ARTICLE

FREEDOM OF INFORMATION BEYOND THE FREEDOM OF INFORMATION ACT

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The U.S. Freedom of Information Act (FOIA) allows any person to request any agency record for any reason. This model has been copied worldwide and celebrated as a structural necessity in a real democracy. Yet in practice, this Article argues, FOIA embodies a distinctively "reactionary" form of transparency. FOIA is reactionary in a straightforward, procedural sense in that disclosure responds to ad hoc demands for information. Partly because of this very feature, FOIA can also be seen as reactionary in a more substantive, political sense insofar as it saps regulatory capacity; distributes government goods in an inegalitarian fashion; and contributes to a culture of adversarialism and derision surrounding the domestic policy bureaucracy while insulating the far more secretive national security agencies, as well as corporations, from similar scrutiny. If this Article's core claims are correct to any significant degree, then open government advocates in general, and progressives in particular, ought to rethink their relationship to this landmark law.

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INTRODUCTION

The Supreme Court has stated that the Freedom of Information Act (FOIA)[1] "defines a structural necessity in a real democracy."[2] Legislators, journalists, and watchdog groups routinely describe FOIA as "an indispensable tool in protecting the people's right to know."[3] The fact that more than one hundred countries and

1 5 U.S.C. § 552 (2012).

2 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

3 *Open Government: Reinvigorating the Freedom of Information Act: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Sen. Patrick J. Leahy); *see also, e.g.*, Patrick J. Carome & Thomas M. Susman, *American Bar Association Symposium on FOIA 25th Anniversary*, 9 GOV'T INFO. Q. 223, 223 (1992) ("Proponents of the FOIA see [it] as an essential component of our democratic form of government."); *Critics Say New Rule Limits Access to Records*, N.Y. TIMES (Feb. 27, 2002), http://www.nytimes.com/2002/02/27/us/critics-say-new-rule-limits-access-to-records.html [https://perma.cc/SLM9-TL8N] (describing FOIA as "indispensable to the democratic process"); *Oh, the Places FOIA'll Go—Freedom of Information Law Turns 46*, OPENTHEGOVERNMENT.ORG (June 26, 2012), http://www.openthegovernment.org/node/3493 [https://perma.cc/3D7A-XYLN] (describing FOIA as "a bedrock law of democracy"). On his first full day in office, President Obama hailed FOIA as "the most prominent expression of a profound national commitment to ensuring an open Government." Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009).

all fifty states have enacted their own freedom of information laws, many of them based on the federal FOIA,[4] would seem to support these claims. But the claims are false. A real democracy must have *some* mechanisms securely in place to shine light on the government's actions. There is no need to have a freedom of information law on the U.S. model.

On the contrary, the FOIA model has proven deficient in significant respects. Some of the causes are familiar. Notwithstanding FOIA's ostensible "philosophy of full agency disclosure,"[5] the Act is shot through with exemptions[6] and has never been funded at a level that would allow agencies to respond promptly to most requests.[7] Notwithstanding FOIA's explicit requirement of de novo judicial review,[8] the courts affirm agency denial decisions at extraordinary rates.[9] Attorneys' fees and other litigation costs remain difficult to recover,[10] monetary damages are unavailable,[11] and sanctions for improper withholding are virtually never applied.[12] The law's efficacy depends on a steady supply of tenacious requesters who know what to look for; in practice, corporate lawyers, information resellers, and other private rent-seekers use it most.[13]

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4 *See* DAVID KOHLER ET AL., MEDIA AND THE LAW 1018 (2d ed. 2014) ("Most current state open records laws closely resemble FOIA."); ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 15 (2006) (explaining that "after 1989 . . . countries began to emulate American practice [by adopting FOIA-style laws] at a remarkable pace"); *see also* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW 44 (1999) ("[The U.S.] FOIA is recognized worldwide as trailblazing legislation.").

5 Dep't of the Air Force v. Rose, 425 U.S. 352, 360 (1976) (quoting S. REP. NO. 89-813, at 38 (1965)).

6 *See infra* note 28 and accompanying text.

7 *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 8-31 (Comm. Print 2016) [hereinafter FOIA IS BROKEN] (criticizing long backlogs and heavy use of exemptions in the Act's administration); Russell L. Weaver, *Free Speech, Transparency, and Democratic Government: An American Perspective*, 1 REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS 165, 171-72 (2015) (Fr.) (summarizing FOIA's best-known "shortcomings"); Charles J. Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1223, 1253 (1998) (lamenting FOIA's "woeful underfunding and understaffing" and noting that legislators, scholars, and agency heads "have all highlighted the need for more FOIA funding to ensure the effective operation of the statute").

8 5 U.S.C. § 552(a)(4)(B) (2012).

9 *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 719 (2002) (finding a ninety percent affirmance rate in FOIA cases); *see also* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 211 (2013) [hereinafter Kwoka, *Deferring to Secrecy*] (cataloging a set of exceptional practices developed by judges in FOIA litigation "that collectively contribute to this super-deferential review").

10 *See* Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 478-80 (2015).

11 *See* Kwoka, *Deferring to Secrecy*, *supra* note 9, at 209.

12 *See* Paul M. Winters, Note, *Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974*, 84 GEO. L.J. 617, 618 (1996) (finding only one instance in which a court had invoked FOIA's sanctions provision, which was added by Congress in 1974 "to spur the recalcitrant agencies"); *see also* 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 8:30 (3d ed. 2000) (describing FOIA sanctions as "rarely invoked").

13 *See infra* subsection II.A.1.

Other grounds for concern are somewhat subtler and yet, I believe, even more fundamental. FOIA's extension of access rights to "any person"[14] (including legal persons and foreigners[15]) makes it an entitlement program with no eligibility criteria. Rationing of benefits occurs de facto, however, through delays and denials that systematically advantage certain classes of requesters. FOIA's reliance on requests is not only "contentious and time-consuming"[16] but also establishes nondisclosure as the default norm in the absence of a formal claim for information and a corresponding "record."[17] FOIA's focus on domestic policy agencies, meanwhile, ensures that the law is least relevant for the executive branch components that are most opaque. As FOIA was becoming an increasingly vaunted symbol of "the people's right to know" over these past five decades, the amount of national security secret-keeping was only going up and up.[18] Those agencies that do have large FOIA practices can expect to be diverted from their mission by tens of thousands of requests each year, along with a steady stream of lawsuits filed by ideologically hostile parties, charges of lackluster implementation, and episodic news stories that draw on the agencies' FOIA disclosures to spotlight alleged incompetence and venality.[19]

Compared to the citizen enforcement schemes used in areas such as environmental law or civil rights law, FOIA's structure is substantially more decentralized and individualistic. It attenuates the link between the exercise of private right and vindication of the public good. The result may be the worst of both worlds: all the ad hockery and adversarialism of a "private attorney general" regime without much benefit, if any, in terms of efficient allocation of public resources or enhanced capacity to detect hidden violations of law. Add up these points, and one might find that FOIA ultimately serves to legitimate the lion's share of government secrecy while delegitimating and debilitating government itself.

Our landmark freedom of information legislation can thus be seen as reactionary on two interrelated levels. FOIA is reactionary in a straightforward,

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14 5 U.S.C. § 552(a)(3)(A) (2012).

15 *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. POLICY, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 40 (2009 ed.) [hereinafter DOJ FOIA GUIDE] ("A FOIA request may be made by 'any person,' a broad term that . . . includes individuals, partnerships, corporations, associations, or public or private organizations other than an agency." (internal brackets and quotation marks omitted)); *id.* at 40 n.88 (noting that, under FOIA, "person" includes noncitizens).

16 Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 585 (2009); *see also id.* (stating that FOIA is "inherently limited by the fact that the requester, by definition, does not know what the agency has and, therefore, does not know what to ask for").

17 *Cf.* Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 971 (2006) ("[FOIA] is not a freedom of 'information' law. It only reaches agency 'records.'").

18 *See infra* subsection II.A.2.

19 *See infra* Section II.B.

procedural sense insofar as disclosure is driven by requests for preexisting records. And partly for this very reason, FOIA is arguably reactionary in a more substantive, political sense insofar as it empowers opponents of regulation, distributes government goods in a regressive fashion, and contributes to a culture of contempt surrounding the domestic policy bureaucracy while insulating the national security state from similar scrutiny.[20] For years now, commentators have been asking whether the First Amendment is serving neo-Lochnerian ends[21] and whether the international transparency lobby is serving neoliberal ends.[22] Analogous questions can fruitfully be asked about FOIA and the global freedom of information (FOI) movement that it has spawned.

Given FOIA's many limitations and drawbacks, a forward-looking legislative approach must do more than refine the Act's request-driven strategy: it must look beyond the FOIA strategy altogether. One alternative model for producing executive branch transparency involves affirmative disclosure requirements, which can be tailored in a variety of ways and enforced by agents such as inspectors general, ombudspersons, and auditors. Another model denies legally binding effect to government policies and decisions that are not publicized in a sufficiently timely manner. A third model employs continuous oversight by congressional bodies. A fourth model looks to whistleblowers and leakers to reveal worrisome activities and dissenting viewpoints.

We have elements of each of these models in the United States. Slowly, incrementally, we have been developing them to compensate in part for the failures of FOIA. But none of these alternatives is as robust as it could be, and

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20 The "reactionary" label may strike some readers as polemical. I believe the label is warranted by the way it illuminates the link between the technical structure and the ideological valence of FOIA. As I will try to detail, FOIA's practical effects are not politically neutral and tend to degrade certain progressive features of state and society, with progressivism understood to embrace ideals such as egalitarianism, expertise, and social improvement through government action.

