60]

b. The Problem of FOIA's Flowchart: "Public Interest" as a Prerequisite to Access

Prior revelations form a prerequisite to successful FOIA requests for a second set of reasons. Even when requesters have knowledge sufficient to frame productive questions, the stock of FOIA requests always exceeds the resources available to process them, and an inconvenient request can rest at the back of a long queue for processing.[61] The current administration, moreover, has admonished officials that FOIA disclosures "should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests,"[62] "giving full and careful consideration to all applicable FOIA exemptions";[63] decisions to resist disclosure were to be defended "unless they lack a sound legal basis."[64] Piercing every exemption based on an arguably "sound legal basis" is no small task.

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59 A precise inquiry is more likely to be correctly processed by harried civil servants at ground level; it is less subject to evasion by hostile ones, and it presents the requester with smaller costs of sorting signal from noise in the material provided. So, too, the broader the inquiry, the more legitimate basis a recalcitrant administration has to claim a need to delay administering the request, or refusing it as "unreasonably burdensome." *See* 5 U.S.C. § 552(a)(3)(A) (2000) (providing that a FOIA request must "reasonably" describe records requested).

60 For elaboration of the useful concept of "deep secrets," distinguished by the fact that the uninformed party does not know of their ignorance of the information withheld, see KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 8–9, 21–22 (1988), and AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 121–26 (1996).

61 *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976) (recognizing right of defendant to process requests on "first in, first out" basis).

62 Memorandum from John Ashcroft, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

63 Memorandum from Laura L.S. Kimberly, Acting Dir., Info. Sec. Oversight Office, & Richard L. Huff & Daniel J. Metcalfe, Co-Dirs., Office of Info. & Privacy, Dep't of Justice to Dep'ts & Agencies (Mar. 19, 2002), *available at* http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm (directing officials to consider means of resisting disclosure).

64 Memorandum from John Ashcroft, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies, *supra* note 62, at 2; *see also* Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff to Heads of Executive Dep'ts & Agencies (Mar. 19, 2002), *available at* http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm (highlighting the Kimberly/Huff/Metcalfe memo); GENEVIEVE J. KNEZO, CONGRESSIONAL RESEARCH SERVICE, "SENSITIVE BUT UNCLASSIFIED" INFORMATION AND OTHER CONTROLS: POLICY AND OPTIONS FOR SCIENTIFIC AND TECHNOLOGICAL INFORMATION 12–13 (2006), *available at* http://www.fas.org/sgp/crs/secrecy/RL33303.pdf (describing the Card and Ashcroft

Each of these gambits becomes less formidable if the programs at issue are already the subject of public contention. For statutory reasons, the ability of requesters to obtain timely processing and to overcome claims of FOIA exemptions are both functions of prior disclosures and attention focused by other structural actors.

i. Expedited Processing and "Urgency To Inform the Public"

When a FOIA requester seeks expedited processing to bypass the queue (as most seeking accountability in GWOT have done), success will be a function of the prior release of information into the public sphere. FOIA, as amended in 1996, provides that expedited processing should be made available in cases where the requester "demonstrates a compelling need."[65] FOIA and its implementing regulations provide that a compelling need can be demonstrated by "a person primarily engaged in disseminating information" who makes a showing of "urgency to inform the public concerning actual or alleged Federal Government activity."[66] Implementing regulations also authorize expedited processing for matters "of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."[67] These showings cannot be made until enough information has made its way into public discourse. Media interest and public contention are the gateways to expedited FOIA processing.

This structure has meant that inquiries regarding the interrogation of immigrants, a recondite data mining program, and a covert attempt to enlist U.S. Attorneys to lobby for funding for Patriot Act programs were denied expedited processing because the requesters could not demonstrate adequate media discussion of the requested material.[68] Conversely, requests regarding controversial military sur-

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memoranda, as well as the aggressive interpretations of extrastatutory FOIA "national security" exemptions pressed by the administration); Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006).

65 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 8, 110 Stat. 3048, 3051–52 (codified as amended at 5 U.S.C. § 552(a)(6)(E)(i)(I) (2000)).

66 5 U.S.C. § 552(a)(6)(E)(v)(II) (2000); *see also* 28 C.F.R. § 16.5(d)(1)(ii) (2006); ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (citing Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001)).

67 28 C.F.R. § 16.5(d)(1)(iv) (2006).

68 ACLU of N. Cal. v. Dep't of Justice, No. C 04-4447 PJH, 2005 U.S. Dist. LEXIS 3763, at 36 (N.D. Cal. Mar. 11, 2005) (denying expedited processing for inquiries regarding interro-

veillance of political dissidents, the use of publicly disputed provisions of the Patriot Act, and the revelation of illegal wiretapping programs by the NSA were held to be entitled to expedited processing on the basis of prerequisite public contention.[69] 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.

ii. FOIA Exceptions and Prerequisite Knowledge

Alongside disclosure obligations, FOIA provides a series of statutorily crafted exemptions from those obligations. Most broadly, Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"[70] and Exemption 7(C) exempts "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[71] Since in the contemporary environment GWOT initiatives carry the prospect of stigma, as well as the whiff of danger, virtually any personally identifiable information is potentially subject to withholding under one of these exemptions.[72] The current administration has been cavalier in its regard for the

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gation of immigrants); Elec. Privacy Info. Ctr. v. Dep't of Def., 355 F. Supp. 2d 98, 102–03 (D.D.C. 2004) (inquiries regarding data mining program); Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, 322 F. Supp. 2d 1, 5 (D.D.C. 2003) (denying expedited processing for inquiries regarding encouragement of U.S. Attorneys to lobby in support of Patriot Act); *see also* Letter from H.J. McIntyre, Director, Directorate for Freedom of Info. & Sec. Review, Dep't of Def., to Amrit Singh, Staff Att'y, ACLU Found. (Oct. 30, 2003), *available at* http://www.aclu.org/torturefoia/legaldocuments/mmDODrejectexpproc.pdf (denying expedited processing of request regarding rendition and torture of Maher Arar, who had been secretly deported and had just been released).

69 ACLU of N. Cal. v. U.S. Dep't of Def., No. C 06-01698 WHA, 2006 U.S. Dist. LEXIS 36888, at *18–*19 (N.D. Cal. May 25, 2006) (granting expedited processing for requests regarding military surveillance of dissident political and cultural organizations); Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 33 (D.D.C. 2006) (granting expedited processing for requests regarding NSA surveillance program); Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at *4 (D.D.C. Nov. 16, 2005) (compelling the release of information related to the Patriot Act); ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 29–32 (D.D.C. 2004) (requests regarding usage of Patriot Act provisions).

70 5 U.S.C. § 552(b)(6).

71 5 U.S.C. § 552(b)(7)(C).

72 *See* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (holding that Exemption 6 applies to any detailed information in government files about a particular individual from which the identity of the individual can be discerned).

freedom and the psychic and bodily integrity of the targets of GWOT initiatives. But when it comes to FOIA requests, it has been scrupulous regarding their privacy. Administration lawyers have regularly maintained that information about those in its custody, like information regarding participants in GWOT initiatives, is exempt from FOIA disclosure because of Exemptions 6 and 7(C).[73]

In addressing claims of exemption under FOIA, courts have balanced the degree of intrusion against the degree of public interest to determine whether an invasion of privacy is "unwarranted." A requester who presses the "public interest" side of this balance plays a stronger hand the more she already knows. The Supreme Court's latest account of the process, in *National Archives and Records Administration v. Favish*, counseled:

> [W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.[74]

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73 The incongruity of the argument has been remarked upon by judges to whom it has been presented. *See, e.g.*, Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 156 n.2 (S.D.N.Y. 2006) ("[I]t is hard to escape the inference that the Government's entire Exemption 6 argument before this Court is a cover for other concerns . . . ."); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 16 (S.D.N.Y. 2005) (commenting, regarding the names of Guantanamo detainees, that "[o]ne might well wonder whether the detainees share the view that keeping their identities secret is in their own best interests"); Associated Press v. Dep't of Def., 395 F. Supp. 2d 17, 18 (S.D.N.Y. 2005) ("[S]ome might think it strange, even hypocritical, that the military officials who held the detainees incommunicado for so many months now express such solicitude for the detainees' privacy rights . . . .").

Claims by third parties have sounded somewhat less hollowly. *See, e.g.*, Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., No. 04-1625 PLF/DAR, 2006 U.S. Dist. LEXIS 94615, at *30 (D.D.C. Dec. 22, 2006) (shielding names of officials requesting information about where persons of Arab descent live in the United States); ACLU v. FBI, 429 F. Supp. 2d 179, 192 (D.D.C. 2006) (shielding names of third parties subjected to investigation by the "National Joint Terrorism Task Force"); L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880 (C.D. Cal. 2006) (shielding names of private security contractors in Iraq who had submitted "serious incident reports"); Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 384 F. Supp. 2d 100 (D.D.C. 2005) (shielding names of government employees involved in airline screening program); Gordon v. FBI, 388 F. Supp. 2d 1028, 1040–42 (N.D. Cal. 2005) (shielding names of third parties who complained about watch lists, but not the names of government or airline employees working on them).

74 541 U.S. 157, 174 (2004).

Knowledge is thus a prerequisite to the assertion of public interest: a deep secret or a program whose outlines are only dimly known can preclude the requisite evidence of impropriety.[75]

As in the pursuit of expedited processing, requesters have been most successful in overcoming claims of FOIA exemptions regarding GWOT initiatives where they can adduce already-available evidence of abuse or public contention. Thus, in *Associated Press v. U.S. Department of Defense*, Judge Rakoff relied on an existing stock of public evidence of abuses at Guantanamo in rejecting Exemption 6 and 7(C) privacy claims to order the release of the identities of detainees who charged abuse by their captors and who had been involved in detainee-against-detainee abuse.[76] After public controversy erupted concerning the existence of "no fly lists," Judge Breyer rejected efforts to withhold the identity of policy makers involved in discussions of the "false positive problem": "The public, however, has an interest in knowing who—and at what level of the government—is working on this significant problem that affects many Americans."[77]

In *ACLU v. Department of Defense*, Judge Hellerstein ordered release of pictures of the Abu Ghraib abuses despite privacy claims because of "a substantial public interest in these pictures, evidenced by the active public debate engendered by the versions previously leaked to the press, or otherwise obtained by the media," as well as the previously disclosed evidence of wrongful governmental conduct.[78] He similarly rejected claims under Exemption 7(F)[79] that the release could incite violence against troops in Afghanistan and Iraq, conclud-

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75 *Cf.* News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1192 (11th Cir. 2007) (granting access to addresses of disbursement of funds since "the newspapers have put forth ample evidence that FEMA's response to Hurricane Frances in Miami-Dade County may have been plagued with fraud, waste, or abuse").

76 No. 05 Civ. 05468 (JSR), 2006 U.S. Dist. LEXIS 67913, at *13–14 (S.D.N.Y. Sept. 20, 2006); *see also* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 105–06, 105 n.17 (D.D.C. 2002) (rejecting both 7(C) and 7(F) claims regarding the identity of non-citizens swept up in post-September 11 dragnet in light of "numerous media reports documenting abuses, . . . [and] first-hand accounts given to Congress, the media, and human rights groups . . . ."), *rev'd*, 331 F.3d 918, 932 (D.C. Cir. 2003) (declining to address privacy claims); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 946–47 (D.C. Cir. 2003) (Tatel, J., dissenting) ("The record includes hundreds of pages of newspaper articles, human rights reports, and congressional testimony reporting alleged governmental abuses . . . .").

77 Gordon v. FBI, 388 F.Supp.2d 1028, 1041 (N.D. Cal. 2005).

78 389 F. Supp. 2d 547, 573 (S.D.N.Y. 2005).

79 5 U.S.C. § 552(b)(7)(F) (2000) (exempting disclosure of "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual").

ing that the prior revelation of "flagrantly improper conduct by American soldiers" required disclosure of the pictures.[80]

This structure of adjudication means that successful FOIA requesters will stand on the shoulders of prior revelation and public controversy, and the institutions that generate them.

iii. The Effect of the Zeitgeist on Bayesian Judges

The fate of the efforts of FOIA requesters depends on prerequisite revelations in a final, somewhat less crisply demonstrable, fashion. Judges in FOIA cases are called upon to make discretionary judgments regarding the reasonableness of timing, the adequacy of searches, the balance between privacy and public interests, and the plausibility of predictions of future impacts on government and private parties. Where no public information exists regarding government abuses, courts may be inclined to give the administration the benefit of the doubt in these matters. But once evidence emerges to prove an administration untrustworthy in one set of public controversies, it is likely to affect the credence granted in others.[81] Enforcement of disclosure obligations will thus build on prior disclosures; it is often only once secrecy is breached by other institutions that courts will be emboldened to enforce FOIA obligations with rigor and skepticism.

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80 *ACLU v. Dep't of Def.*, 389 F. Supp. 2d at 578. Litigation before Judge Hellerstein also highlighted the prerequisite of prior disclosure in seeking evidence from the CIA. Although CIA operational files are excluded from FOIA, the exemption disappears with respect to files that are the subject of investigation by the CIA's Inspector General. *See* ACLU v. Dep't of Def., 351 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (citing 50 U.S.C. § 431(c)(3) (2000)).

81 Many of the successes of requesters in GWOT FOIA cases followed the revelations of abuses in Abu Ghraib, the DOJ Inspector General's report of abuses in the post-September 11 roundup, the exposure of mendacity in the case for the Iraq war, and the admonition by the Supreme Court that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (opinion of O'Connor, J.). *See, e.g.*, Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 156 (S.D.N.Y. 2006) (citing Rumsfeld v. Padilla, 542 U.S. 426 (2004)); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 20 (S.D.N.Y. 2005) (citing *Hamdi*, 542 U.S. at 530); ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004) (quoting *Hamdi*, 542 U.S. at 530); *see also* Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 150 (S.D.N.Y. 2006) (relying on Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 355–56 (2d Cir. 2005)); ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 551, 574 (S.D.N.Y. 2005) (relying on *La Raza*, 411 F.3d at 355).

Judge Rakoff's approach in *Associated Press v. U.S. Department of Defense* was also probably not unaffected by his prior experience with the administration's efforts to bury its missteps in *In re Material Witness Warrant*, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002).

2. *The Struggle for Prerequisite Knowledge: Volatility of Information, Leaks and Legal Challenges*

The current administration has—whether for reasons of operational necessity, or out of a desire to avoid opposition, or both—sought to minimize public knowledge concerning many of its more dubious initiatives. Indeed, in a policy that hamstrung internal deliberations as well as shielded the executive from public scrutiny, potential internal opponents were kept ignorant of dubious policies that would otherwise have fallen within their purview.[82] Former Office of Legal Counsel (OLC) head Jack Goldsmith described a modus operandi which "made it a practice to limit readership of controversial legal opinions to a very small group of lawyers . . . ostensibly done to prevent leaks," but actually "to minimize resistance to them."[83]

These efforts at concealment, if entirely effective, would not only have precluded knowledgeable contemporaneous discussion of the GWOT initiatives. They would have immunized the initiatives from subsequent FOIA inquiry, for prerequisite knowledge and public contention are preconditions to effective FOIA requests. The efforts were not, however, entirely effective because of institutions and legal practices beyond FOIA itself. Disclosures by the subjects of GWOT initiatives and officials in the ordinary course of business, along with revelations by dissident civil servants and the background of free expression guaranteed by the constitutional structure, brought the nature of the administration's initiatives to light.

a. Technology and the Volatility of Information

GWOT concealment efforts ran aground in part on the phenomenon that, as the Internet adage puts it, "information wants to be free." At a basic level, most actions leave informational spoor that

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82 *E.g.*, Mayer, *The Memo*, *supra* note 21, at 32 (describing promulgation of policy on "counter-resistance techniques" without notification of opposing participants in policy process); Eric Lichtblau & James Risen, *Justice Deputy Resisted Parts of Spy Program*, N.Y. TIMES, Jan. 1, 2006 (late ed.), 1, at 15 ("At its outset in 2002, the surveillance operation was so highly classified that even Larry Thompson, the deputy attorney general to Mr. Ashcroft, who was active in most of the government's most classified counterterrorism operations, was not given access to the program.").

83 JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 167 (2007); *see id.* at 141–42 (describing secrecy surrounding "torture memorandums"); *id.* at 181–82 (describing "flimsy legal opinions . . . guarded closely so no one could question the legal basis for the operations. . . . Addington angrily denied the NSA Inspector General's request to see a copy of OLC's legal analysis in support of the Terrorist Surveillance Program").

can be discerned over time by sufficiently determined observers. Passers-by will notice forcible kidnappings on busy streets, family members will complain of disappearances, airport mechanics and observers will see unusual departure patterns, flight plans will be recorded in air traffic control databases. And of course, once the subjects of initiatives are allowed to communicate with the outside world, they will tell their own tales.[84] The twenty-first century information environment has brought interested private researchers and reporters the capacity to gather and sift large volumes of information seeking patterns and collateral disclosures and to share those patterns or disclosures across continents. Further, the Internet has allowed researchers to leverage a previously unavailable cadre of interested amateurs. These trends converged when covert CIA involvement in "extraordinary rendition" flights was publicly established through the combination of corporate registration statements, routine disclosures of FAA flight data and the existence of a network of "plane spotter" hobbyists who track arrivals and departures at airports, all analyzed by a loose collaboration of news reporters and European prosecutors.[85]

Partial concealment is insufficient to preserve "deep secrets," and in an open society, total concealment is a challenging task. The American legal scene is not graced with an equivalent of the "Official Secrets Act"; the law does not purport to impose criminal punish-

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84 One must be tacitly grateful for the broader institutional context that inhibits the administration from literally burying its mistakes. *Cf.* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition,'* WASH. POST, Dec. 4, 2005, at A1 ("The first night he said he was kicked and beaten and warned by an interrogator: 'You are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know.' . . . At the CIA, . . . [s]omeone suggested a reverse rendition: Return Masri to Macedonia and release him. 'There wouldn't be a trace. No airplane tickets. Nothing. No one would believe him,' one former official said. . . . Once the mistake reached Tenet, he laid out the options to his counterparts, including the idea of not telling the Germans. . . . [But] '[y]ou couldn't have the president lying to the German chancellor' . . . .").