This characterization of FOIA as reactionary, it bears mention, differs from Albert Hirschman's well-known use of the term. *See generally* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991). Unlike Hirschman, my focus is not on forms of rhetoric but on legal practices that exist within and exacerbate a particular political economy. That said, this Article's rhetorical strategy might itself be read as reactionary in Hirschman's sense, in that the Article questions the first-order benefits and emphasizes the second-order costs of a purportedly progressive measure. When the progressive justifications for a canonical policy no longer hold up, it seems to me that commentators may need to explore arguments that are formally reactionary (while also empirically and institutionally grounded) to make meaningful debate and reform possible again.

21 *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917-18 nn.4–8 (2016) (collecting sources that suggest the First Amendment has been "hijacked" by antistatist, economically libertarian interests).

22 *See* Clare Birchall, *Transparency, Interrupted: Secrets of the Left*, THEORY, CULTURE & SOC'Y, Dec. 2011, at 60, 65 (reviewing critiques of transparency "for its complicity with neoliberalism" and an ethic of governance that privileges individualism and market functionality over other values); Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 476 n.123 (2012) (collecting sources on "transparency's relationship to global neoliberalism").

our affirmative disclosure norms are especially immature. To make good on the promise of FOIA over the next fifty years of the Act's life,[23] this Article submits, we will need to devote greater attention and resources to a range of information-forcing mechanisms. And to enable that shift, a shift away from the traditional FOIA model, we will need to let go of FOIA triumphalism—to stop seeing the law as the indispensable centerpiece of the open government universe, and to start seeing its reactionary elements more clearly.

I. THE FOIA STRATEGY

To get critical purchase on FOIA, it is important to recognize that the Act embodies one distinctive strategy among many available for promoting government openness and accountability. Without reviewing the development of FOIA in any detail, this Part will sketch the basic components of this strategy in contradistinction to other (nonmutually exclusive) strategies. The immediate goal is to clarify distinctive features of the FOIA system. The broader goal is to clarify the challenge of regulating government transparency by establishing some ideal types.

A. *FOIA as a Personal Enforcement Regime*

The engine of the FOIA system is the request for a government record. In contrast to the pre-FOIA Administrative Procedure Act (APA), FOIA allows "any person" to submit a request.[24] In contrast to many state FOI laws, FOIA applies only to executive agencies and does not reach Congress, the courts, private entities, or the President's inner circle.[25] Following receipt of a written request, agencies must turn over "reasonably describe[d]" records[26] promptly—within

23 FOIA was signed into law on July 4, 1966, Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), and took effect one year later, Pub. L. No. 90-23, § 4, 81 Stat. 54, 56 (1967). This Article was originally drafted in preparation for a conference on FOIA's fiftieth anniversary. *See FOIA@50*, COLUM. L. SCH. (June 13, 2016), http://www.law.columbia.edu/media_inquiries/news_events/2016/june2016/FOIA-at-50 [https://perma.cc/3A3L-5TN6].

24 5 U.S.C. § 552(a)(3)(A) (2012); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 828 n.205 (2009) (collecting cases affirming that "FOIA permits any person to request any type of information . . . without demonstrating any distinct interest in or particular need for the material"); Herz, *supra* note 16, at 582-83 (describing the "any person" standard as "a fundamental shift" from the original APA, "which gave wide discretion to agencies to withhold records if the requester was not 'properly and directly concerned'" (quoting Administrative Procedure Act, Pub. L. No. 79-404, § 3(c), 60 Stat. 237, 238 (1946))).

25 *Compare* 1 O'REILLY, *supra* note 12, § 4:5 (reviewing entities excluded from FOIA jurisdiction), *with* RICHARD J. PELTZ-STEELE, THE LAW OF ACCESS TO GOVERNMENT 129 (2012) (observing that most state FOI laws "apply to the legislature itself").

26 5 U.S.C. § 552(a)(3)(A). Records must be provided "in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." *Id.* § 552(a)(3)(B).

twenty working days absent "unusual circumstances"[27]—unless the records or portions thereof fall under one of nine enumerated exemptions.[28] Adverse determinations are subject to administrative appeal and judicial review.[29] The requester has no obligation to explain why she seeks records or to publicize them once obtained, and in practice the overwhelming share of materials obtained through FOIA have not been disseminated to the general public.[30] Government transparency is thus framed as an individual right held by the requester alone.

FOIA is sometimes described as a "citizen enforcement" or "private attorney general" regime.[31] Like other such regimes, it relies on adversarial legal process, rather than inquisitorial or collaborative methods, to secure public values. Public-oriented inquiries by concerned citizens and their advocates, however, make up only a small fraction of the 700,000-plus FOIA requests submitted each year.[32] Studies have consistently shown that the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment.[33] Beyond businesses and trade groups, other significant classes of FOIA users include individuals seeking records related to their government

27 *Id.* § 552(a)(6).

28 *Id.* § 552(b)(1)–(9). The exemptions cover records that (1) are classified "in the interest of national defense or foreign policy"; (2) are "related solely to the internal personnel rules and practices of an agency"; (3) are "specifically exempted from disclosure by [another] statute"; (4) are trade secrets or confidential commercial or financial information; (5) are inter-agency or intra-agency memoranda that would be privileged in ordinary litigation; (6) "would constitute a clearly unwarranted invasion of personal privacy" if disclosed; (7) are "compiled for law enforcement purposes" under certain circumstances; (8) are related to examinations of financial institutions; or (9) involve "geological or geophysical information" concerning wells. *Id.*

29 *See id.* §§ 552(a)(4)(B), 552(a)(6)(A), 552(a)(6)(C)(i).

30 Challenging this historic practice, the Obama Administration launched a pilot program in 2015 to assess whether agencies should be required to post FOIA responses online. *See infra* notes 239–242 and accompanying text (discussing the "release to one, release to all" initiative).

31 *See, e.g.*, *"Preclusion" Doctrines Under the FOIA*, FOIA UPDATE, Summer 1985, at 6, https://www.justice.gov/oip/blog/foia-update-foia-counselor-preclusion-doctrines-under-foia [https://perma.cc/AMF4-V69U] (noting that "FOIA plaintiffs are often considered as private 'attorneys-general'").

32 *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. & PRIVACY, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015, at 2 (2016) [hereinafter DOJ FY 2015 SUMMARY] (reporting 713,168 FOIA requests received by the federal government in fiscal year 2015).

33 *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1376-81 (2016) [hereinafter Kwoka, *FOIA, Inc.*] (summarizing prior studies and finding that "commercial requests represent the overwhelming majority of all requests received" at the largest FOIA offices for which complete data are available). The corporate skew in FOIA usage is longstanding. *See* Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 958 (1974) (observing that the "benefits of the Act have inured predominantly to . . . corporation[s] seeking through disclosure an economic, competitive or legal advantage").

benefits or immigration proceedings,[34] as well as eccentrics and political opposition researchers who flood the system with repeated requests.[35]

"Private attorney general" regimes typically identify some desired end, such as reducing pollution or discrimination, and empower citizens to bring lawsuits in service of that end.[36] Yet in the case of FOIA, there is no specific, substantive policy that is being served. The filing of a FOIA request *creates* the legal norm—the obligation to disclose records responsive to that request—which then may be the basis of an enforcement action. Citizen suits regarding the environment or civil rights are meant to vindicate a set of highly reticulated environmental laws and civil rights laws. The only law that FOIA actions vindicate, at least in any direct sense, is the Act's own disclosure requirement. The system of legal entitlements that FOIA creates is so broadly accessible, and potentially so divorced from public policy goals in any given instance, that it seems better characterized not as a private attorney general regime but rather as a personal enforcement regime.

FOIA is strikingly decentralized not only on the requester side but also on the government side. Although the White House issues occasional implementation guidance and may consult with agencies on requests involving "White House equities,"[37] the overall degree of FOIA presidentialization is low.[38] The Act applies to more than one hundred federal agencies, many of which maintain one or more offices dedicated to processing FOIA requests.[39] Chronically

34 *See* Kwoka, *FOIA, Inc.*, *supra* note 33, at 1421 n.412 (discussing the use of FOIA by immigrants in removal proceedings); *see also Frequent Filers: Businesses Make FOIA Their Business*, SOC'Y OF PROF. JOURNALISTS: READING ROOM (July 3, 2006), http://www.spj.org/rrr.asp?ref=31&t=FOIA [https://perma.cc/PBY7-JKUK] [hereinafter *Frequent Filers*] (indicating that more than 90 percent of the FOIA requests submitted to the Department of Veterans Affairs, the Department of Health and Human Services, and the Social Security Administration "are also filed under the Privacy Act and come from individuals seeking personal records").

35 *See* PETER LEVINE, DEP'T OF DEF., CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT TO THE DEPARTMENT OF JUSTICE 13 (2016) (complaining that some Defense Department components are "overwhelmed by one or two requesters who try to monopolize the system by filing a large number of requests"); Bruce E. Cain, *Yes, American Government Is Too Open*, 29 GOVERNANCE 295, 296-97 (2016) ("Opposition researchers routinely use [FOIA] requests to gather information about opposing candidates."); Michael Doyle, *Missed Information: The Reporting Tool That Reporters Don't Use*, WASH. MONTHLY, May 2000, at 38, 38 (reporting that "[t]he National Security Agency has received more requests for information about UFOs than for any topic from reporters" and that "[t]he apparent 1998 champion for aggressively filing FOIA requests across multiple federal agencies was . . . a political operative seeking dirt on an opponent").

36 *See generally* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013) (reviewing private enforcement mechanisms).

37 *See generally* Mark J. Rozell & Daniel Z. Epstein, *White House Equities: The New Executive Privilege*, 45 PRESIDENTIAL STUD. Q. 382 (2015) (chronicling and critiquing the rise of this practice).

38 *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2252, 2383 (2001) (identifying a general trend toward the "presidentialization of administration").

39 For the full list of agencies, see *Make a Request*, FOIA.GOV, https://www.foia.gov/report-make request.html [https://perma.cc/H4MJ-K3VW] (last updated Feb. 2011). Within larger agencies, FOIA

underfunded and historically low-status,[40] these offices together employ over 4000 civil servants.[41] Many thousands of other executive branch employees, as well as contractors, assist with FOIA matters on a part-time basis.[42] The Department of Justice (DOJ) provides litigation support and coordinates interagency FOIA practice to a modest extent.[43] The Office of Government Information Services (OGIS), created by statute in 2007 and located within the National Archives and Records Administration (NARA),[44] now supplies an additional coordination mechanism along with mediation services.[45] OGIS, however, has minimal coercive authority[46] and fewer than a dozen employees at this writing.[47] Congress had considered creating an agency-wide "FOI Ombudsman" or "FOI Commission" when overhauling FOIA in 1974, but the reform was viewed as too "major" at the time.[48]

Over the past quarter-century, the FOIA strategy has swept the globe. Spurred by an international right-to-know movement, the majority of the world's

processing is often spread across multiple components or program offices. *See* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 133 (1984) (calling attention to "the highly decentralized nature of most agency FOIA operations").

40 *See, e.g.*, Kathryn M. Braeman, *Overview of FOIA Administration in Government*, 34 ADMIN. L. REV. 111, 112 (1982) (stating that "in many cases [FOIA] work is assigned to the new kid on the block" and that, "[o]f course, there is a perception . . . that this is mere clerical work"). The Office of Personnel Management created a distinct job category for FOIA professionals in 2012, forty-six years after the statute's enactment. *See OPM Establishes a New Occupational Series for FOIA and Privacy Act Professionals*, U.S. DEP'T JUST.: OFF. INFO. POL'Y (Apr. 23, 2012), https://www.justice.gov/oip/blog/opm-establishes-new-occupational-series-foia-and-privacy-act-professionals [https://perma.cc/543A-RZBD].

41 DOJ FY 2015 SUMMARY, *supra* note 32, at 20.

42 On the growing use of contract workers in FOIA administration, see Clara Hogan, *The Outsourcing of Federal FOIA Services*, NEWS MEDIA & L., Summer 2011, at 21. On the role of non-FOIA personnel, see *infra* notes 156–162 and accompanying text.

43 *See generally* Jefferey M. Sellers, Note, *Public Enforcement of the Freedom of Information Act*, 2 YALE L. & POL'Y REV. 78, 84-119 (1983) (tracing the evolution of "public enforcement" mechanisms for FOIA and describing DOJ as "the closest to a 'lead agency' in administering the Act").

44 *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 10, 121 Stat. 2524, 2529 (codified at 5 U.S.C. § 552(h) (2012)).

45 *See* 5 U.S.C. § 552(h)(3) (2012) (authorizing OGIS to "issue advisory opinions" and "to resolve disputes between persons making requests . . . and administrative agencies as a non-exclusive alternative to litigation").

46 *See* Mark Fenster, *The Informational Ombudsman: Fixing Open Government by Institutional Design*, 1 REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS 275, 293 (2015) (Fr.) ("OGIS has almost no power, . . . as open government advocates frequently note and complain.").

47 *See OGIS Contact Information*, OFF. GOV'T INFO. SERVICES, https://ogis.archives.gov/about-ogis/contact-information.htm [https://perma.cc/HW3Z-ALAQ] (listing eight OGIS staff as of February 18, 2017); *see also* David Cuillier, *FOI Toolbox: Get Help from FOIA Ombudsman*, QUILL, Oct. 2010, at 27 (criticizing OGIS's small staff size). The recently enacted FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, modestly strengthens OGIS's role, among other reforms, but it authorizes no new resources for implementation. *See OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP'T JUST.: OFF. OF INFO. POL'Y, https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016 [https://perma.cc/6344-2Y2L] (last updated Aug. 17, 2016).

48 1 O'REILLY, *supra* note 12, § 3:7.

countries, and virtually all of the wealthier countries, have adopted laws that replicate FOIA's basic features, including the focus on official records; affordance of access rights to any individual or association; reliance on private requests to trigger disclosure obligations; independent or quasi-independent review of denial decisions; and exemptions for the protection of national security, public safety, personal privacy, commercial secrets, and internal deliberations.[49] A "super-statute" at home,[50] FOIA has become one of the United States' leading legal exports abroad.

Within the general FOIA framework, countless permutations are possible. Congress has revised FOIA numerous times,[51] and scholars have suggested many additional reforms, from increased user fees[52] to stronger prioritization of media requesters[53] to the creation of a more powerful centralized oversight body comparable to Mexico's Institute for Access to Information and Data Protection.[54] Some of these reforms could have significant consequences. Yet, if it is important to avoid oversimplifying the FOIA strategy and to recognize the possibilities for internal variation, it is also important to avoid overlooking—and

49 *See* DAVID BANISAR, PRIVACY INT'L, FREEDOM OF INFORMATION AROUND THE WORLD 2006, at 20-26 (2006) (describing "[c]ommon [f]eatures of FOI laws"); Colin J. Bennett, *Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability*, 10 GOVERNANCE 213, 217 (1997) (noting "a remarkable degree of cross-national similarity between FOI laws," with "differences center[ing] on relatively tangential issues"); James T. O'Reilly, *"Access to Records" Versus "Access to Evil:" Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 KAN. J.L. & PUB. POL'Y 559, 562 (2002) (explaining that "most other nations [have] followed the template of the U.S. FOIA in allowing the unqualified term 'any person[]'"); *see also* John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 99-115 (2006) (cataloging and comparing national FOI laws); Greg Michener, *FOI Laws Around the World*, J. DEMOCRACY, Apr. 2011, at 145, 146 (chronicling the "rapid diffusion" of FOI laws since 1990). Before it went global, the FOIA strategy had already swept the United States. *See* Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. L. 65, 65-66 (1996) (explaining that the enactment of FOIA prompted "each of the fifty states not already having an open records statute [to] adopt[] its own version"). In 2009, the world's first FOI treaty of general subject matter, which tracks the U.S. FOIA on numerous dimensions, was adopted by the Council of Europe. Council of Europe Convention on Access to Official Documents, June 18, 2009, C.E.T.S. No. 205, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680084826 [https://perma.cc/U8J6-QWAA].

50 David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 n.204 (2010).

51 *See* Tai, *supra* note 10, at 456-57 ("In the aggregate, amendments to FOIA have been far more extensive than all the amendments to the other APA sections combined . . . .").

52 *See, e.g.*, *id.* at 483-88.

53 *See, e.g.*, Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193.

54 *See, e.g.*, Julia Collins, *Is Mexico Doing a Better Job with Access to Information and Transparency than the US?—At Least on the National Level*, NAT'L SEC. ARCHIVE: UNREDACTED (Oct. 23, 2012), https://nsarchive.wordpress.com/2012/10/23/is-mexico-doing-a-better-job-with-access-to-information-and-transparency-than-the-us-at-least-on-the-national-level [https://perma.cc/FP6U-HJXS] (quoting Tom Blanton, Director of the National Security Archive, for the view that Mexico's FOI law has become the "global Gold standard").

naturalizing—the core elements of FOI laws that do *not* vary across jurisdictions. These elements, as this Article will argue, are neither politically neutral nor practically necessary and are far from an unalloyed good for public values.

B. *Other Regulatory Models*

An array of strategies for opening up government have emerged in recent decades and, in many jurisdictions, both complement and compete with the FOIA strategy. The critical question for legal designers, accordingly, is not whether any given FOI policy is working well (however this is defined and assessed). The critical question is whether the overall mix of openness policies is working well. To fixate on the performance of a FOI law alone is to risk missing the forest for the trees and committing a fallacy of composition.[55]

At the U.S. federal level, at least four other legislative models for eliciting executive branch transparency warrant mention. Part IV returns to these models and asks how affirmative disclosure, in particular, might be strengthened in light of FOIA's failings. For present purposes, the important thing to see is simply that these models exist—and that assessments of FOIA therefore must not be made in a vacuum, but rather in light of feasible alternative approaches that are already to some extent in place.

1. Affirmative Disclosure

Instead of delegating the authority to request records to an open-ended set of future parties, the legislature can instruct the executive to publicize certain categories of information in a certain manner and pursuant to a certain timeline. Such instructions are sometimes referred to as affirmative disclosure rules. Under a command-and-control version of this model, the legislature dictates at Time One which classes of information must be made public. "New governance"-style variants may allow for more fluid or deliberative assessments as to what must be revealed.

FOIA itself has come to incorporate several affirmative disclosure requirements. Since the start, Congress has directed agencies to make publicly available certain items of general interest, including final opinions and orders, statements of policy, and interpretive rules.[56] In the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA), Congress went further and linked an ongoing affirmative disclosure obligation to the request-and-respond system, requiring that agencies post online records that have already been

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55 *Cf.* Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 8 (2009) (defining the fallacy of composition as "the assumption that what is true of the members must also be true of the aggregate").

56 5 U.S.C. § 552(a)(1) (2012).

released to a requester and that are likely to be requested repeatedly in the future.[57] These requirements, however, are said to be "widely ignored,"[58] and affirmative disclosure is still seen by many as a "backwater, drab corner" of FOIA activity[59]—and of administrative law more broadly[60]—as compared to requests for documents.

2. Conditioning Legal Effect on Prior Publication

Another model of regulating executive branch transparency, and one that is relatively simple to operationalize, works by denying legal effect to policies and decisions that are not disclosed with sufficient notice to affected parties. Whereas affirmative disclosure requirements seek to anticipate and specify ex ante the set of agency behaviors that ought to be revealed, this model focuses on the ex post consequences of withholding. It does not similarly ensure a steady flow of information from the government to the public, but it reduces the burden on legislative drafters to delineate access rights and responsibilities.