85 STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM 114–20 (2006) (describing research combining "plane spotting" websites and listservs with FOIA-mandated live-feed aviation databases provided by the FAA); *see also id.* at 124–26 (describing the use of corporate disclosure statements to identify CIA ownership of flights); TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS 95–121 (2006) (describing combination of "plane spotting" websites and discussion lists by hobby enthusiasts and FAA databases); *id.* at 45–74 (describing the "paper trail" of corporate public disclosures and civilian aircraft registration that connected rendition flights to front companies). Other civil society investigators were equally assiduous in gathering evidence of abuses. *E.g.*, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (2005), http://www.hrw.org/reports/2005/us0405/index.htm.

ment on most who disclose, convey, or publish inconvenient information.[86] In the absence of a tradition and infrastructure of suppression, retrofitting a system of public justice and administration to assure total secrecy becomes a substantial, and often insuperable, challenge.[87] Thus, the existence of one sealed case was revealed by a listing of court records on a docket website.[88] The identity of the recipient of a secret national security letter in another was disclosed by an incomplete redaction.[89] Secrets concerning one surveillance program were revealed by inadvertent inclusion of classified contracts in routine FOIA disclosures.[90] The targets of a second program were

86 *See* The British Official Secrets Act, 1989, c.6, § 1 (Eng.) (providing that "a member of the security and intelligence services" or "a person notified that he is subject to the" Act "is guilty of an offence if without lawful authority he discloses any information . . . relating to security or intelligence . . . ."). For the U.S. practice, see Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (discussing the limits of criminal enforcement of classification status under current statutes); Message on Returning Without Approval to the House of Representatives the "Intelligence Authorization Act for Fiscal Year 2001," 36 WEEKLY COMP. PRES. DOC. 2784 (Nov. 4, 2000) (vetoing an attempt to expand criminal liability for disclosure of classified information); *cf.* JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK (2006), *available at* http://www.fas.org/sgp/crs/secrecy/RS21900.pdf.

87 This may be one reason, in addition to a concern for substantive outcomes, that the current administration has sought to divert GWOT prosecutions into novel forums.

88 *See* Press Release, Soc'y of Prof'l Journalists, Miami Court Reporter Selected for Pulliam First Amendment Award (Aug. 26, 2004), *available at* http://www.spj.org/news.asp?ref=377 (describing the work of reporter Dan Christensen, who discovered the existence of the case of Mohamed K. Bellahouel, secretly held as a "material witness" for five months following September 11, and noting that Christensen "was tipped to the secret case with a clue in the daily calendar of the U.S. Court of Appeals in Miami"); *see also* People for the Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6 (D.D.C. 2006) (adjudicating a FOIA request for list of sealed cases).

89 *See* Doe v. Gonzales, 127 S. Ct. 1, 9 (2005) ("Doe's identity had been publicly available for several days on the District Court's Web site and on PACER, the electronic docket system run by the Administrative Office of the United States Courts. The parties also learned that the media had correctly reported Doe's identity on at least one occasion." (first citation omitted) (citing Alison Leigh Cowan, *Librarians Must Stay Silent in Patriot Act Suit, Court Says*, N.Y. TIMES, Sept. 21, 2005, at B2)); *see also* Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1.

90 *See* Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 02-0063 (CKK), 2004 U.S. Dist. LEXIS 28485, at *2 (D.D.C. Aug. 23, 2004) ("[I]ts January 31, 2003, release had mistakenly included documents regarding a classified contract with ChoicePoint. At the time, the very fact that this contract existed was classified. The FBI sought from Plaintiff all copies of the pages referencing this contract, and Plaintiff returned one copy of those pages promptly, but FBI subsequently learned that this information had been disseminated to the Associated Press. Deciding that 'any attempted containment would be futile,' the FBI returned that copy to Plaintiff on May 16, 2003." (citations omitted)).

alerted in the course of legal maneuvering to freeze the assets of alleged terrorist financiers.[91]

Once information is disclosed, the Constitution constrains efforts to prevent publication of truthful information.[92] These constraints combine with the protean capacities of the Internet[93] to make its suppression unlikely.

The institutional context for these collateral disclosures varied, but one constant has been a reasonably open society embedded in an increasingly closely woven informational environment. The volatility of information is not a new phenomenon; Benjamin Franklin observed that "three may keep a secret, if two of them are dead."[94] The exponential increase in the number of potential researchers, however, and their capacity to cooperate across time and space, combine with the burgeoning ability to gather and correlate information to magnify the impact of collateral breaches of deep secrecy.

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91 *See* Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006) ("[The Office of Foreign Assets Control] inadvertently disclosed this document to counsel for Al-Haramain in late August 2004 as part of a production of unclassified documents relating to Al-Haramain's potential status as a specially designated global terrorist. Lynne Bernabei, an attorney for Al-Haramain[,] . . . copied and disseminated the materials, including the pertinent document which was labeled 'TOP SECRET,' to Al-Haramain's directors and Bernabei's co-counsel. In August or September, a reporter from the Washington Post reviewed these documents for an article he was researching. . . . At the request of the FBI, Bernabei and her co-counsel returned their copies of the sensitive document to the FBI. The FBI did not pursue Al-Haramain's directors, whom the government describes as 'likely recipients' of the document, to ask them to return their copies."); *see also* Ryan Singel, *NSA Snooped on Lawyers Knowing Spying Was Illegal, Suit Charges*, WIRED, July 10, 2007, http://www.wired.com/politics/law/news/2007/07/haramain_appeal.

92 *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 528 (2001); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

93 *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 441 (2d Cir. 2001) (describing "electronic civil disobedience" to avoid efforts to suppress a decryption program); Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101 (2004) (demonstrating the proliferation of U.S.-based websites either posting or linking to the DeCSS program over the course of the Universal Studios lawsuit); Kristin R. Eschenfelder et al., *The Limits of DeCSS Posting: A Comparison of Internet Posting of DVD Circumvention Devices in the European Union and China*, 31 J. INFO. SCI. 317, 318 (2005) (surveying such posting and linking on a range of non-U.S.-based websites); *cf.* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203–04 (N.D. Cal. 2004) (describing Sisyphean efforts by a voting-machine manufacturer to end the publication of its internal e-mail records on a series of websites).

94 BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1735), *reprinted in* THE OXFORD DICTIONARY OF QUOTATIONS 211 (2d ed. 1953).

b. Whistleblowers and Civil Servants

Collateral disclosures by targets, observers, and record-keepers have been supplemented by intentional releases of information by civil servants. Sometimes the releases of information regarding GWOT initiatives followed from official action by conscientious civil servants carrying out their assigned tasks. Thus in January 2002, as the administration struggled to suppress the dimensions of its dragnet detentions of non-citizens, the Immigration and Naturalization Service effectively revealed the identity of detainees held in Pasaic and Hudson County jails on immigration charges when detainees were allowed to meet with advocacy groups for standard "know your rights" presentations.[95] The Department of Justice Inspector General's critical report on the treatment of those detainees, and the post-September 11 dragnet that had led to their incarceration was officially released on June 2, 2003.[96]

GWOT secrecy has been breached more tellingly in unofficial disclosures by disaffected government employees. Internal disclosures catalyzed opposition within the government, and opponents in turn laid the basis for public disclosures. In January 2002, sources leaked a memorandum from Alberto Gonzales arguing that a "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."[97] President Bush's official response was to partially reverse his earlier decision to ignore the Geneva Convention.[98] In June 2002, a whistleblower from the Department of Justice's Professional Responsibility Advisory Office debunked administration claims that it had not been advised that

95 Elizabeth Llorente, *INS Will Let Advocates Meet with Detainees*, THE RECORD (Bergen County, N.J.), Jan. 30, 2002, at A1; Hanna Rosin, *Groups Find Way To Get Names of INS Detainees*, WASH. POST, Jan. 31, 2002, at A16.

96 OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 14 (April 2003), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf.

97 Rowan Scarborough, *Powell Wants Detainees To Be Declared POWs: Memo Shows Differences with White House*, WASH. TIMES, Jan. 26, 2002, at A1.

98 Fact Sheet: Status of Detainees at Guantanamo, 2002 WEEKLY COMP. PRES. DOC. 205 (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html. Consistent with the disingenuous legalism that has characterized this administration, the announcement guaranteeing "humane" treatment applied only to detainees at Guantanamo, leaving open the possibility of treating Al Qaeda detainees elsewhere inhumanely, since Bush had "determined" that the Geneva Convention did not cover them. *See* SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 4 (2004); *accord* Mayer, *supra* note 12.

its interrogation of John Walker Lindh violated criminal defense rights.[99] The administration agreed to a plea bargain with Lindh in exchange for his silence.

In late 2002, Naval investigators repelled by the recorded abuse of suspects at Guantanamo notified sympathetic superiors.[100] In December 2002, government sources provided the basis for a front-page article in the *Washington Post* providing accounts of abusive interrogation techniques.[101] As a result of the internal opposition and the external critique, techniques were temporarily suspended.[102]

In April 2003, internal military dismay with the prospect of abandoning limits that had constrained abuse for two generations impelled military lawyers to approach civilian human rights advocates confidentially in an effort to spark external opposition.[103] In May 2003, internal sources leaked the harsh criticism of the post-September 11 roundup contained in the Department of Justice In-

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99 Jesselyn Radack, *Whistleblowing in Washington*, REFORM JUDAISM, Spring 2006, http://reformjudaismmag.org/Articles/index.cfm?*id*=1104 (describing decision to leak e-mails); *see also* Radack v. U.S. Dep't of Justice, 402 F. Supp. 2d 99 (D.D.C. 2005); Michael Isikoff, *The Lindh Case E-Mails: The Justice Department's Own Lawyers Have Raised Questions About the Government's Case Against the American Taliban*, NEWSWEEK, June 24, 2002, at 8 (describing the e-mails).

100 Mayer, *The Memo*, *supra* note 21 (describing report to Alberto Mora, General Counsel to the Navy, by Naval Criminal Investigative Service head David Brant, relying on information obtained by N.C.I.S. psychologist Michael Gelles, who "had computer access to the Army's interrogation logs at Guantánamo"); *see also* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, PART IV: IMPUNITY FOR THE ARCHITECTS OF ILLEGAL POLICY (2005), http://www.hrw.org/reports/2005/us0405/6.htm (giving a similar account).

101 Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1. Earlier disclosures had hinted at the policy. *See* Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works*, WALL ST. J., Apr. 26, 2002, at A1 (describing tactics as "just a hair's-breadth away from being an illegal specialty under the Geneva Convention" (internal quotation marks omitted)); Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01 (giving an account of "renditions" to Egypt and Guantanamo, and quoting "officials" and "diplomats" as stating that "dozens" of renditions had occurred to "get information from terrorists in a way we can't do on U.S. soil" (internal quotation marks omitted)); Eric Umansky, *Failures of Imagination: American Journalists and the Coverage of American Torture*, COLUM. JOURNALISM REV., Sept./Oct. 2006, at 16 (describing the genesis of the Chandrasekaran & Finn article, *supra*, and noting that in early 2002, Chandrasekaran "talked to Indonesia intel sources, and one opened up to [him]").

102 See the discussion of the Mora memorandum in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1163 n.88, 1192 n.216.

103 John Barry et al., *Roots of Torture*, NEWSWEEK, May 24, 2004, at 26; Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, at 38.

spector General's report.[104] In November 2003, sources leaked an FBI memorandum encouraging law enforcement officials to surveil anti-war protestors.[105]

In January 2004, after Specialist Joseph Darby submitted a complaint and a CD of Abu Ghraib pictures to a military investigator, reports of the nature of the abuse began to circulate.[106] The administration sought to suppress the results of the investigation of that abuse by General Antonio Taguba, completed in early March, which set forth both the "sadistic, blatant, and wanton" prisoner abuse by guards and apparent collusion and acquiescence by superiors.[107] But information continued to make its way to the media from outraged insiders; with the broadcast of some of the Abu Ghraib photos by *60 Minutes* and the subsequent waves of disclosures and criticism, the effort largely collapsed.[108] In May and June 2004, internal whistleblow-

104 Dan Eggen, *Report Criticizes Post-Sept. 11 Interviews*, WASH. POST, May 10, 2003, at A13; *Justice and 9/11 Detainees: Critical Report* (CNN television broadcast May 30, 2003), transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0305/30/se.16.html. The report was released in June 2003. *See supra* note 96.

105 Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1.

106 Barbara Starr, *Details of Army's Abuse Investigation Surface*, CNN.COM, Jan. 21, 2004, http://www.cnn.com/2004/US/01/20/sprj.nirq.abuse/.

107 U.S. DEP'T OF DEF., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 6, 14, 16 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf [hereinafter TAGUBA REPORT] (noting that the report was completed on February 29, 2004, "out-brief[ed]" on March 3, 2004, and submitted on March 9, 2004); *see also* David Folkenflik, *Iraq Prison Story Tough To Hold Off On, CBS Says*, BALT. SUN, May 5, 2004, at 1D (describing pressure by Gen. Richard Myers to prevent the broadcast of evidence of abuse).

The Taguba Report was classified "SECRET/NO FOREIGN DISSEMINATION." The administration subsequently conceded that this classification was an error. *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1199 n.252, 1204–05. But in the effort to suppress the report, the administration threatened prosecution on the basis of the spurious classification. *See Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 8, 2004, at A15; E-Mail from Information Services Customer Liaison, U.S. Dep't of Def., to All ISD Customers (May 6, 2004, 12:45 EST), *available at* http://www.time.com/time/world/article/0,8599,634637,00.html (threatening prosecution for leaks of the Taguba report).

108 *60 Minutes II* (CBS television broadcast Apr. 28, 2004) (*quoted in Abuse of Iraqi POWs by GIs Probed*, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml); *see also* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 43 (quoting from a copy of the Taguba Report "obtained by *The New Yorker*" describing some of the graphic abuses); *cf.* Sewell Chan & Jackie Spinner, *Allegations of Abuse Lead to Shakeup at Iraqi Prison*, WASH. POST, Apr. 30, 2004, at A24 (describing abuses and "sealed charging papers").

ers began to disseminate legal memoranda authorizing abusive interrogation, and the supporting documents of the Taguba Report.[109]

In early 2005, a military lawyer leaked a list of names of prisoners at Guantanamo to civil rights attorneys.[110] By the end of that year, whistleblowers had revealed the wide usage of secret National Security Letters,[111] the existence of a secret warrantless program of illegal wiretapping by the NSA,[112] the profile of a network of CIA "black sites" where suspects were seized and transported for brutal interrogation[113] and the contents of a secret Pentagon surveillance database containing records of dozens of peaceful political protests.[114]

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109 *E.g.*, Barry et al., *supra* note 103 (describing the legal memoranda authorizing abusive interrogation); Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A1 (reporting contents of the memoranda); Osha Gray Davidson, *The Secret File of Abu Ghraib*, ROLLING STONE, (July 28, 2004), *available at* http://www.rollingstone.com/politics/story/6388256/the_secret_file_of_abu_ghraib (describing Taguba Report "annexes" leaked to the author in June, but not posting them); Dana Priest & Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1 (reporting on the August 2002 Bybee memo and 2003 working group report); Editorial, *Tormented Truths: Secrecy Obscures Why Administration Sought Memos on Uses of Torture*, NEWSDAY (N.Y.), June 10, 2004, at A42; *Morning Edition: Ashcroft Won't Release Torture Memos to Senate* (NPR radio broadcast June 9, 2004), *recording available at* http://www.npr.org/templates/story/story.php?storyId=1950677, at 1:00 ("The memorandum . . . has since been obtained by NPR and is on the NPR Web site."); *see also* ALEXANDER COHEN, CENTER FOR PUBLIC INTEGRITY, THE ABU GHRAIB SUPPLEMENTARY DOCUMENTS (Oct. 8, 2004), http://www.publicintegrity.org/report.aspx?aid=396&sid=100 (posting files forwarded by Osha Gray Davidson after reviewing them for sensitive information).

110 *See* Brooks Egerton, *Losing a Fight for Detainees*, DALLAS MORNING NEWS, May 18, 2007, at 1A (describing the prosecution of the attorney, Matthew Diaz, beginning in 2005). The Department of Defense continued its court martial proceedings against Commander Diaz even after the names had been disclosed in response to FOIA litigation. *Id.* ("When asked why the government pressed on with its criminal case against Cmdr. Diaz, Navy spokeswoman Beth Baker said, 'I can't give you a philosophical answer.'").

111 Gellman, *supra* note 89.

112 Risen & Lichtblau, *supra* note 58; *see also* Lichtblau & Risen, *supra* note 82, at 1; *cf.* Tim Grieve, *What the Times Knew, and When It Knew It*, SALON.COM, Aug. 14, 2006, http://www.salon.com/politics/war_room/2006/08/14/times/index.html (noting that the New York Times had drafted its story in November 2004 but decided to hold it at the request of the administration on the "eve" of the 2004 presidential election). Subsequent leaks revealed the fact that telecommunications companies had cooperated in the illegal surveillance program. *See* Cauley & Diamond, *supra* note 58.

113 Priest, *supra* note 57, at A1; *see also* Priest, *supra* note 84. A more general account of the policy of "extraordinary renditions," based in part on the disclosures of officials and former officials who believed that the CIA "had lost its way," is provided in Mayer, *supra* note 12. *See also* GREY, *supra* note 85, at 114–20; PAGLEN & THOMPSON, *supra* note 85.

114 Lisa Myers et al., *Is the Pentagon Spying on Americans?*, MSNBC.COM, Dec. 14, 2005, http://www.msnbc.msn.com/*id*/10454316. The existence of the program that gathered the information had been revealed by a whistleblower two years earlier. *See* Brian McWilliams, *DOD Logging Unverified Tips*, WIRED, June 25, 2003, http://www.wired.com/politics/law/news/2003/06/59365.

Many of these disclosures provided the prerequisite knowledge for subsequent invocations of transparency rules. Revelation of FBI surveillance programs against dissidents triggered FOIA requests by activists.[115] Disclosure of Pentagon programs had a similar result.[116] Leaks of the abuses at Abu Ghraib and the existence of legal authorities for prisoner abuse and coercive interrogation set the stage for FOIA requests by advocacy organizations seeking specific documents identified in the media, along with broader information on detainee abuse.[117] By 2007, those inquiries had resulted in the release of over

115 *See* ACLU v. FBI, 429 F. Supp. 2d 179 (D.D.C. 2006) (describing production of documents regarding surveillance by Joint Terrorism Task Forces); Dan Eggen, *Coalition Seeks FBI's Files on Protest Groups*, WASH. POST, Dec. 3, 2004, at A3 (describing the ACLU's efforts); CTR. FOR CONSTITUTIONAL RIGHTS, CCR FILES FREEDOM OF INFORMATION ACT ON BEHALF OF UNITED FOR PEACE AND JUSTICE (Dec. 16, 2003) (describing FOIA request by the "national antiwar coalition, United for Peace and Justice (UFPJ)"); Press Release, ACLU, FBI Spied on Denver Bookstore and Anti-War Protesters, New Documents Reveal (Mar. 28, 2006), *available at* http://www.aclu.org/safefree/spyfiles/24790prs20060328.html (describing the contents of an FBI report obtained by the ACLU through FOIA); Press Release, ACLU, ACLU Releases First Concrete Evidence of FBI Spying Based Solely on Groups' Anti-War Views (Mar. 14, 2006), *available at* http://www.aclu.org/safefree/spying/24528prs20060314.html; Press Release, ACLU, New Documents Show FBI Targeting Environmental and Animal Rights Groups Activities as 'Domestic Terrorism' (Dec. 20, 2005), *available at* http://www.aclu.org/safefree/spying/23124prs20051220.html; Press Release, New Documents Show FBI Joint Terrorism Task Force Targeting Peaceful Protest Activity in Colorado (Dec. 8, 2005), http://www.aclu.org/safefree/spying/22884prs20051208.html; Press Release, ACLU, FBI Document Labels Michigan Affirmative Action and Peace Groups as Terrorists (Aug. 29, 2005), *available at* http://www.aclu.org/safefree/spying/20246prs20050829.html; Press Release, ACLU, FBI Is Keeping Documents on ACLU and Other Peaceful Groups (July 18, 2005), *available at* http://www.aclu.org/safefree/general/20073prs20050718.html; Letter from Ann Beeson, Associate Legal Director, ACLU, to FBI (Dec. 2, 2004), *available at* http://www.aclu.org/FilesPDFs/foia_jttf.pdf (requesting documents under FOIA regarding the National Joint Terrorism Task Force and its surveillance activities).

116 *See, e.g.*, Complaint, Am. Friends Serv. Comm. v. Dep't of Justice, No. 06CV02529 (E.D. Pa. June 14, 2006) (describing FOIA requests by ACLU affiliates to uncover the targets of Pentagon spying); Eric Lichtblau & Mark Mazzetti, *Military Documents Hold Tips on Antiwar Activities*, N.Y. TIMES, Nov. 21, 2006, at A18; ACLU, NO REAL THREAT: THE PENTAGON'S SECRET DATABASE ON PEACEFUL PROTEST (2007), http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; Press Release, ACLU, ACLU Calls for Investigation in Response to New Details of Pentagon Spy Files (Nov. 21, 2006), *available at* http://www.aclu.org/safefree/spyfiles/27468prs20061121.html; Press Release, Servicemembers Legal Def. Network, Pentagon Releases Documents Acknowledging Surveillance of Gay Groups (Apr. 11, 2006), *available at* http://www.sldn.org/templates/press/record.html?record=2859.

117 Letter from Lawrence S. Lustberg et al., Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., to H.J. McIntyre, Director, Directorate for Freedom of Info. & Sec. Review, Dep't of Def. (May 25, 2004), *available at* http://www.aclu.org/torturefoia/legal documents/jjACLUSecondFOIArequest.pdf (requesting records regarding the treatment of post-September 11 detainees). Other NGOs also began to deploy FOIA to bring detainee abuses to light. *See, e.g.*, Federation of American Scientists, *Photos of Iraqi Prisoner*

100,000 pages of documents.[118] Exposure of the NSA's illegal wiretapping program provoked official inquiries from a long-quiescent Congress, along with a flurry of FOIA requests by news media,[119] nongovernmental activists,[120] and political opposition.[121]

Abuse Sought Under FOIA, SECRECY NEWS, May 12, 2004, http://www.fas.org/sgp/news/secrecy/2004/05/051204.html; HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN, 99 (2006), http://www.humanrightsfirst.org/us_law/etn/dic/foia.asp (last visited Sept. 1, 2007) (describing requests made from 2004 to 2005); Sam Hananel, *Amnesty Int'l Seeks Military's Taser Files*, ASSOCIATED PRESS, Nov. 30, 2004, *available at* http://www.commondreams.org/headlines04/1130-25.htm (reporting an Amnesty International FOIA request regarding the use of Tasers in Iraq and Afghanistan).

118 *See* discussion in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1202–06.

119 N.Y. Times Co. v. U.S. Dep't of Def., 499 F. Supp. 2d 501, 506 (S.D.N.Y. 2007) (referring to the release of 174 pages of documents in response to FOIA request filed December 2005); Gerstein v. CIA, No. C-06-4643 MMC, 2006 U.S. Dist. LEXIS 89847, at *16 (N.D. Cal. Nov. 29, 2006) (ordering expedited processing of March 2006 FOIA request for documents regarding referrals of leaks for criminal prosecution).

120 *See* People for the Am. Way Found. v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21, 25 & n.1 (D.D.C. 2006) (referring to the release of 106 pages of documents in response to FOIA request filed in December 2005); Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 36, 43 (D.D.C. 2006) (ordering expedited processing of December 2005 FOIA request); *see also* Dan Eggen & Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying*, WASH. POST, Mar. 9, 2006, at A3 (describing memo released in response to FOIA request); Nat'l Sec. Archive, Justice Department E-Mail on Wiretapping Program Released Through FOIA (Mar. 9, 2006), http://www.gwu.edu/~nsarchiv/news/20060309/index.htm (providing access to DOJ documents obtained through FOIA); Nat'l Sec. Archive, Department of Justice Concedes It Can Begin To Release Internal Warrantless Surveillance Records on March 3 (Feb. 13, 2006), http://www.gwu.edu/~nsarchiv/news/20060213/index.htm (describing suit filed by National Security Archives and the consequent release of a DOJ memo providing the legal authorities for the surveillance program); *cf.* ACLU v. NSA, 493 F.3d 644, 687–88 (6th Cir. 2007) (dismissing injunctive action for lack of standing); *In re* NSA Telecomms. Records Litig., No. MDL 06-1791 VRW, 2007 U.S. Dist. LEXIS 53456 (N.D. Cal. July 24, 2007) (refusing to enjoin state investigations of telecommunications companies); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1223, 1225 (D. Or. 2006) (refusing to dismiss action for illegal wiretapping on state secret grounds as the wiretap already disclosed, but refusing to require disclosure of existence of subsequent or ongoing surveillance); Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 917, 920 (N.D. Ill. 2006) (dismissing action against telecommunications companies for cooperating with NSA on grounds of state secrets privilege); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (refusing to dismiss action against telecommunications company on state secrets ground); Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 95913, at *12–*14 (E.D.N.Y. Oct. 3, 2006) (ordering defendants to state *ex parte* to Court whether plaintiffs' communications with counsel had been subject to warrantless NSA wiretaps).

121 John McCaslin, *Inside the Beltway*, WASH. TIMES, Jan. 9, 2006, at A5 (describing a FOIA request by the Democratic National Committee for Justice Department memos outlining authority for warrantless surveillance that had been hand-delivered to Justice Department headquarters in the form of "160,000 separate requests—each printed and boxed up—signed by party supporters in the past two weeks"); *see also* Democratic National Commit-

As with resistance to record destruction or sanitization, the crucial institutional context of these disclosures has been the permanent infrastructure of federal civil service. Just as a long-term civil service is likelier to harbor individuals who resist the destruction of records than is a system of political appointment, it is more prone to generate individuals who take the riskier step of affirmatively disclosing abuses to outsiders. As with recordkeeping, whistleblowing does not require broad participation by employees before it is effective. It takes only one individual willing to disseminate information to dispel the deep secrecy that hamstrings FOIA requesters. The digital environment, moreover, serves as a force multiplier for leakers: a single e-mail can include several lengthy documents, and a digital picture is worth a thousand e-mails.[122] Like collateral disclosures, once information is released into the public sphere, the combination of First Amendment protections and the resilience of the Internet makes it very hard to contain.

Long-term civil servants are not systematically tied to the current administration by bonds of either personal or ideological loyalty. Many will have been brought into government under prior administrations of contrasting commitments, and their long-term prospects depend on future administrations for advancement.[123] They are more likely than temporary officials to have long-standing relations with journalists or other outsiders whom they can trust to retain the confidentiality of their disclosures.[124]

Civil servants are more inclined than political appointees to resent violations of internal norms of departments where they have spent their careers, and this inclination is prominent in GWOT disclosures. The JAGs who approached human rights advocates to spur them to

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tee, Make Your Freedom of Information Act Request, http://www.democrats.org/page/petition/domesticspying (last visited Sept. 1, 2007).

122 *Cf.* Josh White, *Now Online, a Guide to Detainee Treatment*, WASH. POST, Dec. 4, 2007, at A19 (describing anonymous posting of Guantanamo operating manual on www.wikileaks.com).

123 JAMES P. PFIFFNER, THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING 82 (2d ed. 1996) ("[W]e would expect career bureaucrats to resist any orders to allocate grants based on illegal or political criteria . . . . [and] to blow the whistle rather than to cover up illegal activities by their colleagues or political superiors."); Mendelson, *supra* note 25, at 650 ("[C]ivil servants with some sense of independence from the sitting President are in a position to bring agency activity to the light of day.").

124 They are also in a position to offer their long-term media contacts an ongoing stream of information that can act as a bond for continued confidentiality. Conversely, the existence of an institutional press that depends on future information for future profits provides a guarantee against defection. A news reporter's reputation for probity with his sources is the guarantee of future scoops, and hence future employment.

investigate a policy of abusive interrogation "said the U.S. military's 50-year history of observing the demands of the Geneva Conventions was now being overturned."[125] The officials who disclosed the illegal NSA wiretaps came forward because they "felt that there was something going wrong in the government. They believed that there was illegal activity."[126] Military sources were brought to speak to reporters about abusive interrogation in Afghanistan "out of what they said was anger and disgust over the unit's treatment of detainees and the failure of task force commanders to punish misconduct."[127] A CIA Deputy Inspector General who had filed reports decrying illegal interrogation techniques was impelled to turn to the press when she "was startled to hear what she considered an outright falsehood" in CIA presentations to Congress denying the use of certain techniques.[128] Other CIA officials revealed details of abuses to Council of Europe investigators because they disapproved of methods "not consonant with the sort of intelligence work they normally do."[129]

To be sure, not all GWOT information has been leaked by principled internal critics. The last five years have been free neither of manipulations by insiders rushing to claim credit[130] nor of selective leaks to punish critics.[131] But the resolution of administration officials

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125 Barry et al., *supra* note 103, at 26.

126 *Meet the Press* (NBC television broadcast Jan. 8, 2006), *transcript available at* http://www.msnbc.msn.com/id/10721401/page/4/ (quoting James Risen, the author of the *New York Times* story on eavesdropping).

127 Eric Schmitt & Carolyn Marshall, *In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1.

128 Smith, *supra* note 21, at A1 (referring also to McCarthy's revulsion for efforts to "secure a secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees'"); *see also* Robert Windrem & Andrea Mitchell, *CIA Officer Fired After Leak*, MSNBC.COM, Apr. 21, 2006, http://www.msnbc.msn.com/id/12423825/. Similar reactions were provoked in other officials. *See, e.g.*, GREY, *supra* note 85, at 250 ("I've been astonished at how willing many of those with close knowledge of these secret U.S. agencies had been to share their concerns. None of what I wrote would be possible without those who felt there were certain stories that simply needed telling.").

129 Marcin Grajewski, *CIA Dissenters Aided Secret Prisons*, REUTERS, July 17, 2007, http://www.reuters.com/article/politicsNews/idUSL1780708920070717 (quoting Council of Europe investigator Dick Marty). *See generally* Council of Europe, Alleged Secret Detentions in Council of Europe Member States, http://www.coe.int/T/E/Com/Files/Events/2006-cia/ (last visited Dec. 28, 2007) (providing chronology and links to Council of Europe inquiries and conclusions).

130 *E.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160, 162 (2d Cir. 2006) (describing the leak of "a plan to freeze the assets and/or search the premises of two foundations" in the aftermath of September 11, and phone calls by reporters to the foundations seeking comments, which allowed the targets to destroy evidence).

131 *E.g.*, Wilson v. Libby, 498 F. Supp. 2d 74 (D.D.C. 2007); *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

to centralize dubious initiatives in the political Office of the Vice President gives testimony to the perceived dangers that civil servants pose to deep secrecy.[132]

c. Legal Challenges

In general, the government is constrained by the First Amendment from imposing gag orders on the subjects of its interventions.[133] Some GWOT targets who were able to retain attorneys persuaded courts to invalidate efforts to restrain them from disclosing their treatment.[134] Administration officials have been only intermittently successful in enlisting courts in the efforts to suppress information.[135] And some targets have been willing to risk legal sanction by revealing their treatment to news media.[136] As with the institutional infrastructure undergirding FOIA requesters, the combination of a strong civil

132 *See* Hersh, *supra* note 24. A similar dynamic may explain the administration's preference for private contractors, who are beholden to the administration that provides their contracts, and whose employees are likely to be less imbued with the institutional norms of government. *See* Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. PUB. ADMIN. RES. & THEORY 413, 433 (1998) (finding a link between the "public service motivation" characteristic of career civil servants and their tendency toward whistle-blowing); Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation*, 26 WORK & OCCUPATIONS 107, 117 (1999) (reporting on the result of a nationwide survey that the rate of whistle-blowing was over five times as great in public as in private employment). Privatization is, of course, no guarantee against whistle-blowing. *See, e.g.*, Ryan Singel, *Whistle-Blower Outs NSA Spy Room*, WIRED, Apr. 7, 2006, http://www.wired.com/science/discoveries/news/2006/04/70619 (describing an AT&T employee who revealed the installation of NSA wiretaps).

133 *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1058 (1991); Butterworth v. Smith, 494 U.S. 624, 632 (1990); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); *see also* Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) (quoting *Daily Mail*).

134 Doe v. Gonzales, 386 F. Supp. 2d 66, 82 (D. Conn. 2005) (declaring unconstitutional effort to gag librarian who had received NSL); Doe v. Ashcroft, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004) (declaring the gag provision of Patriot Act regarding National Security Letters unconstitutional as applied to ISP and rejecting efforts to seal pleadings); Doe v. Ashcroft, 317 F. Supp. 2d 488, 492, 490 (S.D.N.Y. 2004) (granting motion to partially unseal, describing administration request "that the ACLU remove the briefing schedule from its website," establishing a "procedure by which those disputes can be resolved," and putting "the burden on the Government to quickly justify each particular redaction under the exacting First Amendment standards applicable"); ACLU, Government Gag Exposed (Aug. 19, 2004), http://www.aclu.org/safefree/patriot/18491res20040819.html (disclosing unsealed documents); *see also* Dan Eggen, *U.S. Uses Secret Evidence in Secrecy Fight with ACLU*, WASH. POST, Aug. 20, 2004, at A17.

135 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1152–57, 1155 n.5, 1176–79, 1181–82, 1217 n.319.

136 Rod Smith, *Sources: FBI Gathered Visitor Information Only in Las Vegas*, LAS VEGAS REV. J., Jan. 7, 2004, at 1A.

society sector, an independent bar, and a structure of constitutional doctrine protecting the ability to publicize concerns provided a seedbed for prerequisite disclosure.

D. FOIA Administration, Adjudication and Institutional Structure

1. Administration, Organizational Dynamics, and the Rule of Law

Even where capable requesters have the information necessary to frame incisive requests, FOIA will fail without good faith and lawful exercise of discretion by recipient officials. When administrators are required to search their files to respond to FOIA requests, what guarantee do requesters have that members of the administration will not "forget" the location of embarrassing information? When FOIA officers are required to prepare indices of documents they seek to withhold, how can we be sure that inconvenient documents are not buried in a misleading characterization?