FOIA incorporates elements of this model, too. One section provides that no person may "be required to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published."[61] Another section prevents agencies from using a "final order, opinion, statement of policy, interpretation, or staff manual or instruction . . . against a party" if the item has not been published or otherwise made available to the party.[62] Some have criticized this language for not going far enough—effectively exempting many national security directives and opinions[63] and allowing agency regulations to

57 Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (1996) (codified at 5 U.S.C. § 552(a)(2) (2012)); *see also* Herz, *supra* note 16, at 586-91 (reviewing the 1996 reform); *infra* notes 304–329 and accompanying text (discussing subsequent affirmative disclosure developments). FOIA has always permitted, but not required, the proactive posting of other information.

58 MARC A. FRANKLIN ET AL., MASS MEDIA LAW 514 (8th ed. 2011); *see also id.* (discussing a 2007 study finding that "only 21 per cent of the agencies had complied with requirements that they post on their Web sites basic information such as opinions, orders, policy statements, and rules interpretations"); PELTZ-STEELE, *supra* note 25, at 384 ("[M]any a federal agency has failed to comply fully with E-FOIA requirements . . . ."); David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1789 (2008) ("[A]gencies have by-and-large failed to comply with EFOIA's affirmative disclosure mandate, and thus FOIA remains predominantly a requester-driven statute." (citation omitted)).

59 1 O'REILLY, *supra* note 12, § 6:1.

60 *See, e.g.*, Herz, *supra* note 16, at 591-96 (cataloging recent laws that "promote the movement of [agency] information online," but concluding that they "fail[] in fact to impose additional requirements for affirmative disclosure").

61 5 U.S.C. § 552(a)(1) (2012).

62 *Id.* § 552(a)(2).

63 *See, e.g.*, ELIZABETH GOITEIN, BRENNAN CTR. FOR JUSTICE, THE NEW ERA OF SECRET LAW 34 (2016) ("Most administrations have issued national security directives in the dozens if not hundreds, and the contents of most of these remained classified for years or decades (with some remaining secret to this day).").

incorporate by reference privately developed standards that can be expensive to access.[64] Their limitations notwithstanding, these provisions of 5 U.S.C. § 552 reflect a general congressional purpose, and a distinct instrumental strategy, to prompt "disclosure of documents which have the force and effect of law."[65]

3. Whistleblowing and Leaking

Beyond agencies' official records and representations, a legislature can seek to foster transparency through the unofficial disclosures of individual executive branch employees. "Whistleblower protection" statutes supply channels of communication through which these employees may reveal—typically to a specified executive body or congressional committee—potentially unlawful, wasteful, or otherwise troubling organizational behaviors without suffering certain adverse consequences. Beginning in earnest during the 1970s, Congress has enacted many whistleblower protection statutes that apply to federal government personnel,[66] although their effectiveness has been called into question.[67]

Outside the channels of communication designated by these laws, executive branch actors also divulge information that has not been officially approved for release in more or less clandestine exchanges with journalists and other audiences. Such "leaking" takes a wide variety of forms and, unlike whistleblowing, is at least as likely to be practiced by calculating political appointees as by concerned civil servants.[68] Media outlets facilitate the flow of unauthorized and quasi-authorized disclosures by soliciting them, calling attention to their content, protecting their sources, and protesting their punishment. Even when the legislature declines to extend statutory protections

64 *See, e.g.*, Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 526 & *passim* (2013) (examining the widespread agency practice of incorporating by reference "voluntary consensus standards," which are not made public and therefore "confer on private parties the power to place a monopoly price on access to knowledge of one's legal obligations").

65 Tereshchuk v. Bureau of Prisons, 67 F. Supp. 3d 441, 456 (D.D.C. 2014).

66 *See* JON O. SHIMABUKURO ET AL., CONG. RESEARCH SERV., R43045, SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS *passim* (2013) (collecting statutes); *see also* Shawn Marie Boyne, *Whistleblowing*, 62 AM. J. COMP. L. 425, 428 (2014) ("Outside the national security employment sector, the breadth and depth of whistleblower protections in the United States has grown exponentially since the Watergate era.").

67 *See, e.g.*, Shelley L. Peffer et al., *Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012*, 35 REV. PUB. PERSONNEL ADMIN. 70, 74-80 (2015) (finding, consistent with prior research, that the Whistleblower Protection Act of 1989 fails to protect most federal government employees and suggesting that the Whistleblower Protection Enhancement Act of 2012 is unlikely to cure these defects). Whistleblower protections are especially limited in the area of national security. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 527 (2013) [hereinafter Pozen, *Leaky Leviathan*] (explaining that such laws "play a marginal role" in the national security context).

68 *See* Pozen, *Leaky Leviathan*, *supra* note 67, at 528-34, 559-79 (describing leaking practices).

to such disclosures (and thereby convert them into whistleblowing), individual legislators and their aides may stimulate leak culture by doing the same.

4. Congressional Monitoring

Finally, the classic model for securing executive branch transparency and accountability in the United States looks to Congress to investigate and respond to the executive's activities. Such monitoring may occur in a "fire alarm" fashion, whereby third parties alert Congress to issues that demand attention. Or it may occur in a more continuous "police patrol" fashion, through committee hearings, reporting requirements, Government Accountability Office (GAO) audits, and other mechanisms that do not necessarily require a pulled alarm.[69] Congress today has at its disposal a vast array of formal and informal oversight tools,[70] some of which (for example, open hearings and unrestricted GAO reports) directly generate public commentary, and some of which (for example, closed hearings and agency site visits) do not. Once legislators have acquired information about the executive, the Constitution's Speech or Debate Clause insulates them from civil or criminal liability for disclosures made in Congress.[71]

The executive branch's implementation of FOIA is itself monitored by Congress in a police patrol manner, assisted by the statutory requirement that each agency publish an annual report compiling aggregate statistics about its processing of requests.[72] Of greater consequence, the use of FOIA by citizens, interest groups, and journalists contributes—along with leaking and whistleblowing—to fire alarm oversight by exposing agency behaviors that might not otherwise have piqued legislative interest.[73] Justice Scalia missed this

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69 *See generally* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (distinguishing between these two forms of oversight).

70 *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69-144 (2006) (cataloging tools used by Congress to supervise the execution of its laws).

71 U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."); *see also* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 742-53 (2012) (analyzing the Speech or Debate Clause as a structural check on executive branch secrecy).

72 5 U.S.C. § 552(e) (2012).

73 Although it does not reference FOIA specifically, McCubbins and Schwartz's canonical article suggests that fire alarm oversight may be facilitated by laws that "afford citizens and interest groups access to information." McCubbins & Schwartz, *supra* note 69, at 166; *see also* Michael A. Fitts, *The Foibles of Formalism: Applying a Political "Transaction Cost" Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1648 (1997) (referring to FOIA as a "fire alarm rule[]"); Ben Worthy, *Access to Information in the UK and India*, 1 REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS 203, 220 (2015) (Fr.) (contending that FOI laws in India and the United Kingdom work "as a crowd-sourced 'fire alarm'"). For an illustration of this phenomenon, see Paul Nussbaum, *Specter Seeks Funds to Fix Bridges*, PHILA. INQUIRER, Sept. 22, 2009, at B1, which describes a request by

point in his famous critique of FOIA as "do-it-yourself oversight by the public and . . . the press," which he contrasted with "institutionalized checks and balances."[74] FOIA enables both popular *and* legislative scrutiny; the former may be a goad to the latter. The extent to which FOIA advances congressional monitoring of the executive is open to question, however, and to my knowledge has never been studied. In subsection II.A.2 and Section III.B, I will consider the possibility that Justice Scalia may have been fundamentally correct in intimating that FOIA would tend to undermine, rather than fortify, congressional power.

II. FOIA AND THE JANUS-FACED STATE

The modern American state, according to historian Ira Katznelson, is Janus-faced.[75] On the one side, facing inward, it looks highly constrained, process-oriented, clientelistic, and deferential to business interests. On the other side, facing outward, it looks highly efficacious, strong-willed, interventionist, and eager to do battle with enemies. The New Deal's accommodation of southern racial and economic hierarchies bequeathed to us "both a 'state of procedures,' in which public institutions are too weak to check private economic power, and a 'crusading state,' in which public institutions dole out overwhelming violence with little democratic oversight."[76]

FOIA, this Part will suggest, both reflects and reinforces this "strangely schizophrenic"[77] equilibrium. "[V]iewed by many as one of the crown jewels of liberalism,"[78] the Act has proven a regressive tool that serves corporate and "crusading" agendas while hobbling relatively visible efforts to regulate health, safety, the economy, the environment, and civil rights. FOIA does the least work where it is most needed and, at least from a normative standpoint that values effective and egalitarian governance above transparency per se, does too much work everywhere else. Other legislative strategies for securing executive branch information, moreover, do not suffer from the same pathologies. If these claims are correct to any significant degree, then open government advocates

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Senator Arlen Specter for stimulus funds to repair Amtrak bridges in the Philadelphia region following a *Philadelphia Inquirer* story about bridge conditions based on records obtained through FOIA.

74 Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 19.

75 *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 18-20, 484-86 (2013) (arguing that, "[m]uch like the Roman God Janus," the post–New Deal American state "possessed two distinctive faces"—one of "procedural government" and the other "of a crusader").

76 Jeremy K. Kessler, *The Last Lost Cause*, JACOBIN, Spring 2013, at 96 (reviewing KATZNELSON, *supra* note 75).

77 *Id.*

78 John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1158 (1985).

ought to rethink their relationship to—and cool off their romance with—this landmark law.

A. *FOIA Winners*

In principle, FOIA is a "quintessential piece of participatory policy-making"[79] that affords equal access rights to all persons[80] and advances a "philosophy of full agency disclosure."[81] In practice, FOIA establishes a working baseline of nondisclosure and systematically advantages certain private concerns as well as certain blocs within government. Some of these distributional implications may not have been consciously intended. But they were foreseeable from the start, and they have persisted over time and repeated themselves in other jurisdictions. They are a feature, not a bug, of the FOIA strategy.