The scope of exemptions gives wide range for administrative predictions of dire consequences from disclosure, and courts will often defer to these predictions. Marking documents classified on grounds of national security, moreover, effectively immunizes them from disclosure.[137] Satirist Tom Lehrer once observed, in the context of pornography, "when correctly viewed, everything is lewd." When viewed through the prism of the possible assembly of a "mosaic" of information by a dangerous enemy of unknown capacities, everything is a dire threat to national security.[138] Given the availability of "national

137 Congress directed that the national security exemption is available only for documents that are "in fact properly classified." 5 U.S.C. § 552(b)(1)(B) (2000); *see* CIA v. Sims, 471 U.S. 159, 189 n.5 (1985) (Marshall, J., concurring) (noting that the language of the exemption was specifically designed by Congress to overrule prior precedent that gave the Executive sole discretion in Exemption 1 withholdings and that this amendment was adopted over a presidential veto). Nonetheless, courts have proved largely unwilling to second-guess claimed exemptions of classified documents. *See* Fuchs, *supra* note 11, at 166–67; Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 715 n.159 ("Cases decided under Exemption 1 during the 1990s were individually reviewed. No ultimately successful challenges were revealed." (citation omitted)); Wells, *supra* note 11, at 854; Pozen, *supra* note 11, at 632, 654. *But cf.* Associated Press v. U.S. Dep't of Def., 498 F. Supp. 2d 707 (S.D.N.Y. 2007) (describing extensive *in camera* review of a representative sample of material redacted pursuant to Exemption 1 and concluding that the exemption was properly invoked).

138 *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (upholding refusal to disclose the names of attorneys for detainees who had been determined to have no connection with terrorism); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 30 & n.11, 32 (D.D.C. 2003) (upholding refusal to disclose the number of times Section 215 of the Patriot Act had been deployed); Pozen, *supra* note 11; *cf.* N. Jersey Me-

security" concerns, why would an administration ever fail to classify damaging material?

Here, again, it turns out that FOIA's efficacy depends on a law-abiding civil service. Many of the decisions regarding FOIA requests are made at a line level by career bureaucrats who have no political stake in disclosure or non-disclosure and who can do their jobs most easily by following regulations in good faith.[139] Indeed, a culture of lawfulness is an asset at most levels of the federal government, and this culture is nurtured in the FOIA context by specific institutional structures.

The strengthened FOIA obligations of 1974 led to the establishment of the Office of Information and Privacy in the Department of Justice in 1981.[140] That office, directed by the same attorneys for over a quarter-century,[141] took as part of its institutional mission the quest to establish a culture of lawful response to FOIA requests. One of the founding attorneys described the dynamic:

> [A] major part of any FOIA officer's job, or the role of someone like me who works to lead them in the right direction, is to firmly grapple with this problem attitude—an attitude that can quickly become ingrained within the culture of any part of an agency, sometimes on four-year cycles as a new president (either Republican or Democrat) comes into office.

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dia Group, Inc. v. Ashcroft, 308 F.3d 198, 219–20 (3d Cir. 2002) (deferring to admittedly "speculative" mosaic claim regarding blanket closure of deportation proceedings because "our nation is faced with threats of such profound and unknown dimension").

The administration is reported to have operated on the proposition that, "[e]ven if there's just a one percent chance of the unimaginable coming due, act as if it is a certainty." RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 62 (2006). At the one percent level, any disclosure that could give suspected terrorists a marginal advantage could be the prelude to a nuclear holocaust. Of course, at the one percent level, it is also true that a failure to disclose could precipitate massively costly mistakes, like invading the wrong country, torturing innocent civilians, and ruining America's normative leverage against terrorists around the world.

139 *See* ROBERTS, *supra* note 12, at 71. It is worth reflecting on whether one element of the administration strategy in promulgating an order directing each agency to appoint a FOIA officer is the prospect of moving politically reliable officials into FOIA choke points. One former government FOIA attorney has advised agencies to deploy a "rapid response team" to cover requests by aggressive civil society organizations. Scott A. Hodes, *FOIA Facts: Rapid Response Team for FOIA*, LLRX.COM, Dec. 17, 2006, http://www.llrx.com/columns/foia38.htm.

140 *See* FOIA Post, *OIP Holds Silver Anniversary Celebration*, Nov. 3, 2006, http://www.usdoj.gov/oip/foiapost/2006foiapost14.htm [hereinafter *Silver Anniversary*]. The Office of Information and Privacy (OIP) was established as an independent office by Attorney General Janet Reno on May 14, 1993. U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSION AND FUNCTIONS MANUAL: OFFICE OF INFORMATION AND PRIVACY, http://www.usdoj.gov/jmd/mps/manual/oip.htm#content (last visited Sept. 1, 2007).

141 *Silver Anniversary*, *supra* note 140. Its founding attorneys have now retired, and have been replaced by another attorney who has been with the office since 1983. *Id.*

> I think the best approach is to confront this attitude directly—to explicitly acknowledge it as an immutable aspect of both human and institutional nature and, in so doing, to attack it head-on. Someone who blatantly resists a legal requirement such as the FOIA is not unlike a bully, I've found, and the best response to that can be a verbal two-by-four across the bridge of the nose. This works more often than you might imagine, even with new political employees.[142]

Even discounting for the bravado of a lawyer defending his life's work, this description rings true as a part of an explanation for the success of FOIA litigation in the context of GWOT.

Structural support for FOIA rests as well in the fact that the self-interest of career civil servants does not always cut against disclosure. In a multi-vocal bureaucracy, a faction that can show itself to have opposed a problematic policy as a matter of principle or prudence may be eager to expose abuses by its long-term rivals. The dynamic manifested itself in maneuvering over what the ACLU referred to as its "torture files" request for documents regarding Abu Ghraib and coercive interrogation policies. The FBI, which had lodged objections to these tactics, affirmatively gathered a chronology of its objections, granted the ACLU's request for expedited processing, and ultimately released revelatory documents. As one account puts the matter:

> [After the initial Abu Ghraib disclosures,] the FBI general counsel's office began a more systematic effort to document the abuses that had been recorded by its agents in Iraq, Afghanistan and Guantanamo. The result was a flood of alarming reports that have now been turned over to the American Civil Liberties Union in its Freedom of Information lawsuit seeking the release of government documents on the treatment of prisoners.
>
> The release of these documents has exacerbated tensions between the FBI and the Pentagon over the issue. Defense officials have privately complained that bureau officials affirmatively decided to turn over the documents in the lawsuit in order to protect itself from charges that it was complicit in the improper treatment of prisoners.[143]

The interplay over the "torture files" FOIA requests highlights a final structural guarantee grounded in career civil service. Invocation of FOIA's national security exemption requires that materials actually have been classified pursuant to valid executive order. The classification process has its own personnel and organizational dynamic.

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142 Tony Mauro, *Justice Department's Independence 'Shattered,' Says Former DOJ Attorney*, LAW.COM, Apr. 16, 2007, http://www.law.com/jsp/law/LawArticleFriendly.jsp?*id*=1176455062969 (quoting Daniel Metcalfe).

143 Michael Isikoff & Mark Hosenball, *Terror Watch: Has the Government Come Clean?*, NEWSWEEK.COM, Jan. 5, 2005, http://www.newsweek.com/id/48419.

These can resist efforts to over-classify in the interests of political gain, if for no other reason than the perception that over-classification diffuses the resources necessary to protect against real threats to security. As I have described elsewhere,[144] the interventions of William Leonard, the Director of the Information Security Oversight Office, in the summer and fall of 2004 apparently limited the classification of Defense Department material regarding abuses of detainees. Because FOIA Exemption 1 can be invoked only where government officials certify that material is in fact classified, it appears that Mr. Leonard's integrity and institutional clout precluded the "national security" gambit and facilitated the release of over 100,000 pages of revealing documents.[145]

2. A Portfolio of Judges

FOIA gives requesters a right to de novo review in U.S. district court of outright refusals to disclose documents; it recognizes as well a right to seek preliminary relief imposing schedules upon dilatory agencies that seek to play rope-a-dope.[146] Confrontations between requesters and a recalcitrant administration, however, often leave substantial room for the exercise of judicial judgment. The evaluation of FOIA exemption claims frequently turns on the judge's perceptions regarding the "reasonableness" of expectations of privacy, the balance between disclosure and other public goods, the persuasiveness of predictions of harm, and the like. Equally important, judges in FOIA cases have broad equitable authority to grant or deny relief regarding the timing and scope of search and review efforts, as well as

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144 Kreimer, *Strategy of Transparency*, *supra* note 19, at 1204–05.

145 Mr. Leonard's efficacy was in part a testament to the career civil service. He was a veteran of over a quarter century in the information security arms of the federal government, and had "served in the Office of the Deputy Assistant Secretary of Defense (Security and Information Operations) as both the Deputy Assistant Secretary as well as the Principal Director." Nat'l Archives, Director, Information Security Oversight Office (ISOO), http://www.archives.gov/isoo/about/director.html (last visited Sept. 1, 2007).

Mr. Leonard, it subsequently emerged, had confronted overreaching by the administration on other turf. *See, e.g.*, Bonnie Goldstein, *Cheney vs. National Archives*, SLATE, June 27, 2007, http://www.slate.com/id/2169209/ (compiling documents from 2006 regarding Leonard's claim that the Vice President's office was in "willful[] violation of executive order regarding classified materials, and Cheney's claim that he was not bound by the order because he was not a member of the executive branch).

146 5 U.S.C. § 552(a)(6)(E)(iii) (2000) ("[F]ailure by an agency to respond in a timely manner to [an expedited] request shall be subject to judicial review . . . ."); *see, e.g.*, Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 38 (D.D.C. 2006); Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318 (D.D.C. Nov. 16, 2005); ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004).

informal power to prod agencies toward disclosure. Much of the action in FOIA requests occurs in the shadow of litigation, or out of the range of effective appellate review. The efficacy of FOIA, therefore, depends in substantial measure on the rigor and skepticism with which trial judges exercise their offices.

All federal judges are, of course, life tenured; any particular FOIA request therefore has a chance of coming before a judge appointed not by the current administration, but by predecessors of different ideology. Moreover, under FOIA, venue for requesters' lawsuits lies both in the location of the requested records, which is usually the District of Columbia, and in the district in which the claimant resides.[147] For matters of national interest, an administration must potentially contend with a nationwide portfolio of litigation. That portfolio is likely to contain a spectrum of legal precedent and of judicial opinion more varied than the consensus in Washington, D.C., or the balance of power on the D.C. Circuit. Strategic litigants may seek pockets of judges and law skeptical to administration claims. This diversity manifested itself in the FOIA litigation over GWOT.

Efforts to withhold documents on prisoner abuse and the details of Guantanamo detention practices were challenged by requesters in New York, outside the precedential authority of the 2-1 majority in the D.C. Circuit that had proffered almost unqualified deference to the administration's claims for exemption from disclosure on grounds of national security.[148] The challenges succeeded before Clinton appointees Alvin Hellerstein, who had served in the Judge Advocate Corps of the U.S. Army from 1959 to 1960,[149] and Jed Rakoff, who had spent seven years in the U.S. Attorney's Office for the Southern District of New York.[150]

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147 5 U.S.C. § 552(a)(4)(B).

148 Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).

149 *See* Fed. Judiciary Ctr., Judges of the U.S. Courts, Alvin K. Hellerstein, http://www.fjc.gov/servlet/tGetInfo?jid=2794 (last visited Sept. 1, 2007) (stating that Clinton nominated Hellerstein in 1998); ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 503–04 (S.D.N.Y. 2004) (ordering production or identification of documents regarding abuse of detainees); *id.* at 502 ("Ours is a government of laws . . . . No one is above the law . . . ."); *id.* at 504 ("Merely raising national security concerns can not justify unlimited delay."); *id.* ("[T]he glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires."). See further the discussion in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1203–08.

150 *See* Fed. Judiciary Ctr., Judges of the U.S. Courts, Jed Saul Rakoff, http://www.fjc.gov/servlet/tGetInfo?jid=1957 (last visited Sept. 1, 2007) (stating that Clinton nominated Rakoff in 1996); Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 153 (S.D.N.Y. 2006) (rebuffing a procedural maneuver to raise a waived claim because, "[t]o put it col-

In California, Judge Charles Breyer, who had served as a Watergate special prosecutor, upbraided the government for tendering "frivolous claims of exemption" regarding documents relating to the "No-Fly list."[151] Even within the District of Columbia, Clinton appointees Gladys Kessler[152] and Ellen Segal Huvelle[153] effected the release of documents debunking the administration's positions con-

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loquially, a motion for reconsideration is not a game of 'gotcha'"); *id.* at 157 (rebuffing substantive claim as "wholly conclusory and grossly speculative"); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 18 (S.D.N.Y. 2005) (describing the administration's position as "strange, even hypocritical"). See further the discussion in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1166–69.

Judge Rakoff had previously ordered an investigation of the administration's misrepresentation of evidence in seeking a warrant to imprison an entirely innocent Egyptian visitor, and refused to seal the unflattering events leading up to that investigation. *In re* Material Witness Warrant, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002). With fortuity bordering on the providential, the administration's 2006 effort to use a grand jury subpoena to suppress a leaked document was also delivered to Judge Rakoff's skeptical hands. *See* Press Release, ACLU, Government Backs Down in Its Attempt To Seize "Secret" Document From ACLU (Dec. 18, 2006), *available at* http://www.aclu.org/safefree/general/27727prs20061218.html (discussing the government's effort to subpoena "all copies" of a document regarding photographing of detainees, detailing the unsuccessful effort to seal proceedings before Judge Rakoff, and providing pleadings from the related litigation).

For another successful FOIA case in New York, see the *La Raza* litigation, in which the government was ordered to release a legal opinion authorizing enforcement of immigration regulations by local government. Nat'l Council of La Raza v. Dep't of Justice, 345 F. Supp. 2d 412 (S.D.N.Y. 2004), *aff'd*, 411 F.3d 350 (2d Cir. 2005); Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572 (S.D.N.Y. 2004). *La Raza* was brought before Judge Lewis Kaplan, who was appointed by Clinton in 1994. Fed. Judiciary Ctr., Judges of the United States Courts, Lewis A. Kaplan, http://www.fjc.gov/servlet/tGetInfo?jid=1226 (last visited Sept. 1, 2007).

151 Gordon v. FBI, 390 F. Supp. 2d 897, 902 (N D. Cal. 2004); *see* Fed. Judiciary Ctr., Judges of the United States Courts, Charles R. Breyer, http://www.fjc.gov/servlet/tGetInfo?jid=2719 (last visited Sept. 1, 2007); Gordon, 390 F. Supp. 2d at 903 (requiring that any further withholding be accompanied by a "certification from government counsel attesting that counsel has personally reviewed all of the withheld information and in counsel's good faith opinion the withheld material is exempt . . . ." (emphasis omitted)); *cf.* Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (upholding certain claims of exemption, rejecting others).

152 *See* Judge Gladys Kessler, http://www.dcd.uscourts.gov/kessler-bio.html (last visited Sept. 1, 2007) (noting that Kessler was appointed in 1994); Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at *4 (D.D.C. Nov. 16, 2005); *see also* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1153–54; 1179–80. Judge Kessler had previously ordered the release of information regarding the post-September 11 dragnet, commenting that "[s]ecret arrests are 'a concept odious to a democratic society . . . .'" Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 96 (D.D.C. 2002), *rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

153 *See* Judge Ellen Segal Huvelle, http://www.dcd.uscourts.gov/huvelle-bio.html (last visited Sept. 1, 2007) (noting that Huvelle was appointed in 1999); ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 28, 32, 33 (D.D.C. 2004); *see also* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1171, 1174–75.

cerning deployment of the Patriot Act by exercising equitable authority regarding timing. Former Assistant U.S. Attorney and Clinton-appointed D.C. district judge Henry Kennedy, impatient with delays in processing a request for information regarding noncompliance with FISA, "easily rejected" an administration position that would give it "carte blanche to determine the time line for processing expedited requests."[154]

To be sure, judges across the country acquiesced to administration claims seeking to resist disclosures of information. But an administration seeking to maintain secrecy must contend with the prospect that a FOIA case would come before one of a portfolio of reasonably skeptical judges. And, as with the prospect of leaks, it requires only one success on a given subject to release information into public dialogue.

III. THE FORCE OF FOIA: THE QUESTION OF EFFICACY

In contrast to the FOIA critics who regard the statute as unnecessary, a second group of commentary casts FOIA as ineffective, particularly as a check on executive overreaching in GWOT.[155] Without doubt, the current administration has sought to impede release of information under FOIA. Without doubt, as well, administration efforts to resist disclosure have met success in litigation, and the administration's failures in FOIA litigation have not galvanized immediate public repudiation of overreaching initiatives in GWOT. Where they have been successful, moreover, FOIA requests have been predicated on prior disclosures, which raises the question of whether FOIA serves any independent function at all. If reasonably detailed public knowledge of abuses is a prerequisite to a successful FOIA request, what will the results of that request add to public dialogue?

The answers to these challenges come in two stages. First, it is important to assay the actual incidence of information disclosed pursuant to FOIA requests. This requires both a full account of the successful requests and an appreciation of the ways in which FOIA can trigger other disclosures and discussion.

As we will see, in the public consideration of GWOT initiatives, FOIA's role in the ecology of transparency has been in part to au-

154 Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 37 (D.D.C. 2006); *see* Judge Henry H. Kennedy, Jr., http://www.dcd.uscourts.gov/kennedy-bio.html (last visited Sept. 1, 2007) (noting that Kennedy was appointed in 1997 and was an Assistant U.S. Attorney from 1973 to 1976).

155 *See* critics cited *supra* notes 9–12 and accompanying text.

thenticate some prior disclosures, easing their way into public discourse. In addition, FOIA has potentiated other subsequent disclosures. The critical literature has failed to appreciate either role.