1. Commercial Requesters, Contractors, and Lawyers

As students of FOIA have noted for decades, businesses are the Act's principal patrons.[82] Nearly four-fifths of the requests made in 2013 to agencies like the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA) were "commercial" in nature.[83] Information resellers and institutional investors have become especially voracious requesters of late.[84]

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79 Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1445 (2000); *see also* Memorandum from President William J. Clinton to Heads of Departments and Agencies (Oct. 4, 1993), http://nsarchive.gwu.edu/nsa/foia/whinitial.pdf [https://perma.cc/UQ2L-GBF7] ("[FOIA] is a vital part of the participatory system of government.").

80 *See supra* note 24 and accompanying text; *see also* U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 499 (1994) ("[A]ll FOIA requesters have an equal, and equally qualified, right to information . . . .").

81 Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (quoting S. REP. NO. 89-813, at 38 (1965)); *see also* 112 CONG. REC. H13645 (daily ed. June 20, 1966) (remarks of Rep. John Moss) ("[FOIA] seeks to open to all citizens . . . the broadest range of information.").

82 *See supra* note 33 and accompanying text.

83 *See* Kwoka, *FOIA, Inc.*, *supra* note 33, at 1388-401. A "commercial" request is defined by regulation as one that "furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made." The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,013 (Mar. 27, 1987).

84 *See* Kwoka, *FOIA, Inc.*, *supra* note 33, at 1361 (detailing "a cottage industry of companies whose entire business model is to request federal records under FOIA and resell them at a profit"); *see also* Antonio Gargano et al., The Freedom of Information Act and the Race Towards Information Acquisition 1 (Apr. 15, 2015) (unpublished manuscript), http://ssrn.com/abstract=2517075 [https://perma.cc/5RGL-VHST] ("[I]nstitutional investors routinely take advantage of FOIA to acquire information from over forty-two federal agencies."); April Klein & Tao Li, Acquiring and Trading on Complex Information: How Hedge Funds Use the Freedom of Information Act 7 (Aug. 2015) (unpublished manuscript), http://ssrn.com/abstract=2653879 [https://perma.cc/U436-F8CL] ("[O]ur results provide evidence that hedge funds exploit the FOIA to receive value-relevant information that is not universally known to the market . . . .").

FOIA, it is often said, was designed to help journalists and civic-minded citizens; the commercial complexion of its user base turned out to be "[o]ne of the greatest surprises about the FOIA in action."[85] While perhaps awkward, the conventional wisdom further holds, this surprising turn was addressed in amendments that allow commercial users to be charged higher fees[86] and, in any case, does not detract from the Act's virtues or require a fundamental reassessment of the FOIA model.[87] This narrative overstates the degree to which corporate dominance was unexpected, and it understates the degree to which this phenomenon affects the balance of power between government and private industry.

FOIA's structure was always a natural fit for business interests. On the one hand, the administrative state generates and collects an enormous amount of information about regulated industries, and many businesses have an economic incentive to seek out agency records that may shed light on the activities of regulators, competitors, customers, or markets—especially when those records, once obtained, need not be shared with others. On the other hand, to make effective use of FOIA, requesters must have the agency-specific insight to know what to look for, a temporal horizon long enough to abide delays, and the wherewithal to negotiate with FOIA staff and to litigate denials under unfavorable conditions.[88] Navigating the FOIA process takes not only motivation but also "time, money, and expertise."[89] Commercial enterprises, as well as certain nonprofit organizations dedicated to transparency or related values, are more likely than individuals and other groups to possess all of these attributes. Commercial requesters are also more likely to hoard whatever information they receive and thus to internalize its rewards.[90] If private enforcement regimes disproportionately benefit savvier

85 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, 665 (1984).

86 The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,013, 10,017-19 (Mar. 27, 1987).

87 *See, e.g.*, RALPH NADER, THE RALPH NADER READER 50 (2000) (touting businesses' "routine[] use of FOIA as "an indication of how widespread the benefits of the Act have been"); Jane Kirtley, *Freedom of Information Act—How Is It Working?*, COMM. LAW., Fall 1996, at 7, 9 (attesting that "most in the news media do not support discrimination against the commercial requester").

88 *See* Kwoka, *FOIA, Inc.*, *supra* note 33, at 1376; Waples, *supra* note 33, at 958; *see also* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 476 (11th ed. 2011) ("[T]he promise that attorneys' fees and other litigation costs of substantially prevailing plaintiffs will be reimbursed . . . is not enough to make litigation by the general public attractive."); *supra* notes 9–11 and accompanying text (noting that FOIA plaintiffs cannot recover monetary damages and face exceptional procedural and substantive obstacles).

89 Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1020 (2008). This is all the more true given that users who seek records from multiple agencies must submit separate requests to each agency's FOIA office or offices.

90 *See* Tai, *supra* note 10, at 485 (explaining that commercial requesters "are least likely to share the contents of any records they receive with the general public").

and wealthier rights-holders (and the lawyers who cater to them) across a range of contexts,[91] FOIA may be an acute case of a more general pattern.

It therefore should not have come as a surprise that commercial requesters would loom so large—and indeed it did not come as a surprise to many. Leading administrative law scholar Kenneth Culp Davis predicted in 1967, the year FOIA took effect, that the "overall conclusion is an easy one that the press . . . will benefit only slightly," whereas "members of the bar and their clients will be the principal beneficiaries."[92] And in the period leading up to FOIA's enactment, numerous agencies voiced concerns that profit-seeking firms and government contractors would seize on the Act as an instrument to undermine economic regulation.[93] The single most persistent institutional critic of FOIA, tellingly, was not a national security agency or a White House office but the Department of Health, Education, and Welfare.[94] Apart from the news media, economic interests played a quiet part in these preenactment debates. But they played a major role in pressing for the APA provisions out of which FOIA grew,[95] and they have been "crucial contributors" to the development of FOIA, as well as FOI laws abroad, ever since.[96]

Businesses occupy a privileged position under FOIA in additional respects. In contrast to some of the Act's foreign counterparts, private entities are not subject to FOIA, as a rule, regardless of how much public power they might wield or how much government contract work they might perform.[97] Both the

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91 *See, e.g.*, Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 818 (1993) (suggesting that "citizen-based" enforcement of environmental laws is more common and effective in affluent communities); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1420-50 (2011) (examining families' use of the Individuals with Disabilities Education Act).

92 Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 803-04 (1967); *cf.* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1345 (noting that "[a]n army of lawyers . . . make their living litigating" FOIA exemptions).

93 *See* Sam Lebovic, *Seeing FOIA Like the State, or, How Administrative Opposition Shaped Freedom of Information*, *in* TROUBLING TRANSPARENCY (David E. Pozen & Michael Schudson eds., forthcoming 2018) (manuscript at 4-8) (on file with author) [hereinafter Lebovic, *Seeing FOIA Like the State*].

94 *Id.* at 4-5. Professor Lebovic concludes that while the predominance of commercial users "might have surprised the journalists who championed FOIA in the 1950s, . . . it would not have surprised the agencies in the 1960s." *Id.* at 11.

95 *See* Tom McClean, *Who Pays the Piper? The Political Economy of Freedom of Information*, 27 GOV'T INFO. Q. 392, 396 (2010) ("Although the justification for [the APA's 'public information' section] was formally couched in terms of the democratic rights of private *individuals*, it is fairly clear that the specifically economic concerns of private *enterprise* were fundamentally what was at stake.").

96 *Id.* at 395.

97 *See* 1 O'REILLY, *supra* note 12, § 4:5. Foreign laws have increasingly begun to supply a limited right of access to information held by private entities that contract with the government or perform "public functions." *See Private Bodies and Public Corporations*, RIGHT2INFO.ORG (Sept. 13, 2013), http://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations [https://perma.cc/HFY5-RC8N]; *see also* Richard Calland, *Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation*, THEORIA,

ideal of "freedom of information" and the evils of excessive secrecy are associated, legally and symbolically, with the public sector alone.[98] Those firms that do contract with the government, moreover, have in FOIA an exceptionally broad "weapon" for obtaining "pre-litigation discovery" against their agency counterparts.[99] Under so-called reverse FOIA procedures developed by the federal courts in the 1970s, companies that submit allegedly proprietary information to an agency may also bring suit to enjoin the agency from revealing it to a third party in response to a FOIA request or in certain other situations.[100] Before disclosing such information, agencies are required to give the submitter notice and an opportunity to object.[101] The "looming possibility" of costly reverse FOIA litigation, consumer advocates have lamented, pushes agencies to "rubber-stamp company claims of commercial sensitivity."[102] In lieu of a legislative determination about how best to balance corporations' confidentiality interests with FOIA's openness goals, the reverse FOIA action has emerged through judicial and executive interpretation as a side entitlement that trumps the general rules where it applies.[103]

Sept. 2014, at 70, 79 (discussing the "groundbreaking" and "deliberately progressive" application of South Africa's 2000 Promotion of Access to Information Act to private actors).

98 *Cf.* Ed Brown & Jonathan Cloke, *Neoliberal Reform, Governance and Corruption in the South: Assessing the International Anti-Corruption Crusade*, 36 ANTIPODE 272, 291 (2004) (identifying an "anti-state bias" in the international anticorruption movement's focus on the public sector); Irma E. Sandoval-Ballesteros, *Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico*, 29 AM. U. INT'L L. REV. 399, 403-10 (2014) (identifying an anti-"public sector bias" in access-to-information and anticorruption laws that exempt "private" actors). For an argument that corporations should be subject to FOI laws, see Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261 (2013).

99 Justin M. Ganderson & Kevin T. Barnett, *The Contractor's Secret Weapon: Using FOIA When Asserting a Claim*, PROCUREMENT L., Winter 2015, at 14, 14. As these practitioners explain: "A contractor can easily explore any topic or theory it desires through FOIA because of FOIA's relatively limited restrictions. Under FOIA, a contractor is not limited to requesting relevant information reasonably calculated to lead to the discovery of admissible evidence, as it would be during a litigation. Instead, a contractor can ask for any information to explore any potential claim, such as those claims that it wouldn't dare raise unless it had specific evidence supporting its theories." *Id.* at 17.