Full analysis requires a clear-eyed assessment of these dynamics as well as the ways in which FOIA disclosures have functioned to leverage the checking functions of other institutions, and the cumulative impact of disclosures over time. Critics inadequately appreciate the ecology of transparency.

A. FOIA and the Half-Full Glass: Assessing Contributions to Public Information

1. FOIA and the Partial Disclosures

While the current administration's policy pronouncements encouraged agencies to withhold documents from FOIA requests whenever there was a "sound legal basis" to do so,[156] the policy has fallen well short of establishing an impenetrable cone of silence. Early studies suggested that the policy memoranda resulted in relatively small changes in FOIA practice.[157] More recently, it appears at the macro level that the period since the current administration's accession to power has witnessed a discernible increase both in levels of FOIA withholding and delays accompanying the processing of FOIA requests.[158] Yet amidst the increasing recalcitrance, the combined pro-

156 *See* discussion of Ashcroft and Card memoranda, *supra* notes 62, 64. The current administration has also encouraged classification of information, which in turn shields it from FOIA disclosure. *See, e.g.*, Dana Milbank & Mike Allen, *Release of Documents Is Delayed*, WASH. POST, Mar. 26, 2003, at A15 (describing revocation of the requirement that material "not be classified if there is 'significant doubt'" as to its danger to national security); Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).

157 *See* THOMAS BLANTON ET AL., THE ASHCROFT MEMO: "DRASTIC" CHANGE OR "MORE THUNDER THAN LIGHTNING"? 10 (2003), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/FOIA%20Audit%20Report.pdf; U.S. GEN. ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY 10 (2003), http://www.gao.gov/new.items/d03981.pdf (reporting that 25% of FOIA officers perceived a change in agency processing of FOIA requests after the Ashcroft Memo).

158 COALITION OF JOURNALISTS FOR OPEN GOV'T, STILL WAITING AFTER ALL THESE YEARS: PART I at 12 tbl. (2007), http://www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf [hereinafter CJOG, STILL WAITING] (documenting over a 40% decrease in the number of requests granted in full by the Department of Defense between 1998 and 2006; a 90% decrease at the CIA; a 70% decrease at the Justice Department; and a 43% decrease overall); COALITION OF JOURNALISTS FOR OPEN GOV'T, WHEN EXEMPTIONS BECOME THE RULE (2005), http://www.cjog.net/documents/Exemptions_Study.pdf [hereinafter CJOG, EXEMPTIONS] (documenting a substantial increase in the invocation of a variety of FOIA exemptions); Minjeong Kim, *Numbers Tell Part of the Story: A Compari-*

portion of requests granted in whole or in part has declined only modestly.[159] Aggregate data do not reveal the significance of the increase in partial withholding.

With regard to requests concerning GWOT, much of the commentary regarding the dullness of FOIA as a weapon against secrecy has focused on litigated cases. Critics highlight the degree to which these cases have accepted speculative, conclusory or overreaching rationales for withholding of information. There can be no dispute that courts have regularly upheld administration refusals of FOIA requests related to GWOT, and in the process have manifested deference bordering on abject abdication.

But FOIA requesters have also met with success. Critical commentary for the most part fails to account for cases—predominantly in the period following the Supreme Court's rejection of uncontrolled executive authority in prosecuting the "GWOT" in June 2004[160]—which rebuffed efforts to resist FOIA inquiries. In this period, FOIA requesters obtained important judgments regarding Guantanamo detainees,[161] prisoner abuse,[162] and surveillance.[163] Critics often fail,

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son of FOIA Implementation Under the Clinton and Bush Administrations, 12 COMM. L. & POL'Y 313, 327 tbl. 3-2 (2007) (reporting a decrease in full grants across agencies from 56.4% in 2000 to 39.6% in 2005); *id.* at 14 tbl. (reporting that backlogs increased between 1998 and 2006); Martha Mendoza, *Backlog Grows for FOI Filings*, ASSOCIATED PRESS, Mar. 13, 2006, http://www.pantagraph.com/articles/2006/03/13/news/108952.prt (reporting an AP study finding that in 2005, "FBI authorities gave just six out of every 1,000 FOI applicants everything they asked for, down from 50 out of every 1,000 in 1998" and that "11 percent of the FOIA requests processed at the CIA were granted in total in 2004, down from 44 percent in 1998").

Overall FOIA requests decreased by 10% from 2000 to 2004. CJOG, EXEMPTIONS, *supra* at 2. The reason for this decrease is not clear. One possibility is that the implementation of the e-FOIA amendments which took effect in 1997 required that FOIA disclosures of broad interest be posted on the agencies' Internet "reading rooms," which, combined with increasing prevalence of Internet access, led to a decrease in duplicative requests. If this is true, it would also have decreased the percentage of grants, since the duplicative requests avoided by the reading rooms would have been granted.

159 CJOG, STILL WAITING, *supra* note 158, at 12 tbl. (reporting that partial or full grants were made in 71% of cases by DOD in 1998 and 67% in 2006; 49% of cases by DOJ in 1998 and 48% in 2006; 68% by the CIA in 1998 and 47% in 2006; and in 69% of cases by the government overall in 1998 and 64% in 2006); Kim, *supra* note 158 (reporting that agencies made partial or full grants in 69% of cases in 2000 and 55% of cases in 2005).

160 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President . . . ."); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

In the first years of GWOT, a number of lower courts had initially been skeptical of attempts to conceal information in non-FOIA contexts. *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1217 n.319. FOIA successes were more sparse.

161 *See* Associated Press v. U.S. Dep't of Def., 462 F. Supp. 2d 573, 577–78 (S.D.N.Y. 2006); Associated Press v. Dep't of Def., No. 05 Civ. 05468 (JSR), 2006 U.S. Dist. LEXIS 67913, at

moreover, to acknowledge the instances where information has been revealed in the shadow of FOIA, but without authoritative judicial mandate. As I have discussed at greater length in *Strategy of Transparency*, such revelations emerged from FOIA requests regarding the post-September 11 dragnet,[164] the MATRIX program,[165] the Combatant Status Review Tribunals (CSRT) in Guantanamo,[166] the implementation of the Patriot Act,[167] other surveillance,[168] and the physical abuse of prisoners detained overseas during the "war on terror."[169]

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*13–14 (S.D.N.Y. Sept. 20, 2006); Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 150–51 (S.D.N.Y. 2006); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 18–19 (S.D.N.Y. 2005); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 16–17 (S.D.N.Y. 2005).

162 ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 576 (S.D.N.Y. 2005); ACLU v. Dep't of Def., 357 F. Supp. 2d 708, 709–10 (S.D.N.Y. 2005); ACLU v. Dep't of Def., 351 F. Supp. 2d 265, 277–78 (S.D.N.Y. 2005); ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 503–04 (S.D.N.Y. 2004); ACLU v. Dep't of Def., No. 04 Civ. 4151 (AKH), 2004 U.S. Dist. LEXIS 24387, at *2–4 (S.D.N.Y. Dec. 2, 2004).

163 Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at *4 (D.D.C. Nov. 16, 2005); Gerstein v. U.S. Dep't of Justice, No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276, at *41, *32 (N.D. Cal. Sept. 30, 2005); ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 33 (D.D.C. 2004).

164 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1150 (describing materials revealing the number and status of post-September 11 detainees in January 2002 and June 2002 in response to FOIA requests and filing of suit).

165 *See id.* at 1163 n.88.

166 *See id.* at 1165 (describing the release of Guantanamo CSRT transcripts in response to filing of FOIA action); *id.* at 1165–66, 1166 n.98 (describing successful FOIA requests by attorneys for detainees).

167 ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 24 (D.D.C. 2003) (describing release of 341 pages of documents in response to FOIA request), *discussed in* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1170–71; Kreimer, *Strategy of Transparency*, *supra* note 19, at 1175 (describing the release of documents demonstrating misrepresentations regarding usage of Section 215 after expedited processing ordered in *ACLU v. U.S. Department of Justice*, 321 F. Supp. 2d 24, 27 (D.D.C. 2004)); *id.* at 1180 (describing release of 250 pages of documents revealing abuses of NSL process in response to the filing of *Electronic Privacy Information Center v. U.S. Department of Justice*, No. 05 845 (GK), 2005 U.S. Dist. LEXIS 40318 (D.D.C. Nov. 16, 2005)); *id.* at 1180 (describing further release of documents in response to processing order in *Electronic Privacy Information Center v. Department of Justice*, and resulting Office of Inspector General inquiry); *id.* at 1182–85 (describing publication of DOJ Inspector General report on use of Patriot Act authorities); *id.* at 1175 n.142 (describing release of documents regarding surveillance and FISA operating procedures and settlement of case in August 2004).

168 People for the Am. Way Found. v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21 (D.D.C. 2006) (describing production of documents); Eggen & Pincus, *supra* note 120, ("[A] series of e-mails . . . . were released . . . by the Electronic Privacy Information Center, which obtained them as part of ongoing Freedom of Information Act litigation.").

169 Kreimer, *Strategy of Transparency*, *supra* note 19, at 1202 (describing release of documents regarding coercive interrogation policy, after portions had been leaked); *id.* at 1205–06 (describing release of 100,000 pages of documents regarding coercive interrogation after order requiring processing of FOIA request); *id.* at 1205 (describing release by FBI of

Judged against a benchmark of full and open discussion of problematic initiatives, FOIA falls short. But, at a time when the political branches were largely trapped in stasis, FOIA initiatives cast important light onto the "dark side" of GWOT.

2. FOIA and the Cascades of Transparency

In assessing the efficacy of FOIA, analysis cannot end with the documents released in response to requests or litigation. For just as leaks of prerequisite knowledge can set the stage for successful FOIA requests, information disclosed by FOIA has laid the groundwork for inquiry and disclosure by other institutions. An evaluation of the efficacy of FOIA must account for the further information that cascades from the initial FOIA disclosures.

As the revelations of Watergate led Congress to strengthen FOIA, they also generated a network of other institutions within the government to audit the exercise of executive authority.[170] FOIA disclosures regarding GWOT abuses in turn triggered inquiries by these watchdogs within the executive branch. Thus, the disclosure of FBI reports of detainee abuse in the ACLU's FOIA litigation before Judge Hellerstein in late 2004 brought about internal investigations both by the Department of Justice Inspector General[171] and a specially commissioned Army investigation team.[172] The revelation of internal re-

documents detailing abuses by CIA and Department of Defense); Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit (Apr. 1, 2008) http://www.aclu.org/safefree/torture/34747prs20080401.html [hereinafter Secret Bush Torture Memo Released] (describing declassification and release of an eighty-one page Office of Legal Counsel memorandum from March 2003 authorizing abusive methods of interrogation "after the court ordered additional briefing on whether the Defense Department could continue to withhold the memo").

170 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1146–47 (noting the importance of inspectors general and other features of the federal bureaucracy); *supra* notes 25–28.

171 Eric Lichtblau, *Justice Dept. Opens Inquiry into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A20. The investigation of the FBI reports had still not concluded two years later. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 11 (2007), http://www.usdoj.gov/oig/special/s0703/final.pdf.

172 U.S. DEP'T OF THE ARMY, ARMY REG. 15-6: FINAL REPORT, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 1–4 (2005), http://www.defenselink.mil/news/Jul2005/d20050714report.pdf [hereinafter SCHMIDT/FURLOW REPORT].

Military investigations had not infrequently proven to be less than aggressive, and other FOIA inquiries had revealed this quality. *E.g.*, Mark Benjamin & Michael Scherer, *A Miller Whitewash?*, SALON.COM, Apr. 25, 2006, http://www.salon.com/news/feature/2006/04/25/miller/; *cf.* Josh White, *Bad Advice Blamed for Banned Tactics*, WASH. POST, June 17, 2006, at A16.

ports concerning abuses of Patriot Act authority in FBI documents disclosed in the EPIC FOIA litigation before Judge Kessler in late 2005 precipitated an investigation by the Department of Justice Office of the Inspector General.[173]

Once the internal watchdogs were prodded awake, the process became recursive in a number of instances. In response to references in the documents to reports of violations to the FBI Intelligence Oversight Board, EPIC filed a follow-on request for reports submitted by the Board, which resulted in the release of more documents.[174] The Department of Justice Inspector General in turn obtained an unredacted set of the reports, which were used in its analysis.[175]

The FOIA disclosures of FBI documentation of torture in late 2004 galvanized hearings even by a Congress dominated by presidential allies.[176] The weight of documents released in the Torture FOIA litigation provided leverage for further inquiry by skeptical members of Congress in confirmation hearings.[177] Synergistically, congressional inquiry triggered by leaks and FOIA documents extracted materials which had been withheld from the initial Torture FOIA disclosures.[178]

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173 *See* Eric Lichtblau, *At F.B.I., Frustration Over Limits on an Antiterror Law*, N.Y. TIMES, Dec. 11, 2005, at 48; Eric Lichtblau, *Justice Dept. Report Cites Intelligence-Rule Violations by F.B.I.*, N.Y. TIMES, Mar. 9, 2006, at A21 ("The inspector general's review grew out of documents, dealing with intelligence violations, that were released last year under a Freedom of Information Act request by the Electronic Privacy Information Center . . . . The inspector general then obtained more documents on violations . . . ."); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 20–30 (2006), http://www.usdoj.gov/oig/special/s0603/final.pdf [hereinafter 2006 PATRIOT ACT REPORT].

174 Electronic Privacy Information Center, Litigation Docket, http://www.epic.org/privacy/litigation/ (last visited Apr. 10, 2007) (discussing EPIC v. Dep't of Justice, No. 06-CV-00029 (D.D.C. 2006)).

175 2006 PATRIOT ACT REPORT, *supra* note 173, at 20–30.

176 *E.g.*, *Review of Department of Defense Detention and Interrogation Policy and Operations in the Global War on Terrorism: Hearings Before S. Comm. on Armed Servs. and Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 108th Cong. 46–47 (2005) (statement of Sen. John Warner, Chairman, S. Comm. on Armed Servs.) ("The committee meets this morning to receive the testimony of the U.S. Southern Command (SOUTHCOM) investigation into the e-mails that came to light as a consequence of a Freedom of Information Act (FOIA) request in December 2004.").

177 *E.g.*, Press Release, Senator Carl Levin, Statement of Senator Carl Levin on the Nomination of Judge Michael Chertoff to Be Secretary of Homeland Security (Feb. 14, 2005), *available at* http://levin.senate.gov/newsroom/release.cfm?*id*=232095 (relying on Torture FOIA disclosures to cross-examine Michael Chertoff on confirmation).

178 *See* Letter from William E. Moschella, Assistant Attorney Gen., to Carl Levin, U.S. Senator (Mar. 18, 2005), *available at* http://levin.senate.gov/newsroom/supporting/2005/DOJ.032105.pdf.

FOIA disclosures of Patriot Act abuse, along with other disclosures of GWOT excesses, helped to persuade Congress to postpone renewal of sunsetted Patriot Act surveillance authorities in late 2005. When the expiring provisions were renewed in March 2006 for another three years,[179] Congress imposed modifications. Among other things, the Patriot Act renewal imposed new obligations of transparency. In addition to requiring reports to congressional committees on the use of National Security Letters, Section 215, and data mining activities,[180] the Reauthorization Act mandated that the Department of Justice's Inspector General conduct a series of audits of "the effectiveness and use, including any improper or illegal use," of national security letters and Section 215 orders issued and obtained by the Department.[181] The first of those audits revealed a series of violations which triggered further debate and inquiry.[182]

Perhaps most important, FOIA disclosures provided a means of authenticating—and allowing mainstream media to take cognizance of—the information that had emerged in bits and pieces from internal critics and targets of GWOT initiatives. Before the disclosures that began with Abu Ghraib, administration apologists shaped public discourse by touting disavowals of "torture," portraying particular leaks as "rumor, innuendo, and assertions,"[183] and denigrating critics

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179 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 102, 120 Stat. 192, 194–95 (Mar. 9, 2006).

180 *Id.* § 106(h), 120 Stat. 192, 199–200 (Mar. 9, 2006) (enacting reporting requirements for Section 215 orders); *id.* § 108, 120 Stat. at 203–04 (enacting reporting requirements for "multipoint surveillance"); *id.* § 109, 120 Stat. at 204–05 (enacting reporting requirements for pen registers and physical searches); *id.* § 118, 120 Stat. at 217–18 (requiring that reports on National Security Letters be submitted to the Committee on the Judiciary, the Committee on Financial Services, and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary, the Committee on Banking, Housing, and Urban Affairs, and the Select Committee on Intelligence of the Senate); *id.* § 126, 120 Stat. at 227–28 (requiring reports on data mining activities).

181 *Id.* § 106A, 120 Stat. at 200–02 (requiring audits of the use of Section 215); *id.* § 119, 120 Stat. at 219–21 (requiring audits of the use of NSLs). In addition to the fact that the Inspector General has proven willing to exercise independent judgment in other areas of the "War on Terror," Congressional experience with unadorned reporting obligations has been decidedly mixed. *See* Gellman, *supra* note 89 (recounting the 2004 requirement of report on the "scope of" national security letters, and reporting that the "'process and standards for approving' them" had gone "[m]ore than a year . . . without a Justice Department reply.").

182 *See* discussion in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1183–85.

183 Press Release, U.S. Dep't of Def., Statement from Pentagon Spokesman Lawrence DiRita on Latest Seymour Hersh Article (Jan. 17, 2005), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=8134.

as "either uninformed, misinformed or poorly informed."[184] Reporters, well aware that leakers can be self-interested sources of varying levels of reliability, and dependent on administration sources for their flow of information on other matters, proved reluctant to openly accuse the administration of mendacity.