100 *See generally* DOJ FOIA GUIDE, *supra* note 15, at 863-80 (explaining "reverse FOIA" actions).

101 *See id.* at 876-79. *New York Times* reporter Sarah Cohen recently stated that, on account of reverse FOIA, she has "never successfully, ever, gotten a federal contract under FOIA." Columbia Journalism Sch., *FOIA@50 Conference Day 2* at 2:20:44, YOUTUBE (June 3, 2016), https://www.youtube.com/watch?v=71D6z2YQzIM [https://perma.cc/7NAF-Z3BZ].

102 Vladeck, *supra* note 58, at 1793.

103 Labor unions, in contrast, have largely failed in their efforts to persuade courts to grant them special status under FOIA. *See, e.g.*, Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51, 71 n.124 (1995) (collecting cases in which "courts have held that unions were not allowed access to the names and addresses of public employees because it would constitute an invasion of their privacy under the FOIA").

If reverse FOIA effectively shrinks the Act's disclosure mandate in an industry-protective manner, a late-1990s revision expands it toward the same end. The Shelby Amendment (named after its Senate sponsor) provides that FOIA requesters may access "all data produced" by private entities that receive federal research grants[104]—but only when those entities are universities and other nonprofits, not when they are "similarly situated profit-seeking firms."[105] Scholars have suggested that the goal of this amendment, which was championed by the tobacco lobby and the Chamber of Commerce, was to hamstring the EPA by letting critics inspect environmental "scientists' work down to the smallest detail, giving them myriad new opportunities to discredit studies' assumptions, methods of analysis, and conclusions, fairly or not."[106]

It might be thought that the progressivity of FOIA's fee structure dispels or at least complicates the idea that commercial requesters have a privileged relation to the statute. The evidence suggests otherwise. Commercial use of FOIA did not fall off after the 1986 changes to the fee schedule, and the latest figures indicate that the government recoups less than one percent of compliance costs, conservatively estimated.[107] Not only do FOIA's profit-seeking users fail to cross-subsidize the more public-spirited users, but they also crowd the latter group out. The huge volume of commercial requests at some agencies, as Professor Margaret Kwoka has documented, substantially decreases the value of the average noncommercial request by lengthening response times and clogging avenues of appeal.[108] It also likely deters many noncommercial requests from being submitted in the first place. FOIA, accordingly, ends up "transferring

104 Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681–495 (1998).

105 Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 347 (2004). For a detailed discussion of the Shelby Amendment and its administrative implementation, see generally ERIC A. FISCHER, CONG. RESEARCH SERV., R42983, PUBLIC ACCESS TO DATA FROM FEDERALLY FUNDED RESEARCH: PROVISIONS IN OMB CIRCULAR A-110 (2013).

106 JASON ROSS ARNOLD, SECRECY IN THE SUNSHINE ERA 229 (2014).

107 FREEDOM OF INFO. ACT FED. ADVISORY COMM., NAT'L ARCHIVES & RECORDS ADMIN., FINAL REPORT AND RECOMMENDATIONS: COMMITTEE TERM 2014–2016, at 10 (2016). Agencies themselves do not recoup a cent, as FOIA fees are paid to the General Fund of the Treasury. *Id.* Noncommercial requesters, meanwhile, continue to complain about the size of fees and the difficulty of obtaining fee waivers. *See, e.g.*, FOIA IS BROKEN, *supra* note 7, at 31-34 (providing examples of "outrageous fee estimates"); Zachary Pall, *The High Costs of Costs: Fees as Barriers to Access Within the United States and Canadian Freedom of Information Régimes*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 599, 628 (2009) (arguing that "the fee assessment system has become a barrier to access").

108 *See* Kwoka, *FOIA, Inc.*, *supra* note 33, at 1422-24; *see also* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 43-44 (1994) (complaining that "[r]esponses to meaningful FOIA requests" are "delayed" by corporate requests for information about competitors).

wealth from the federal government to private enterprise" and amounts to a "corporate subsidy."[109]

The existence and effects of this subsidy are largely invisible to ordinary citizens, who continue to imagine journalists as the Act's principal users.[110] This invisibility, in turn, diminishes prospects for political opposition. Congress's refusal to discriminate among different classes of FOIA requesters except at the margins is not as "egalitarian" as it appears,[111] but rather tilts the production of information toward business interests. And Congress's refusal to modify the FOIA entitlement has led to a steady decay in its worth to everyone else.

To observe that FOIA is used mainly by commercial actors or that it supplies a hidden corporate subsidy is hardly to establish that the Act disserves social welfare or other goals. Business use of FOIA may redound to the public good in a number of ways.[112] Yet if a full account of social costs and benefits would be enormously difficult to trace out, some basic distributional and political-economy implications seem clear enough (more will be considered shortly). FOIA's request-driven structure, we can now see, invites a kind of corporate capture, which funnels government resources toward private industry, creates opportunities for informational arbitrage, increases companies' leverage over agencies in litigation and negotiations, and compromises the Act's participatory character.[113] Furthermore, none of the other legislative models for promoting executive branch transparency and accountability—from affirmative disclosure requirements to ex post checks on secret law to whistleblower protection measures—has such a strong structural affinity, if any, with business interests, as none of the other models similarly rations access to information according to persons' means and motivation. Information "freeing" policies need not have a regressive, corporate skew. But our FOIA does.

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109 Kwoka, *FOIA, Inc.*, *supra* note 33, at 1415.

110 *See* PELTZ-STEELE, *supra* note 25, at 129 ("A widely held misconception is that FOIAs are employed primarily by journalists . . . .").

111 *See, e.g.*, WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 370 (3d ed. 2009) ("FOIA is basically an egalitarian statute.").

112 *See American Bar Association Symposium on FOIA 25th Anniversary*, 9 GOV'T INFO. Q. 223, 249 (1992) (remarks of Thomas Susman) (cataloging potential public benefits from business use of FOIA, including policing of "fraud, waste, and abuse" and "lower prices and increased competition that can result when a contractor finds out what the government is buying, what the specifications are, how the systems are configured, and what the government is paying in its procurement processes").

113 These effects, moreover, may be magnified in jurisdictions with relatively weak public sectors. *See* Calland, *supra* note 97, at 75 (suggesting that corporate domination of access-to-information laws "can have massive implications for states with weak or under-resourced governments but well-resourced and determined private actors, as is the case in many developing countries").

2. National Security Secrecy

FOIA was developed over the 1950s, 1960s, and 1970s against the backdrop of, and partly in response to, the rise of national security secrecy. A web of nondisclosure policies and protocols began to take shape following World War II, and in 1951, President Truman established the first executive-wide classification system to govern nonmilitary as well as military information "the safeguarding of which is necessary in the interest of national security."[114] As the classification system swelled during the Cold War, concerned members of Congress and the media began to call for a new statute that could disrupt the culture of secrecy it had fostered.[115] The original FOIA met resistance in this regard. In the 1973 case of *EPA v. Mink*, the Supreme Court rejected as "wholly untenable" a claim that the Act allowed plaintiffs to "subject the soundness of executive security classifications to judicial review."[116] One year later, Congress amended FOIA over President Ford's veto with the express purpose of overruling *Mink* and fixing the "overclassification" problem, which had "by common consensus transformed the . . . classification scheme into an 'extravagant . . . system of denial.'"[117]

The effort failed. Even though the 1974 amendments prescribe a de novo standard of review, courts have consistently afforded agencies great deference when classified information is at issue.[118] In most Exemption 1 cases,[119] courts grant the government summary judgment without allowing discovery or performing in camera inspection of the requested records, making it "virtually impossible for individual litigants to counter the opinions of agency personnel."[120] Courts have

114 Exec. Order. No. 10,290, § 4, 3 C.F.R. 789, 790 (1949–1953); *see also* 1 ARVIN S. QUIST, SECURITY CLASSIFICATION OF INFORMATION 50-52 (2002) (discussing President Truman's executive order and the "concern" it caused in Congress and the press).

115 For a valuable discussion of this period, see SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA 164-89 (2016) [hereinafter LEBOVIC, FREE SPEECH AND UNFREE NEWS].

116 410 U.S. 73, 84 (1973).

117 Robert C. Post, Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401, 419-20 (1976) (quoting 120 CONG. REC. S9316 (daily ed. May 30, 1974) (remarks of Sen. Kennedy)); *see also* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 635-37 (2005) [hereinafter Pozen, *Mosaic Theory*] (summarizing the 1974 reforms).

118 *See* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163-68 (2006); *see also* Kwoka, *Deferring to Secrecy*, *supra* note 9, at 214 ("Despite two attempts by Congress to establish de novo judicial review of decisions to withhold records based on national security, courts acknowledge outright the deference they afford to claims of national security classification.").

119 Exemption 1 covers matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (2012).

120 Fuchs, *supra* note 118, at 164. Without clear statutory warrant, courts have also allowed agencies to give "*Glomar* responses" that refuse to confirm or deny the existence of requested records

been similarly deferential to intelligence agencies' assertions of Exemption 3, which incorporates certain nondisclosure provisions of other statutes, including the CIA Act of 1949, the CIA Information Act of 1984, the National Security Act of 1947, and the National Security Agency (NSA) Act of 1959.[121] The D.C. Circuit held in 1996 that the increasingly powerful National Security Council is exempt from FOIA altogether as a non-"agency" within the meaning of the statute.[122] "[M]eaningful victories in national security FOIA cases," in the experience of leading litigators, "remain legal unicorns."[123] Exemptions 1 and 3, furthermore, have been used by the intelligence agencies to shake free not only from record requests but also from FOIA's affirmative disclosure obligations, with the result that these agencies "rarely, if ever," publish the rules governing their activities.[124]

While the courts were developing these doctrines, the national secrecy state grew and grew.[125] By 2004, some suspected that "as many as a trillion pages" were classified in the United States, or the equivalent of "200 Libraries of Congress."[126] Commentators from across the political spectrum describe the

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on the ground that this fact is itself classifiable. *See generally* Nathan Freed Wessler, Note, *"[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the* Glomar *Response Under FOIA*, 85 N.Y.U. L. REV. 1381 (2010).