After October 2004, these ploys became less effective. FOIA had not served to reveal "deep secrets," but rather to provide details and substantiation for the fragmentary reports that had disclosed the existence of the secrets. Crucially, established media reporting these details were not required to rely on accounts by administration opponents as their authenticating sources. FOIA disclosures provided official documents, allowing the media to adopt the stance of a neutral observer reporting on the memoranda of government officials. As material finally began to emerge in the ACLU coalition litigation before Judge Hellerstein, the patterns of abusive interrogation began to move from the realm of speculation to the realm of fact in public debate.[185] With substantiation, it became less risky to report corroborating accounts from administration critics.

3. FOIA and the Network of Knowledge

Critical accounts which minimize FOIA's impact also fail adequately to address a third effect, for the responses to FOIA requests often carry disclosures beyond the precise propositional content of the documents and data revealed. At the simplest level, as my colleague Cary Coglianese and his co-authors have observed in an analogous regulatory context, additional sources of information allow investigators to "triangulate" by using the consistency of observations to derive reliability.[186]

We have seen that FOIA disclosures importantly substantiated information leaked by internal whistleblowers or uncovered by external investigations. The impact of information can be more than additive moreover, for it is often the case, as my colleague Polk Wagner has

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184 Richard A. Serrano & John Hendren, *Rumsfeld Strongly Denies Mistreatment of Prisoners*, L.A. TIMES, Jan. 23, 2002, at A1 (internal quotation marks omitted).

185 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1209–11 (discussing reporting of FOIA disclosures).

186 Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 333 (2004). Coglianese et al. describe the situation of regulators seeking to control commercial activities, but the observation is equally apt for citizens or legislators seeking to control a potentially abusive executive.

noted in the context of intellectual property, that data, "once disclosed, convey[] more information than simply the . . . expression itself."[187] In the area of intellectual property, combining the latent information of disclosures with other background data generates innovation that could not be predicted from the propositional content of the information itself; in the sphere of GWOT, disclosures of particular abuses combined with other available information to provide a synergistic level of oversight. In judging the success or failure of FOIA requests, therefore, it is not adequate simply to address the disclosed documents standing alone.[188]

Again, without quarreling with the observation that the administration has successfully stymied many FOIA requests and falls orders of magnitude short of full transparency, it is important to observe that this meta-propositional effect has manifested itself in the GWOT cases. The ACLU's early Patriot Act FOIAs, for example, resulted in the production of a document listing National Security Letters issued over a two-year period, with each entry carefully blacked out to obscure all information regarding the substance and purpose of those letters. But when the administration sought, in litigation, to maintain that the NSLs and the gag orders they contained were without coercive effect, the ACLU provided the court with the pages of blacked-out entries, which established the widespread use of those letters. Combined with prior public statements by the administration claiming that the letters had never been challenged, this data in turn persuaded the court that recipients viewed the letters as coercive interferences with their rights, rather than mere requests.[189] Similarly, taken alone, any single transcript of the CSRT proceedings released in response to the Associated Press FOIA request in 2004[190] has relatively little probative impact. But analyzed in the aggregate, and combined with information available from other sources, researchers

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187 R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1007 (2003) (emphasis omitted). For one classic account of the way that juxtaposition of information can yield "undiscovered public knowledge," see Don R. Swanson, *Fish Oil, Raynaud's Syndrome, and Undiscovered Public Knowledge*, 30 PERSP. BIOLOGY & MED. 7 (1986).

188 The administration seems fully aware of this effect, for it is the basis for the "mosaic" theory deployed to block even the most routine of GWOT disclosures. See discussion of mosaic theory, *supra* note 138 and accompanying text. One suspects that it is the prospect of "mosaic artisans" in the person of investigative reporters rather than astute terrorists that accounts for the enthusiasm with which the theory is deployed.

189 Doe v. Ashcroft, 334 F. Supp. 2d 471, 502 (S.D.N.Y. 2004), *vacated*, 449 F.3d 415 (2d Cir. 2006).

190 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1166–68.

generated persuasive evidence that the Guantanamo inmates were enormously far from the "worst of the worst."[191]

Investigative reporters who substantiated covert CIA involvement in "extraordinary rendition" flights began with FAA flight registration documents and a digital archive of flight plans made available by the FAA pursuant to FOIA.[192] That rather anodyne information, however, fit together with other pieces of data: corporate registration statements, leaks by disaffected intelligence sources, reports by victims of rendition and human rights organizations, European prosecutors, and the data gathered by an online network of "plane spotter" hobbyists who track arrivals and departures at airports. The combination established the existence and nature of the program of CIA sponsored disappearances.[193] Two of those reporters described the process, "By accessing multiple sources of data, one can find bits and pieces of raw information, and these bits and pieces of information can provide the Holmesian drops of water that one might use to infer the existence of oceans."[194]

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191 *See, e.g.*, MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (Feb. 8, 2006), http://law.shu.edu/aaafinal.pdf [hereinafter DENBEAUX, PROFILE]; MARK DENBEAUX ET AL., SECOND REPORT ON THE GUANTANAMO DETAINEES: INTER- AND INTRA-DEPARTMENTAL DISAGREEMENTS ABOUT WHO IS OUR ENEMY 3–4 (2006), http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf; MARK DENBEAUX ET AL., NO-HEARING HEARINGS (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf [hereinafter DENBEAUX, NO-HEARING HEARINGS] (reporting a pattern of one-sided procedures based on analyses of transcripts).

Unsurprisingly, the administration disputes these conclusions. *See, e.g.*, William Glaberson, *Pentagon Study Sees Threat in Guantánamo Detainees*, N.Y. TIMES, July 26, 2007, at A16. But with the information in the public domain, the dispute is resolvable by reference to facts.

192 GREY, *supra* note 85, at 115, 117 (describing an archive of flight plans available "[b]ecause of the Freedom of Information Act," and airplane ownership records obtained from the FAA); *see also* PAGLEN & THOMPSON, *supra* note 85, at 104, 108–09 (describing FOIA requests by "plane-spotter" hobbyist, followed by examination of published FAA and military databases).

193 GREY, *supra* note 85, at 114–20 (describing research combining "plane spotting" websites and listservs with FOIA-mandated live-feed aviation databases provided by the FAA along with investigative reporters around the world and European prosecutors); *see also id.* at 124–26 (describing the use of corporate disclosure statements to identify CIA ownership of flights).

194 PAGLEN & THOMPSON, *supra* note 85, at 103; *see also id.* at 95–121 (describing combination of "planespotting" websites and discussion lists by hobby enthusiasts and FAA data bases); *id.* at 45–74 (describing "paper trail" of corporate public disclosures and civilian aircraft registration that connected rendition flights to front companies).

B. FOIA and the "Frozen Scandal": The Substantive Impact of Disclosure on Abuses

A number of critics have acknowledged the ultimate release of information regarding GWOT abuses, but have expressed concern that transparency successes have failed to impact the policies revealed. President Bush was reelected in November 2004, seven months after the Abu Ghraib disclosures began, after a campaign largely devoid of discussion of prisoner abuse; Alberto Gonzales, who had been demonstrably implicated in the prisoner treatment policy as White House Counsel, was confirmed as Attorney General three months later. Media coverage of the scandal appeared to recede, and congressional and military investigations languished. Taking the impact of the Watergate disclosures on the Nixon presidency as a benchmark, some commentators interpreted these developments to betoken the replacement of the model of "sunlight as a disinfectant" with the model of the "frozen scandal" of "revelation but not a true investigation or punishment: scandals we are forced to live with."[195]

There is undoubted merit in these concerns. But there is also an element of excessive expectation and a lack of historical perspective. It is true that President Nixon's impeachment and resignation followed hard on the heels of the revelation of the tape-recorded evidence of his involvement in Watergate, pried loose by the Supreme Court's order in *United States v. Nixon*.[196] But even taking the Watergate break-in as a self-contained episode, the process of revelation had begun two years earlier with the apprehension of the Watergate burglars and disclosure of their ties with the Nixon campaign in June 1972.[197] More important, the burglary itself was only one of a long chain of abuses that underlay the Nixon Articles of Impeachment.[198]

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195 Mark Danner, *"The Secret Way to War": An Exchange*, 52 N.Y. REV. BOOKS, July 14, 2005, *available at* http://www.nybooks.com/articles/18131; *see also supra* note 12 and accompanying text.

196 United States v. Nixon, 418 U.S. 683 (July 8, 1974). Nixon was impeached on July 27, 1974 and resigned on August 9, 1974.

197 By August of 1972, the connection between the Committee to Reelect the President and the burglars was a matter of public record. *See* Carl Bernstein & Bob Woodward, *Bug Suspect Got Campaign Funds*, WASH. POST, Aug. 1, 1972, at A1; *see also The Watergate Story*, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-srv/politics/special/watergate/index.html (last visited Oct. 1, 2007) (reviewing the history of disclosures regarding Watergate).

198 Article of Impeachment III was based on the refusal to honor subpoenas in the Watergate investigation. Article I was based on the cover-up of the Watergate break-in, but also adduced the effort "to conceal the existence and scope of other unlawful covert activities." ARTICLES OF IMPEACHMENT, H.R. Rep. No. 93-1503, *reprinted in* John W. Dean III, *Water-*

Revelations of those abuses had begun to appear by the beginning of 1970.[199] By the time of the Watergate burglary, a pattern of domestic political harassment,[200] warrantless electronic surveillance,[201] and efforts to suppress revelations of misjudgments and falsehoods in the Vietnam War[202] had been in evidence in the court of public opinion for a year and a half. Perhaps the starkest revelations resulted from what might be termed a self-help freedom of information action in March 1971 by an anonymous group which went by the name of the "Citizens Commission to Investigate the FBI." These activists burgled an FBI office in Media, PA, and removed over 1,000 documents which revealed the "COINTELPRO" efforts by the FBI to suppress domestic dissent.[203] Political insiders were well aware of the use by Nixon partisans of federal regulatory and law enforcement mechanisms to coerce political contributions.[204] Yet it was not until a year after the burglary that the Senate Watergate Committee began its hearings, and not until a year later that President Nixon resigned.

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gate: What Was It?, 51 HASTINGS L.J. 609, 655–59 (2000). Article II condemned an extensive pattern of political surveillance, retaliation, and extortion. *Id.*; *see also* 36 C.F.R. § 1275.16 (defining Watergate for purposes of Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (codified as amended at 44 U.S.C. § 2107 (2000)).

199 Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASH. MONTHLY, Jan. 1970, at 4 (providing a description by a former military intelligence officer of the extensive domestic political surveillance files); *see also* Christopher H. Pyle, *CONUS Revisited: The Army Covers Up*, WASH. MONTHLY, July 1970. These revelations triggered unsuccessful legal challenges. *See* Tatum v. Laird, 444 F.2d 947, 962–63 (D.C. Cir. 1971) (MacKinnon, J., dissenting) (citing the trial court decision in April 1970), *rev'd*, 408 U.S. 1 (1972); ACLU v. Westmoreland, 323 F. Supp. 1153 (N.D. Ill. 1971); ACLU v. Laird, 463 F.2d 499 (7th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

200 *E.g.,* Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (describing deployment of "material witness" detention against political activist); Frank J. Donner & Eugene Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, NATION, Jan. 3, 1972.

201 United States v. Sinclair, 321 F. Supp. 1074, 1076 (E.D. Mich. 1971), *aff'd sub nom.*, United States v. U.S. Dist. Ct. (*Keith*), 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972).

202 N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (detailing publication of Pentagon Papers beginning in June 1971, and efforts to suppress them).

203 *See* Allan M. Jalon, *A Break-In to End All Break-Ins*, L.A. TIMES, Mar. 8, 2006, at B13 (describing theft "while much of the country was watching the Muhammad Ali-Joe Frazier fight" of documents revealing "years of systematic wiretapping, infiltration and media manipulation designed to suppress dissent" and subsequent publication of the documents); *see also* Brandywine Peace Community, COINTELPRO History and Overview, http://www.brandywinepeace.com/FBI%20PDF%20COMPILATION%201.pdf (last visited Oct. 1, 2007) (reproducing the stolen documents).

204 *See* JIMMY BRESLIN, HOW THE GOOD GUYS FINALLY WON: NOTES FROM AN IMPEACHMENT SUMMER 13–15 (1975) (describing reports to Democratic fundraisers during the 1972 campaign by contributors who were being coerced by Nixon administration officials).

Observers of the Nixon reelection in November 1972 could have diagnosed a "frozen scandal," but the accumulation of revelations resembled more closely a slow-moving glacier.[205]

So, if Watergate is indeed the benchmark, it is important to observe the ways in which FOIA revelations regarding GWOT have gathered gradual and cumulative momentum and have begun to catalyze responses in other institutions.

1. FOIA and Institutional Leverage

a. Litigation

For a generation of lawyers weaned on *Brown v. Board of Education*, the most obvious source of leverage against abuse lies in litigation. Without advancing the insupportable claim that federal courts have been eager to confront overreaching in GWOT, it is worth noting that the materials revealed by FOIA litigation have provided building blocks for litigation to curb abuses. The documents provided substance for actions in U.S. courts and foreign venues by former detainees seeking redress for abuse.[206] They provided background, as well, for litigation by current prisoners.[207] Few of these efforts have as yet borne fruit, though they have generated some political momentum.

More strikingly, FOIA documents were deployed before the Supreme Court by advocates challenging the administration's claim of unreviewable power over detainees. Again, it is important to appreciate the cumulative effect of transparency. The initial leaks of the Abu

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205 To move the metaphor from ice cap to desert, political scientists have observed that the presence of friction in American government decision-making causes policy processes to move abruptly from one state to another in response to a continued accumulation of data, as a pile of sand subjected to a continued stream of sand grains generates occasional landslides rather than a uniform stream of run-off. BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 148–50 (2005); *see, e.g.*, Bryan D. Jones et al., *Policy Punctuations in American Political Institutions*, 97 AM. POL. SCI. REV. 151 (2003).

206 Kreimer, *Strategy of Transparency*, *supra* note 19, at 1212–13.

207 *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 474 (D.D.C. 2005) (holding, based on documents received in Torture FOIA litigation, that plaintiffs stated a claim for due process violations arising from mistreatment of detainees), *vacated by* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* 128 S. Ct. 2229 (2008); O.K. v. Bush, 377 F. Supp. 2d 102, 107–08, 112–13 (D.D.C. 2005) (referring to FOIA evidence of abuse, but refusing to enjoin future abuse because of insufficient showing of probable abuse); *cf.* Associated Press v. U.S. Dep't of Def., No. 05 Civ 5468 (JSR), 2006 U.S. Dist. LEXIS 67913, at *2–*3 (S.D.N.Y. Sept. 20, 2006) (citing Torture FOIA documents in support of grant of FOIA request regarding Guantanamo records).

Ghraib abuses, the Taguba Report, and the legal memoranda authorizing "enhanced" interrogation set the stage for the initial rebuff of the administration's claims of unreviewable authority over detainees in 2004.[208] As documentary evidence of abuses continued to emerge from Judge Hellerstein's FOIA orders in late 2005 and 2006, the Supreme Court considered the petition for certiorari and the merits of *Hamdan v. Rumsfeld*.[209] Advocates for the detainees adduced both the Torture FOIA documents themselves and the resulting public commentary and investigation to argue that restraints on treatment of detainees were necessary to assure adherence to minimal requirements of human rights.[210] In June 2006, the majority opinion in *Hamdan* not only granted relief to Mr. Hamdan and his compatriots in Guantanamo, but was crafted to impose legal restraints on abuse by American operatives overseas.[211]

With looming congressional elections, the administration sought legislation that would reverse the legal restraints. The ensuing maneuvers before the still-Republican-controlled Congress resulted in legislation that disavows "cruel, inhuman and degrading treatment," but still withholds effective judicial relief from its victims. The Supreme Court will address Congress' handiwork this Term.[212] The

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208 Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); *cf.* Rumsfeld v. Padilla, 542 U.S. 426 (2004). It appears that the Justices were cognizant of the mounting tide of disclosures regarding the administration's abuses. *See* GOLDSMITH, *supra* note 83, at 134 (characterizing the decisions as a signal to the President in light of the disclosures surrounding Abu Ghraib that he could neither claim a blank check, nor establish a "law-free zone"); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 153 (2007) (characterizing decisions as reactions to abuses revealed by the Abu Ghraib disclosures); JEFFREY TOOBIN, THE NINE 232–33 (2007) (characterizing the decisions in the same light as Margulies); Tim Grieve, *Trust Us*, SALON.COM, May 17, 2004, http://dir.salon.com/story/news/feature/2004/05/17/trust/index.html.

209 Hamdan v. Rumsfeld, 546 U.S. 1002 (2005) (granting certiorari); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). This latter case was argued March 2006 and decided June 30, 2006.

210 Brief for Human Rights First as Amicus Curiae Supporting Petitioner at 14–15, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), *available at* 2005 WL 2178808; Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 20–21, *Hamdan*, 546 U.S. 1002 (2006) (No. 05-184), *available at* 2006 WL 53969; *id.* at 20 n.27 ("Voluminous documentation of the above is *available at* http://www.aclu.org/torturefoia."); Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 4–5, 5 n.3, 26-28, *Hamdan*, 548 U.S. 557 (No. 05-184), *available at* 2006 WL 53968; Brief for Appellee at 13, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393), *available at* 2004 WL 3080434.

211 *Hamdan*, 546 U.S. 557, 126 S. Ct. 2749, 2795 (2006); *see* discussion in Kreimer, *Strategy of Transparency*, *supra* note 19, at 1213–14.

212 Boumediene v. Bush, 127 S. Ct. 3078 (2007) (granting certiorari), *rev'g* 127 S. Ct. 1478 (2007) (denying writ of certiorari). As this Article was going to print, the Supreme Court issued its opinion in *Boumediene v. United States*, invalidating the Congressional effort to

Court's decision to reverse its denial of review in these cases, in turn, seems to have resulted from the disclosure by a whistleblower of the arbitrary and cursory nature of the CSRT process against the background of analyses of CSRT transcripts disclosed by earlier FOIA requests.[213] Consideration will be shadowed as well by recent revelations of secret OLC opinions effectively authorizing the administration to ignore statutes constraining torture that have emerged from a combination of leaks and FOIA litigation.[214]

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deprive detainees of habeas corpus rights. 128 S. Ct. 2229 (2008). The majority rejected the proposition that "the political branches have the power to switch the Constitution on and off at will," *id.* at 2259, and announced that "[w]hile some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those held in custody." *Id.* at 2275. It called for the commencement of a "genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism." *Id.* at 2277. That debate, like the opinion itself, will be informed by the ecology of transparency.

The reversal of the Court's decision not to review the current Guantanamo process followed the filing of a critical affidavit by a former officer at the Office for the Administrative Review of the Detention of Enemy Combatants. *See infra* note 213.

213 *See* Brief of Amicus Curiae the Association of the Bar of the City of New York in Support of Petitioners at 7, 9, 19, Boumediene v. Bush, No. 06-1195 (U.S. Aug. 24, 2007), *available at* 2007 WL 2414901 (citing DENBEAUX, NO-HEARING HEARINGS, *supra* note 191); Brief for Petitioners Al Odah et al. at 33 n.26, *Al Odah*, No. 06-1196 (U.S. Aug. 24, 2007), *available at* 2007 WL 2414905 (citing DENBEAUX, NO-HEARING HEARINGS, *supra* note 191); Brief for Petitioners El-Banna et al. at 5 n.7, 33 n.32, *Al Odah*, No. 06-1196 (U.S. Aug. 24, 2007), *available at* 2007 WL 2414903 [hereinafter El-Banna Brief] (citing DENBEAUX, NO-HEARING HEARINGS, *supra* note 191); *id.* at 40 (citing an 84-page government log of interrogation methods used against one prisoner at Guantanamo, which was obtained by *Time* magazine and posted online, Interrogation Log: Detainee 063, *available at* http://www.time.com/time/2006/log/log.pdf); Brief for Amici Curiae Coal. of Non-Governmental Orgs. in Support of Petitioners at 19–21, *Boumediene*, No. 06-1195 (U.S. Aug. 24, 2007), *available at* 2007 WL 2428372 (adducing Denbeaux analysis); Brief of Amici Curiae Amnesty Int'l, Human Rights Inst. of the Int'l Bar Assoc., Int'l Fed'n for Human Rights, Int'l L. Assoc. in Support of Petitioners at 26 n.28, *Boumediene*, No. 06-1195 (U.S. Aug. 24, 2007), *available at* 2007 WL 2441589 (citing the Denbeaux analysis); Brief Amicus Curiae of Nat'l Inst. of Military Justice in Support of Petitioners at 2 n.2, *Boumediene*, No. 06-1195 (U.S. Aug. 24, 2007), *available at* 2007 WL 2456944 (citing DENBEAUX, PROFILE, *supra* note 191); Brief of Amicus Curiae Nat'l Assoc. of Criminal Def. Lawyers in Opposition to Respondent's Motion to Dismiss at 21, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *available at* 2006 WL 4003611 (citing DENBEAUX, NO-HEARING HEARINGS, *supra* note 191); Reply to Opposition to Petition for Rehearing, at i, Declaration of Stephen Abraham, Al Odah v. United States, No. 06-1196 (U.S. June 22, 2007), *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf; William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. TIMES, July 23, 2007, at A1; Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005, at 26.

214 Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (revealing existence of two opinions leaked by officials); Press Release, ACLU Learns of Third Secret Torture Memo by Gonzales Justice Department (Nov. 6, 2007), http://www.aclu.org/safefree/torture/32597prs20071106.html (commenting on the existence of a third legal opinion disclosed by responses to ongoing FOIA inquiries); *see also*

b. Political Redress of Specific Abuses

Congress, the political branch which might be expected to serve as a counterweight to executive abuse, has been less than aggressive in confronting the overreaching of GWOT. But that fact should not distract from the occasions on which political pressure has built effectively on specific revelations. Some programs regarding domestic surveillance have been withdrawn after disclosure of their excesses;[215] others, which relied on cooperation of state governments outside the current administration's coalition, have withered because of local opposition.[216] FOIA disclosures impeached the credibility of administration spokespersons who campaigned for expansion of the Patriot Act,[217] and a series of disclosures of GWOT abuses immediately preceded the December 16, 2005 decision in the Senate to block renewal of the Patriot Act.[218] Evidence of abuse of National Security Letters triggered an internal FBI audit, which in turn revealed widespread abuses and generated programmatic changes to bring the agency into

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Secret Bush Administration Torture Memo Released Today In Response to ACLU Lawsuit, *supra* note 169; Mazzetti, *supra* note 39 (reporting declassification and release of eighty-one page OLC memorandum authorizing abusive interrogation techniques).

215 *See* Michael Isikoff, *The Other Big Brother*, NEWSWEEK, Jan. 30, 2006, at 32; Press Release, Dep't of Def., DoD To Implement Interim Threat Reporting Procedures (Aug. 21, 2007), *available at* http://www.cifa.mil/Public%20Affairs/release_aug07.html (reporting closure of military database); Lichtblau & Mazzetti, *supra* note 116 (describing purge of documents regarding surveillance of political activities from military database); *cf.* Am. Library Ass'n, Department of Justice Rescinds Order for Libraries To Destroy Documents (July 30, 2004), http://www.ala.org/al_onlineTemplate.cfm?Section=American_Libraries&template=/ContentManagement/ContentDisplay.cfm&ContentID=72146 (describing rescission of an order to destroy documents in depository libraries after the American Library Association filed FOIA requests for the documents at issue).

216 A series of FOIA requests by the ACLU lent efficacy to a campaign to persuade states to withdraw from the MATRIX (Multistate Anti-Terrorism Information Exchange) surveillance network. *See* ACLU, THE ACLU IN THE COURTS SINCE 9/11, at 6, http://www.aclu.org/pdfs/safefree/since911pastcases_20061019.pdf (describing "simultaneous Freedom of Information Act requests in eight states concerning those states' participation in the 'MATRIX' database surveillance system" following an October 2003 federal FOIA request, resulting in the ultimate abandonment of the program in 2005); ACLU, Feature on MATRIX (Mar. 8, 2005), http://www.aclu.org/privacy/spying/15701res20050308.html; ACLU, State-by-State Breakdown on Participation in MATRIX (Jan. 16, 2004), http://www.aclu.org/safefree/resources/16906res20040116.html (providing links to FOIA requests and withdrawals from the program);.

217 *See* Gail Appleson, *FBI Asked for Secret Patriot Act Searches*, HOUSTON CHRON., June 18, 2004, at A6 ("Last September, at a time when the section was drawing widespread criticism from librarians, booksellers and civil rights groups, U.S. Attorney General John Ashcroft said the power had never been used. Records obtained by the ACLU show that the FBI asked for permission to use the law a few weeks later.").

218 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1180–81.

line.[219] Revelation of warrantless wiretapping programs generated substantial oversight, though apparently the program continued with short-term congressional sanction.[220] Advocacy organizations have in turn sought access to FISA court decisions approving the surveillance program using court rules disclosed pursuant to prior FOIA requests.[221]

The disclosure of the text of OLC opinions authorizing abusive interrogation techniques in April 2004 focused the attention of, and gave leverage to, internal critics of the memoranda; the official withdrawal of the OLC torture opinion followed a week later.[222] The prospect of cross-examination of Alberto Gonzales on the basis of the ACLU's torture FOIA materials contributed to the incentives to issue a public replacement for the earlier torture memo on December 30, 2004.[223] In March 2005, under congressional scrutiny, the Defense Department General Counsel rescinded the 2003 Working Group

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219 *See* John Solomon, *FBI Finds It Frequently Overstepped in Collecting Data*, WASH. POST, June 14, 2007, at A1 (describing internal audit undertaken in response to Inspector General's report, which in turn was triggered by FOIA disclosures, and proposed remedies).

220 *See* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (to be codified at 50 U.S.C. §§ 1805a–1805c).

221 *See* Press Release, ACLU, In Unprecedented Order, FISA Court Requires Bush Administration To Respond to ACLU's Request That Secret Court Orders Be Released to the Public (Aug. 17, 2007), *available at* http://www.aclu.org/safefree/spying/31356prs20070817.html (describing ACLU request); Press Release, ACLU, ACLU Obtains Rules of Secret Wiretap Court but Says Much of Government's Spy Power Remains Shrouded in Unnecessary Secrecy (Aug. 25, 2004), *available at* http://www.aclu.org/safefree/patriot/18495prs20040825.html (describing the content of the FISA court rules). At the same time, other organizations continue to seek information regarding the surveillance program using FOIA requests. *See, e.g.*, Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56 (D.D.C. 2007) (finding response to FOIA requests inadequate).

222 *See* GOLDSMITH, *supra* note 83, at 156–62 (describing incentives to "rectify" an "egregious and now-public error," "precipitated" by "public outcry"); Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, § 6 (Magazine), at 40 ("Goldsmith . . . says he didn't have the time or resources to create a replacement opinion immediately. . . . In April 2004, however, Goldsmith's priorities were reversed when the Abu Ghraib scandal broke. . . . [I]n June [2004] . . . Yoo's August 2002 opinion was leaked to the media. . . . A week after the leak of Yoo's August 2002 memo, Goldsmith withdrew the opinion. Goldsmith made the decision himself, in consultation with [Patrick] Philbin and Deputy Attorney General James B. Comey, both of whom, Goldsmith says, agreed it was the right thing to do.").

223 *See* Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Justice to Deputy Att'y Gen., Dep't of Justice (Dec. 30, 2004), http://www.usdoj.gov/olc/18usc23402340a2.htm (regarding legal standards applicable under 18 U.S.C. §§ 2340–2340A); *see also* Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34, 40 (describing the "fierce behind-the-scenes bureaucratic fight" leading up to the December 2004 memo).

Report which had authorized coercive interrogation.[224] At the end of 2005, material obtained by the Torture FOIA litigation figured prominently in the debates leading to the adoption of the McCain anti-torture amendment,[225] as did leaks by internal critics repelled by mendacity in administration efforts to counter the initial disclosures.[226]

2. *Transparency and the Dynamics of Legitimacy*

Beyond the impact of FOIA disclosures on specific GWOT abuses, the disclosures catalyzed more diffuse effects. The ability of the administration to engage in initiatives unconstrained by opposing norms of legality and human rights depended in the early years of GWOT both on secrecy and on a cycle of acquiescence. Amidst the surge of fear and patriotism in the aftermath of September 11, public approval and trust of the federal executive soared to levels unheard of for two generations. Congressional opposition and inquiry were muted, and judges regularly extended extraordinary deference to the executive. News media credited administration claims of necessity and lawfulness, and proved reluctant to report discordant accounts.[227] Administration spokesmen, in turn, pointed to these approving accounts of their actions as proof of their legitimacy.[228]

As a mutually reinforcing series of leaks, successful FOIA requests, and investigations began to reveal a picture of both overreaching and mendacity, the cycle altered. On one front, public confirmation of dubious tactics allowed critics both inside and outside of government to mobilize and coordinate. Where tightly compartmentalized concealment prevented internal critics from objecting to problematic policies, disclosure began to empower and energize them. Within the executive branch, public disclosures began to pierce the mutually

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224 *See* Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (reporting a March 17, 2005 memo "that rescinded the working group's report").

225 *See* Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2739–40 (2005) § 1003 (codified at 42 U.S.C. § 2000dd (2000)) (enacting a prohibition on "cruel, inhuman, or degrading treatment or punishment" of any "individual in the custody or under the physical control of the United States Government").

226 *See* Kreimer, *Strategy of Transparency*, *supra* note 19, at 1212 n.302.

227 *See* Umansky, *supra* note 12.

228 For one particularly egregious example, see Charles Layton, *Miller Brouhaha*, AM. JOURNALISM REV., Aug./Sept. 2003, at 30 (quoting reporter Bob Simon on the events of September 8, 2002, shortly before the mid-term elections, saying, "You leak a story to the New York Times . . . and the New York Times prints it, and then you go on the Sunday shows quoting the New York Times and corroborating your own information. You've got to hand it to them. That takes, as we say here in New York, chutzpah").

reinforcing groupthink that had discounted costs of extra-legal tactics to American "soft power," and had presumed the necessity and effectiveness of those tactics. In Congress, revelation allowed critics to draw on the insights of skeptics within the government, and to gather expertise sufficient to dispute claims of legality and efficacy.[229] In the media, disclosures of internal evidence allowed reports of abuses without stepping outside of the frame of respectful discourse.[230]

As a matter of practical politics, the administration was required to expend political capital in defending controversial practices, from "black sites" to torture to unchecked surveillance, rather than simply hiding them. This—along with other military and political debacles—depleted the administration's stock of raw political power to press forward with other less easily concealed initiatives.

More diffusely, disclosures impeaching the administration's credibility and claims of lawfulness in one area generated skepticism and emboldened critics more broadly. Efforts to suppress criticism in turn generated further inquiries.[231] Judges, lawmakers, and journalists react negatively to being deceived, and once hard evidence of deception and abuse emerged in some areas of the GWOT, they became less inclined to extend comity in others.[232] As dissonant notes sounded in the chorus of support for GWOT initiatives, public perceptions began to change as well, empowering critical interventions

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229 Compare this to the refusal to allow Intelligence Committee members to consult their staff when investigating the NSA wiretapping program. *See Bipartisan Call for Wiretapping Probe*, CNN.COM, Dec. 21, 2005, http://www.cnn.com/2005/POLITICS/12/20/wiretaps/index.html.

230 *Cf.* Scott L. Althaus, *When News Norms Collide, Follow the Lead: New Evidence for Press Independence*, 20 POL. COMM. 381, 383–86 (2003) (arguing that news media are likely to provide critical coverage only when competing official perspectives are available); W. Lance Bennett et al., *None Dare Call It Torture: Indexing and the Limits of Press Independence in the Abu Ghraib Scandal*, 56 J. COMM. 467, 470–71 (2006) (describing the effect of "the presence of credible midlevel sources" in legitimizing adverse news coverage); Robert M. Entman, *Punctuating the Homogeneity of Institutionalized News: Abusing Prisoners at Abu Ghraib Versus Killing Civilians at Fallujah*, 23 POL. COMM. 215, 222–23 (2006) (arguing that the presence of authenticated reports of abuse opened space for criticism).

231 Thus, the effort to retaliate against Joseph Wilson for his revelations in 2003 led to the appointment of special prosecutor Patrick Fitzgerald, and the efforts to mislead Fitzgerald's investigation led to the perjury prosecution of the Vice President's chief of staff Scooter Libby in 2005 and conviction in 2006, along with the revelation of the Vice President's role in the affair. For one overview of the proceedings, see Max Frankel, *The Washington Back Channel*, N.Y. TIMES Mar. 25, 2007 § 6 (Magazine), at 40.

232 *See, e.g.*, *supra* notes 149–54 (discussing the skepticism of judges deciding FOIA disputes); *see also* GOLDSMITH, *supra* note 83, at 136 (characterizing the *Hamdan* decision as "informed by the atmospherics of executive extravagance"); *id.* at 133 (noting the importance of "political support, credibility and reputation" as "determinants of presidential power").

by political actors.[233] As one set of commentators receptive to claims of anti-terrorist executive authority describe the dynamic, "revelation of the deception damages the president's credibility, making it more difficult for him [to] achieve his next set of goals."[234] Or as Abraham Lincoln, who made his extra-constitutional assertions of authority in public, is said to have put the matter, "If you once forfeit the confidence of your fellow-citizens, . . . you can never regain their respect and esteem. It is true that you may fool all of the people some of the time; you can even fool some of the people all the time; but you can't fool all of the people all the time."[235]

C. FOIA and the Question of Proportionality

A final set of critics acknowledges the possibility that the disclosures mandated by FOIA and facilitated by the rest of the ecology of transparency occasionally contribute to public accountability. These commentators express skepticism, however, that the current regime is actually well shaped to accomplish that task. Some critics maintain that FOIA far more often contributes to private rent-seeking than to public oversight[236] and suggest that resources devoted to private requests are misdirected. Others accuse the system of an inability to match public benefits with public costs and advocate a more targeted

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233 *Cf.* ENTMAN, *supra* note 44, at 107 (noting the importance of unison of message in dominating news frames); Scott L. Althaus & Young Mie Kim, *Priming Effects in Complex Information Environments: Reassessing the Impact of News Discourse on Presidential Approval*, 68 J. POL. 960, 973 (2006) (describing the cumulative effect of repeated news coverage); Entman, *supra* note 230, at 216 (describing a "spiral" of opposition triggered when criticism reaches a "critical mass").

234 Eric A. Posner & Adrian Vermeule, *The Credible Executive* 5 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 139, 2006), *available at* http://ssrn.com/abstract=931501. Posner and Vermeule refer to credibility among the public, though in some ways credibility among news media, opinion leaders, and the courts has been impacted more heavily by FOIA disclosures.

235 ALEXANDER K. MCCLURE, "ABE" LINCOLN'S YARNS AND STORIES 184 (1904).

Disclosure (and associated mechanisms) do have a marked disadvantage when compared to adjudication and legislative command. As the "Total Information Awareness" experience indicates, when one sprig of evil withers under the glare of publicity, the way is open for the impulse to sprout elsewhere under a different shelter of secrecy. *See* Matt Kelley, *Feds Sharpen Secret Tools for Data Mining*, USA TODAY, July 20, 2006, at 5A. In some sense, a level of honesty on the part of an executive cannot be foregone. But of course, the more times that an executive seeks to evade public norms, the more it erodes the trust that maintains it in office.