121 5 U.S.C. § 552(b)(3); *see also* GOITEIN, *supra* note 63, at 45 (noting that the "CIA's website," like the NSA's, "makes clear that it considers almost any information about its activities . . . to be shielded by Exemption 3"); U.S. DEP'T OF JUSTICE, OFFICE OF INFO. POLICY, STATUTES FOUND TO QUALIFY UNDER EXEMPTION 3 OF THE FOIA (2016), https://www.justice.gov/oip/page/file/623931/download [https://perma.cc/BES7-XP4E] (listing statutory provisions found to authorize Exemption 3 withholding). A number of other countries' FOI laws explicitly carve out the intelligence services in full or in part. *See* ROBERTS, *supra* note 4, at 34-35 (providing examples).

122 Armstrong v. Exec. Office of the President, 90 F.3d 553, 565-67 (D.C. Cir. 1996). For a critique of this decision, see Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REG. 363 (2014).

123 David McCraw, *FOIA Litigation Has Its Own Rules, But We Deserve Better*, JUST SECURITY (Mar. 15, 2016), https://www.justsecurity.org/29974/foia-litigation-rules-deserve [https://perma.cc/JJL6-6KKJ]. A 1995 review by DOJ identified eighteen FOIA cases since 1979 in which a court had ordered disclosure of classified information; these orders were "often, but not always, overturned on appeal." *History of Exemption 1 Disclosure Orders*, FOIA UPDATE, Spring/Summer 1995, at 4, 12, https://www.justice.gov/oip/blog/foia-update-litigation-review-history-exemption-1-disclosure-orders [https://perma.cc/ZN6Q-8SGS]. A more recent study estimated that five percent of cases involving Exemption 1 result in an "outright win" for the plaintiff (down to three percent since 9/11), and less than twenty percent "lead to even partial disclosure." Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 728 (2014). These estimates almost certainly overstate plaintiffs' success rate, given that the authors exclude unreported cases and include cases in which Exemption 1 may have played only a minor role. *See id.* at 765 & n.213.

124 GOITEIN, *supra* note 63, at 45; *see also* Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 YALE L.J.F. 242, 249-50 (2016) (criticizing judicial rulings that exclude national-security-related opinions by DOJ's Office of Legal Counsel from FOIA's affirmative disclosure requirements on the ground that these opinions do not constitute authoritative "working law").

125 I borrow the phrase "national secrecy state" from LEBOVIC, FREE SPEECH AND UNFREE NEWS, *supra* note 115, at 166; and Jon Wiener, *The National Secrecy State*, NATION, Dec. 21, 1998, at 27.

126 Peter Galison, *Removing Knowledge*, 31 CRITICAL INQUIRY 229, 230 (2004).

classification system as "staggeringly large"[127] and "out of control."[128] FOIA has proven so profoundly unresponsive to the rise of national security secrecy—and therefore to the rise of government secrecy—that we might even say there is an element of *transparency theater* in the conceit that the Act secures the people's right to know.[129] "In the war for executive accountability," as one veteran civil liberties lawyer has reflected, "FOIA is a slingshot attempting to pierce the tank armor of government secrecy and over-classification."[130]

The slingshot does some damage. Plaintiffs occasionally prevail in cases involving the national security exemption.[131] More important, in the shadow of judicial review, the FOIA process can spur recalcitrant agencies to release certain previously classified records on their own or pursuant to settlement agreements with journalists and NGOs.[132] The supine judicial record understates the degree to which FOIA generates disclosure. Notwithstanding this important qualification, however, even the most optimistic assessment

127 Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007).

128 JOINT SEC. COMM'N, REDEFINING SECURITY 6 (1994); *see also* ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 4-6 (2011) (documenting the consensus view inside and outside government that there is "widespread overclassification").

129 *See* LEBOVIC, FREE SPEECH AND UNFREE NEWS, *supra* note 115, at 166, 189 (describing FOIA as "a superficial response" and "a weak ameliorative" to the explosive growth of secrecy during the Cold War); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 935 (2006) (suggesting that laws like FOIA "fail to enforce disclosure requirements in the areas of federal governmental performance where they are most needed: to evaluate decisions regarding such key political issues as national security and foreign relations"). FOI laws have generated a more egregious sort of transparency theater in countries such as Zimbabwe, where "the dictatorship of Robert Mugabe twisted a FOI statute into a gag law for limiting access to previously available information." Michener, *supra* note 49, at 147. On the analogous concept of "security theater," see BRUCE SCHNEIER, BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD 38-40 (2003).

130 Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's* Power and Constraint, 45 CASE W. RES. J. INT'L L. 23, 36 (2012) (book review).

131 *See supra* note 123. Plaintiffs fare somewhat better in the face of the law enforcement exemption (Exemption 7), although in this area, too, agencies like the Federal Bureau of Investigation have benefited from broad judicial construction. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA 779-80 (11th ed. 2012); *see also* David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J.F. 232, 239 (2016) ("The Department of Justice's *Guide to the Freedom of Information Act* catalogs one decision after another in which the application of Exemption 7 has spun free of both the statutory language and the exemption's rationale.").

132 For rich elaborations of these and related dynamics, see JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 112-18 (2012); Kreimer, *supra* note 89, at 1053-56; and Stephen J. Schulhofer, *Access to National Security Information Under the US Freedom of Information Act*, 1 REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS 257, 264-66 (2015) (Fr.).

must concede that the Act has supplied "only a weak, somewhat unpredictable weapon for challenging executive control of national security information."[133]

Perhaps, as Professor Adam Samaha has suggested, "FOIA never had a chance" to curb overclassification, given its design.[134] If so, then it behooves us to consider alternative designs. FOIA's ability to constrain classification depends not only on the willingness of sophisticated requesters to bring lawsuits, but also on the willingness of judges to order disclosure with at least some regularity in the absence of a noninformational injury and in the face of an executive branch claim that doing so would cause national security harm. The collapse of de novo review under Exemption 1 casts doubt on whether the latter precondition can be met.[135] Even if judicial review could be strengthened through legislation or otherwise, the combination of FOIA's request-driven structure and the sheer size and complexity of the classification system consigns the Act to a peripheral role.[136] Only by addressing the standards, procedures, or incentives that govern the classification (and declassification) process could Congress hope to push back against national security secrecy in a systematic fashion.

At the time FOIA was passed in 1966 and then overhauled in 1974, such a statute was conceivable. Prior to 1966, Congress had never clearly accepted the legitimacy of the executive-wide classification system.[137] As public support for the presidency plummeted during the Vietnam War and the Watergate scandal, a policy window opened in which Congress was willing and able to overcome partisan division and presidential vetoes to enact a series of framework statutes with the aim of reining in the executive branch, including on national security matters.[138] Committees of both houses actively considered bills that would legislate a security classification system.[139] Rather than seek to revamp the classification process, however, Congress opted in the end for the indirect FOIA model and the pointillistic resolution of secrecy disputes on a case-by-case basis. In so doing,

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133 Schulhofer, *supra* note 132, at 268.

134 Samaha, *supra* note 17, at 940-41. Samaha stresses that FOIA may nonetheless facilitate disclosure "far upstream from litigation." *Id.* at 940.

135 Nor does the international record seem promising. Although I am not aware of any rigorous comparative work on the question, academic and NGO commentaries on FOI laws in other countries routinely describe the national security exemptions as broad and judicial review of their use as highly deferential. *See, e.g.*, David Banisar, *Public Oversight and National Security: Comparative Approaches to Freedom of Information*, *in* DEMOCRATIC CONTROL OF INTELLIGENCE SERVICES 217, 226-27 (Hans Born & Marina Caparini eds., 2007).

136 *Cf.* Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 406 (2009) ("[A]t its best, FOIA only facilitates access to specific records; it does not and cannot alter the practices and procedures that make them inaccessible in the first place.").

137 *See* LEBOVIC, FREE SPEECH AND UNFREE NEWS, *supra* note 115, at 188.

138 *See* Sudha Setty, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL'Y 247, 254 (2008) (placing FOIA in this historical context).

139 *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-298 GOV, MANAGING SECRECY: SECURITY CLASSIFICATION REFORM—THE GOVERNMENT SECRECY ACT PROPOSAL 4 (1998).

Congress effectively blessed the modern classification regime for the first time;[140] conceded the definition of "national security" to the executive;[141] channeled civil society resistance to the national security state away from the political arena and toward the courts; and arguably created a perverse incentive for officials to classify more, not less, in order to avail themselves of Exemption 1.[142] The policy window closed. Congress also failed to develop a framework for declassifying or otherwise affirmatively disclosing national security information that no longer needs to be kept secret. Even today, following a wave of declassification-promoting reforms in recent years,[143] the entire appropriated budget of NARA—which houses both the National Declassification Center and the Information Security Oversight Office and plays a leading role on declassification as well as records management[144]—is smaller than the annual cost of implementing FOIA.[145]

As in the preceding Section, to observe that FOIA offers a weak corrective to national security secrecy is merely to raise and frame, not to answer, some difficult questions about the law's ultimate worth. There may well be deep structural forces in the American state that would oppose any effort to minimize classification;[146] from this perspective, FOIA's weakness in the national security field seems predictable, if not overdetermined. It is nonetheless important to appreciate the particular limitations of the Act in this field and the way they relate to its "reactionary," request-driven design. Not only did FOIA's legislative sponsors fail to solve or even seriously confront the overclassification problem when they empowered private parties to bring lawsuits in pursuit of specific records, but they also helped to entrench and legitimate the emerging classification system. The result is a freedom of information law that leaves the Cold War national secrecy state largely intact,

140 *See* LEBOVIC, FREE SPEECH AND UNFREE NEWS, *supra* note 115, at 188 ("In 1966, in its *Freedom of Information* Act, Congress did not challenge the legitimacy of the classification system, but acknowledged it.").