236 *See supra* notes 6–8 (discussing Justice Scalia's characterization of FOIA as the "Sistine Chapel of Cost Benefit Analysis Ignored").

set of institutions to provide "optimal" levels of disclosure.[237] While these concerns have some substance, the experience of the GWOT suggests that virtues of the current system reside precisely in the characteristics that generate critique. The breadth of the FOIA regime gives it robustness, and its situation in a resilient ecology of transparency provides a failsafe mechanism adapted to the task of bringing the popular conscience to bear against tyranny and barbarism.

1. The Robustness of a Broad FOIA Regime

Notwithstanding the service of FOIA in disclosing GWOT abuses, these instances hardly predominate in the functioning of FOIA. Skeptics are clearly correct in their observation that self-interested businesses and inquisitive private parties rather than investigative reporters or civil society organizations file most FOIA requests.[238] A FOIA regime that responded only to requests from representatives of the "public interest" on matters of public governance could conceivably be considerably less expensive and less intrusive.[239]

Leaving aside the rather considerable hurdles to identifying who represents the "public interest"—and one person's crank or "special interest" can be another's publicly virtuous crusader—such a system would sacrifice considerable protection for transparency in the case of politically contested issues like GWOT. As we have noted earlier, the existence of an infrastructure of career civil servants processing FOIA requests is the *sine qua non* of an effectively functioning FOIA

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237 *See, e.g.*, Fenster, *supra* note 11, at 940–49; Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 948 (2006) (criticizing the existing regime as lacking "a normative standard for judging when disclosure is appropriate" that is "calibrated to a standard of socially desirable openness or secrecy"); Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 890, 902–03 (1986) ("[A] struggle between the press and the government is unlikely to produce an acceptable 'equilibrium.'").

238 *See, e.g.*, COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, FREQUENT FILERS: BUSINESSES MAKE FOIA THEIR BUSINESS, July 3, 2006, http://www.cjog.net/documents/Who_Uses_FOIA.pdf (reporting that the media filed 6% of FOIA requests on a government-wide basis, and nonprofits filed 3%); Tapscott & Taylor, *supra* note 13 (reporting, based on a study of major department requests, that 40% of requests came from corporations, 25% from lawyers, 16% from unidentified individuals, 8% from nonprofits, and 5% from journalists). The phenomenon has persisted for a generation. *See* Wald, *supra* note 17, at 665 (observing that 1 in 20 FOIA requests were filed by journalists or scholars, and 4 in 5 by businesses or their lawyers).

239 Regulations issued in response to the 1996 FOIA amendments identify certain filers as entitled to public interest fee waivers, and allow particular public interest requests expedited processing. *See supra* notes 34–35 and 65–67. But skeptics would presumably not only fast-track public interest requests, but also eliminate private requests.

system. At a mundane level, the capital expenditures establishing the bureaucracy to process "private" FOIA requests finance the same bureaucracy that processes "public" ones. Within the government, the broad availability of FOIA sets a tone of disclosure as a standard operating procedure in responding to proper requests. Requests are not by definition politically charged and confrontational; they are part of the way in which civil servants normally do business. Equally important, a continued flow of FOIA requests into the courts, financed by private litigation, establishes a case law that is available to "public interest" requesters.

At a structural level, a FOIA system that provides broad benefits to "special interests" establishes a level of robustness against political attack. Commentators have noted that transparency regimes are often established in the wake of particular scandals, but prove stable only where a sufficient constituency benefits from the regime to sustain it in the face of predictable claims of overreaching or costliness.[240] The broader the constituencies that benefit from a regime of transparency, the more likely that regime is to prove sustainable; where the ACLU and the Associated Press can stand with the Business Roundtable, they are more likely to resist predictable pressures to curtail FOIA. Given plausible models of political economy, it seems that Congress is most likely to establish or expand FOIA entitlements where its interests diverge from those of the executive.[241] The broader the scope of FOIA, the more such divergences are likely to appear. If the goal is not to calibrate the transparency regime precisely to the "public interest," but to provide a failsafe against egregious abuses by a possible regime weakly constrained by the political forces of the moment, a broad inclusion of "private" requesters is not a FOIA bug but a feature.

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240 *E.g.*, ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 110–15 (2007); ARCHON FUNG ET AL., THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES SUSTAINABLE? 4–5 (2002), http://www.transparencypolicy.net/pdfs/FGW.pdf.

241 Patrick Egan, Costly Monitoring: Using Positive Theory to Analyze the Implications of the Freedom of Information Act 7 (unpublished manuscript, presented at the annual meeting of the American Political Science Association, Phila., Pa., Aug. 2003), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/4/8/1/p64817_index.html.

The converse claim, namely that transparency is likely to be provided by government agents as a means of establishing their trustworthiness and inducing principals to grant them broader authority and resources, John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 132–33, 137–38 (Adam Przeworski et al. eds., 1999), seems less than fully persuasive in this setting.

2. FOIA and Optimality

a. Transparency and Pathology

Critics are of course correct that the structures of transparency examined here are not precisely calibrated to generating optimal decisions by federal officials. Some requests are denied or delayed past the time that they could allow the public to provide input into decisionmaking. Others are granted in a fashion that could allow small public benefit, but impose substantial costs on decisionmakers. But optimizing individual disclosure decisions is not the only—or the most important—goal a system of transparency serves. Just as the "checking value" in First Amendment theory focuses on keeping public opinion ready to check the worst excesses of government,[242] transparency structures can serve not only to achieve the best of which government is capable, but also to avoid the worst.

The question should not be whether the system balances each tradeoff between "transparency" and "efficiency" optimally at the margin. Rather, the issue is whether at a reasonable cost, the system provides both checks against tyrannical or barbaric decisions and hedges against catastrophic government failures in the case of emergency.[243] It is particularly where a sense of shame grounded on the actor's own ideals (or at least those the actor attributes to the electorate) would be powerfully triggered that the possibility of disclosure itself is most important.

The pathologies of GWOT are not rooted in a secret effort to maximize the interests of one pressure group at the expense of the polity, but rather in an unwillingness to avow the moral costs of the means adopted to further what is allegedly a consensus goal. There are few interest groups that lobby actively for torture, domestic spying, and star chamber inquisitions for their own sakes. Rather, much post-September 11 secrecy was either an effort to further electoral chances of the incumbent administration by hiding the moral costs of the policies adopted, or was more generally part of a strategic pro-

242 *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 455 (1985); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

243 *See, e.g.*, CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 59–61, 109–14 (2005); CASS R. SUNSTEIN, WORST-CASE SCENARIOS 118–75 (2007). Of course, the system must also provide hedges against catastrophes resulting from government failure to act. *Cf.* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 609–10 (2003).

gram to aggrandize the unrestricted authority of the national executive. In either case, the appropriate role for transparency mechanisms is not fulfilled by a static account of marginal cost-benefit optimization.

A judge asked to balance the costs and benefits of disclosing allegedly problematic GWOT initiatives would be all too likely to succumb to the enthusiasms that generated the initiatives themselves, along with the siren song of deference to "representative institutions" endowed with both legitimacy and the mystique of knowledge of hidden threats. The messier ecology of transparency, which relies on a loosely joined chain of leakers, investigators, and advocates, can be more robust in crises of fear and outrage.

b. Sunsets, Secrecy, and States of Exception

Does the ecology of transparency, of which FOIA is a part, meet this goal of limiting excesses of barbarism or tyranny at reasonable cost? In one view, the GWOT cases are studies in failure. Transparency mechanisms have generally not functioned well to provide occasions for public reflection at the inception of problematic antiterrorist policies. The secrecy in which initiatives were shrouded, combined with resistance to FOIA requests, the demands of prerequisite knowledge, the slow pace of FOIA processing and litigation, and the tendency of investigations and leaks to occur only after the fact, precluded meaningful ex ante impact. With a few exceptions, transparency mechanisms are reactive.

Yet to be reactive is not to be without effect, and the ecology of transparency has proved to be roughly tailored to the function of allowing the possibility of extra-legal constitutional action to avoid catastrophic failure, while providing temporal boundaries to those exercises of power. One recurring suggestion in dealing with the moral and constitutional challenges of the aftermath of September 11 has been a temporary suspension of the rule of law on the model of the European "state of exception," which would allow otherwise illegal interventions by the executive for the duration of an emergency, but retain the underlying force of the legal regime for normal times.[244] The recurring objection to those proposals has been a con-

244 *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1040 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1065 (2003) (describing emergency legislation suspending usual rules). The suggestions are not new. *See, e.g.*, CLINTON L. ROSSITER, CONSTITUTIONAL

cern that the perpetual emergency of a "long war" may turn a temporary expedient into a permanent policy.[245] Lincoln's initial extralegal tactics were time-limited by the re-convening of Congress, and ultimately by the rule of *Ex parte Milligan* that militarized expedients could be adopted only where civil governance was unavailable.[246] But the expansion of modern executive claims of unilateral prerogative authority makes these constraints less reliable. Particularly in a period of unified government, there seems little warrant to assume that extra-legal emergency power once invoked will be remitted in a timely fashion.

One plausible reading of the ecology of transparency in the aftermath of September 11 is that the system, proceeding from leaks to authentication to publicity to resistance, is more than simply a "contest" or "domesticated civil disobedience" justified in Burkean terms.[247] It functions as a time-limited state of exception, with retrospective review.[248] Executive officials may engage in constitutionally dubious action without contemporaneous check, because the action takes place in secret. But the ecology of transparency renders the period of secrecy self-limiting. Once disclosed, the existence of the veiled initiatives provides the basis for both critique and further releases of information.

The duration of secrecy will not be fixed, but is likely to respond to both the scope of the infringement and its justification. The

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DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948); Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

245 David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1771–75 (2004) (observing that where Congress enacted framework statutes to cabin executive abuses, they have failed under stress, and expressing skepticism that emergencies will be short-lived); Gross, *supra* note 244, at 1090 ("[T]emporary arrangements in this area have a peculiar tendency to become entrenched over time and thus normalized and made routine."); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 706–07 (2006); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1829 (2004); Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 641–43 (2006) (noting the dangers of "bad-faith declarations of emergency" and the tendency of pre-commitments to "come undone during national-security emergencies"). Again, the concern is not new; Justice Jackson similarly observed that executive suspension of rights in the wake of the Reichstag fire was never revoked. *See* Jackson, *supra* note 244, at 108.

246 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866); DANIEL FARBER, LINCOLN'S CONSTITUTION 194 (2003).

247 ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 79–85 (1975); Stewart, *supra* note 5, at 636.

248 *Cf.* Gross, *supra* note 244, at 1099 (advocating a model in which "public officials . . . act outside the legal order" and "assume the risks involved in acting extralegally").

rough magnitude of the September 11 roundups became apparent in a few months, and the use of torture began to reveal itself within two years; on the other hand, warrantless NSA wiretaps were disclosed only after a period of four years.[249] The more immediate and broader the harm to the targets, the more likely a target is to effectively disclose her treatment. The more normatively dubious the action, the more likely some government actor is to view the secrecy as inappropriate, and to leak it to opponents inside or outside of government. Conversely, the more pressing and persuasive the justification for the breach of law, the more likely those with knowledge are to maintain secrecy. As a first approximation, the length of the period of secrecy will be correlated with the net justifiability of the exceptional action.

The cumulative judgment regarding net justifiability will determine the effectiveness of disclosure. A single outlying objector is less likely to make it through the screen of demands for authentication by media initially sympathetic to government actors than a continued series of objectors. But as others corroborate the leak, its penetrating power increases. Leaks provide the basis for FOIA requests, and FOIA requests in turn provide an occasion for courts to address the justifiability of continued secrecy. As the issues become matters of public contention, FOIA requests can achieve expedited processing.

The probability of effective disclosure will correlate inversely with the state of faith in the legitimacy of government action. Initial disclosures will be greeted with skepticism by the mechanisms of authentication in the media and the courts. If and as the justifiability of prior government actions becomes suspect, however, the screens will become more porous, and the time frame of effective secrecy will shrink. So too, the willingness of skeptics in the media or NGO communities to take the time to accumulate and piece together information will increase with the level of outrage associated with the particular practice.

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249 *See supra* notes 37–41 and accompanying text (discussing the length of FOIA litigation). For a benchmark of the speed of whistleblowing in a business context, see Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* 18–19 (Jan. 2007) (unpublished manuscript, *available at* http://www.law.yale.edu/documents/pdf/CBL/whistle.pdf), which describes a "web of monitors" in securities fraud cases that disclose fraud: "financial analysts and short sellers" (who reveal fraud in "a median duration of 9.1 months"), "external equity holders" (15.9 months), "suppliers, clients and competitors" (13.3 months), "[n]on financial market regulators" (13.3 months), "auditors" (14.7 months), "the media (21.0 months), the SEC (21.2 months), and professional service firms like plaintiff lawyers (31.4 months)," and "employee whistleblowers (20.9 months)".

From the point of view of an executive—or at least an executive that thinks ahead—this ecology imposes rough budget constraints on extralegal action. The larger the scope of initial extralegal action, the more individuals who will be privy to it, and the more quickly it will be disclosed. Conversely, the less justified an intervention appears, the harder it will be to invoke the state of exception in subsequent iterations, as court and media become more skeptical of the administration and open to the claims of critics. The effect of disclosure must be measured not only against the likelihood of reelection, but also against the stock of legitimacy. The willingness of other actors in the system to defer to the executive will be a function of the degree to which the executive is regarded as both legitimate and authoritative.

Whether the executive thinks ahead or not, review of the actions will take place not in the heat of the moment, but in retrospect, when the initial enthusiasm for force is likely to have waned.[250] On one hand, this means that the system of transparency cannot prevent violations of constitutional norms. On the other hand, it also means that review of legally dubious initiatives will not be infected with the initial hysteria that gives rise to the violations themselves. Like the prior restraint doctrine, a delayed review allows valuation of alleged breaches of legality to take place in the somewhat more sober and concretely grounded light of history (or at least the instant history embedded in memoirs).[251]

Time-shifted review has the virtue, as well, of deferring the policy costs associated with disclosure. Given the continued evolution of surveillance technology, a two-year delay in revelation of a technique is in most cases time enough for better techniques to develop; conversely, a surveillance technique effective enough to result in interdictions is likely to be discovered by the targets, as they are interdicted, and to become less pressing. In a related context, commentators have argued,

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250 *Cf.* DAN REITER & ALLAN C. STAM, DEMOCRACIES AT WAR 164 (2002) (describing on the basis of cross-national studies a predictable "dissipation" of consent for war in democracies); *id.* at 170–71 ("Beyond eighteen months of fighting, democratic initiators become less and less willing to continue to fight, the probability dropping significantly [from 46% in the second year] to 29 percent in the fourth year [.30 at 40 months] and 22 percent by the fifth year [.22 at 55 mo.] of a war.").

251 *See, e.g.*, Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49–55 (1981); Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1320, 1342 (2007);.

> [T]ransparency operates to reduce principal-agent slack between organized interests and lawmakers more than it reduces slack between voters and their elected representatives. In principle, the solution would be to keep organized interests in the dark about legislative behavior while fully revealing it to voters. . . . [I]t may be possible, in some cases, to deprive transfer-seeking organized interests of the information while the deals are being struck and interest group influence is most problematic, while at the same time ensuring that voters have access to information before they cast their ballots.[252]

By analogy, a retrospective disclosure regime allows voters to discipline their "representatives," while preventing terrorists from gaming control measures.

IV. CONCLUSION

The ecology of transparency will not prevent abuse. Those who would lobby for humanity or civil liberties will often be in no position to challenge barbaric policies before they take effect. Leaks may be strategic or premature, or they may be drowned out by chaff. News media, Congress, or the courts may be co-opted or intimidated. Executive actors may not worry about the future, may have high discount rates, or may seek to game the system by front-loading violations and embedding them in areas resistant to possible disclosure.[253]

Ultimately, the ecology of transparency will do no more and no less than require our constitutional conscience as a nation to finally confront the actions of our government. The public may be persuaded to define constitutional deviancy down; once violations of constitutional norms are disclosed, there is danger that the abuses rather than the norms they flout will be regarded as the baseline of acceptability. But the hope must be that, in the words of one sponsor of the original Freedom of Information Act who himself experienced the impact of cumulative disclosures, "While excesses and imbalances will inevitably exist for a time, fortunately they tend not to last. Ulti-

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252 Elizabeth Garrett & Adrian Vermeule, *Transparency in the Budget Process* 15 (Univ. of S. Cal. Ctr. in Law, Econ. & Org., Research Paper No. CO6-2, 2006), *available at* http://ssrn.com/abstract=877951; *cf.* Fenster, *supra* note 11, at 942 ("Although the cost of information disclosure may outweigh its benefits at one moment—especially before the government's decisional process or a particular government action is complete—the benefits of disclosure may outweigh the costs at a later moment.").

253 *See* Hersh, *supra* note 24, at 54 (recounting discussion by Iran-Contra veterans within the administration which concluded that "even though the program was eventually exposed, it had been possible to execute it without telling Congress" and that disclosure could be delayed by limiting the role of the CIA and the uniformed military and establishing a program "run out of the Vice-President's office").

mately truth prevails. The American people seem to have inner gyroscopes that keep them centered and balanced."[254]

254 Donald H. Rumsfeld, U.S. Secretary of Def., Remarks to the Newspaper Assoc. of Am./Am. Soc'y of Newspaper Editors (Apr. 22, 2004), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2526.