141 *Cf.* Pozen, *Mosaic Theory*, *supra* note 117, at 637 (noting that the executive has the "advantage in FOIA appeals of controlling both the disputed information and—through Exemption 1's reliance on executive orders—the definition of national security").

142 *See* Scalia, *supra* note 74, at 15 (asserting that agencies "overclassified documents to take advantage of the 'national security' exemption" in the original FOIA).

143 *See* Aftergood, *supra* note 136, at 407-11 (reviewing some of these reforms).

144 *See NARA and Declassification*, NAT'L ARCHIVES, https://www.archives.gov/declassification [https://perma.cc/X475-GF6R] (last updated Dec. 29, 2016) (providing information on NARA's declassification activities).

145 *Compare* DOJ FY 2015 SUMMARY, *supra* note 32, at 20 (reporting that FOIA cost approximately $480 million to administer in fiscal year 2015), *with* NAT'L ARCHIVES & RECORDS ADMIN., FY 2015 SUMMARY REPORT 14 (2016) (reporting that NARA received approximately $386 million from current-year appropriations in fiscal year 2015).

146 *See* Pozen, *Leaky Leviathan*, *supra* note 67, at 582 (providing an account of why "[u]nwinding overclassification is exceedingly difficult to do").

while substantially limiting the space for government secret-keeping—and decisive action—on domestic policy matters.

B. *FOIA Losers*

In ways both subtle and obvious, I have suggested, FOIA confers special benefits on certain commercial and national security interests—and these distributional ramifications should not be seen as perversions of the Act so much as natural byproducts of its structure. For those with progressive priors at least, a discomfiting picture of transparency's "crown jewel"[147] begins to come into focus. The picture becomes still more discomfiting when one considers FOIA's effects on the administrative process and on the depiction of government in the public sphere.

1. The FOIA Tax: Bureaucratic Capacity and Legitimacy

Like the prevalence of commercial requests and the deference shown to the government in national security cases, the basic point that FOIA inconveniences agencies is familiar from the literature (as well as common sense). Commentators not infrequently mention, in passing, that responding to FOIA requests can be "a significant burden."[148] Critics note that Congress grossly underestimated compliance costs when writing and rewriting the Act in 1966 and 1974.[149] Advocates respond by pointing to obscure federal programs with a comparable price tag.[150] The discourse, such as it is, has become narrow and stale. As with the subjects of commercial use and national security secrecy, the familiar concerns about FOIA's administrative burden need to be pushed further, for they contain the seeds of a more interesting and important critique.

For starters, the official estimates of FOIA's cost should be understood as a lower bound. As required by the Act,[151] DOJ prepares annual reports that state the "total estimated cost of all FOIA related activities across the

147 *See* TED GUP, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE 119 (2007) (describing FOIA as "the crown jewel of transparency").

148 Tomlinson, *supra* note 39, at 124; *see also, e.g.*, Scalia, *supra* note 74, at 16 ("[FOIA has] greatly burdened investigative agencies and the courts."); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1333 (1972) ("[C]ompliance with the FOIA is costly, time-consuming and complex . . . ."). I have not seen any detailed analysis of these burdens.

149 *See, e.g.*, Scalia, *supra* note 74, at 16 (contending that "a single request under [the 1974 FOIA amendments]" cost more than four times the amount the House Committee Report estimated the amendments would cost for an entire year).

150 The de rigueur comparison for many years was to "military bands." *See, e.g.*, Wichmann III, *supra* note 7, at 1255 & n.286.

151 5 U.S.C. § 552(e)(1)(O) (2012).

[executive branch]."[152] This figure was $480,235,967.62 in fiscal year 2015.[153] Even in standard budgetary terms, that sum seems too low. When calculating their FOIA-related costs, agencies are advised by DOJ to include "salaries of FOIA personnel, overhead, and any other FOIA-related expenses."[154] Agencies are not expressly advised to include—and, according to the former President of the American Society of Access Professionals, often fail to include[155]—the nonsalary compensation of FOIA personnel; the prorated salaries, benefits, and overhead associated with employees who provide clerical or technical support to FOIA personnel; or the prorated salaries, benefits, and overhead associated with the much larger pool of employees who contribute to FOIA administration on an ad hoc basis (as explained two paragraphs below). DOJ's costing methodology is thus conservative as well as imprecise. The entire enterprise is also misleadingly narrow, in my view, because FOIA imposes numerous harder-to-quantify "costs" on the administrative state.

Beyond the monetary *compliance costs* that are DOJ's focus, FOIA imposes what we might call *diversion costs* insofar as it diverts the attention of employees away from an agency's substantive mission.[156] This phenomenon occurs in plain sight when non-FOIA personnel are assigned to perform the duties of FOIA personnel. Congressional underfunding puts pressure on agencies to make such reassignments on a regular basis. In fiscal year 2015, the Department of Defense had over 375 employees functioning as the "equivalent" of "full-time FOIA employees," versus an official FOIA staff of 349.[157] DOJ's dollar estimates capture the former group's salaries but not the opportunity cost of its lost labor on other matters.

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152 DOJ FY 2015 SUMMARY, *supra* note 32, at 20.

153 *Id.*

154 U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS 55 (2013).

155 Telephone Interview with Frederick J. Sadler (July 11, 2016). Sadler further observed that DOJ's instruction to count the overhead of FOIA personnel is "insufficiently defined" and "probably results in under-reporting" of overhead expenses for many FOIA offices. Email from Frederick J. Sadler to David Pozen, Professor of Law, Columbia L. Sch. (Aug. 24, 2016) (on file with author).

156 Compliance with FOIA is seen by few, if any, agency heads as part of their agency's mission. *See generally* Suzanne J. Piotrowski & David H. Rosenbloom, *Nonmission-Based Values in Results-Oriented Public Management: The Case of Freedom of Information*, 62 PUB. ADMIN. REV. 643 (2002) (demonstrating this point through a review of agencies' performance plans). Although I focus here on dynamics within the executive branch, FOIA also diverts the attention of federal judges and their staffs from other cases. *See, e.g.*, Savage v. CIA, 826 F.2d 561, 563 (7th Cir. 1987) (Posner, J.) ("We cannot forbear to express concern about the waste of judicial resources that is involved in allowing a person to obtain two levels of federal judicial review of an agency's denial of a [modest FOIA fee waiver claim].").

157 U.S. DEP'T OF DEF., FREEDOM OF INFORMATION ACT (FOIA) ANNUAL REPORT FOR FISCAL YEAR 2015, at 45 (2016) (capitalization omitted). The Department of Defense has an unusually large FOIA operation. The Department of the Treasury, by way of comparison, had approximately

Even if Congress were to appropriate substantially larger sums for dedicated FOIA personnel,[158] non-FOIA personnel would still find themselves diverted by the Act from other matters. Responding to FOIA requests frequently requires that the employees of non-FOIA offices search their emails and files for responsive records, and that a subset of these employees work with FOIA staff to assess such issues as whether a given record is responsive, whether the requester should be asked to narrow the scope of her inquiry, whether the request implicates reverse FOIA, and the applicability of the Act's vaguely worded exemptions to particular documents or to passages or names therein.[159] An air of wariness pervades some of these interactions. The permanent FOIA bureaucracy is so disconnected, culturally and programmatically, from many agency components that even the most FOIA-respectful front office cannot take for granted that the agency's institutional interests or its lawful secrets would be safeguarded in an unsupervised compliance process.[160] For the same set of reasons, no amount of automation could eliminate these diversion costs, which arise in part out of the need for policy expertise and practical judgment in the Act's implementation.[161] As the volume of FOIA requests rises, then, so will the drain on non-FOIA employees' time, resources, and focus.[162]

FOIA can also make it more difficult for agencies to work with private parties on a cooperative basis. As the initial version of the Act began to move through Congress, some agencies complained that it would increase their

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ninety-nine "[e]quivalent" and forty-seven official full-time FOIA employees in fiscal year 2015. U.S. DEP'T OF THE TREASURY, 2015 FREEDOM OF INFORMATION ACT ANNUAL REPORT 34 (2016).

158 Individual agencies, again, receive nothing from FOIA fees. *See supra* note 107.

159 In its handout for new federal employees, DOJ's Office of Information Policy stresses that "FOIA is everyone's responsibility. Any documents you create or maintain as part of your job may be responsive to a FOIA request. FOIA professionals at your agency . . . may call on you for assistance in searching for responsive records and reviewing those records for release." Infographic of *The Freedom of Information Act*, U.S. DEP'T JUST.: OFF. INFO. POL'Y, https://www.justice.gov/sites/default/files/oip/pages/attachments/2015/03/13/foia_infographic.pdf [https://perma.cc/9CMX-PB4L].

160 *See supra* notes 37–45 and accompanying text (noting the high degree of decentralization and low degree of bureaucratic status that has traditionally characterized FOIA work). The growing use of contractors for FOIA services exacerbates these concerns. *Cf.* Hogan, *supra* note 42, at 22 (discussing the lack of "day-to-day oversight" of FOIA contract workers (internal quotation marks omitted)).

161 On the potential for automated systems to facilitate FOIA processing, see Cindy Dillow, *The Role of Automation in FOIA Compliance*, INFO. MGMT., Jan./Feb. 2016, at 37. Both governmental and nongovernmental automated systems have recently been introduced to facilitate FOIA requesting. *See, e.g.*, FOIA MACHINE, https://www.foiamachine.org [https://perma.cc/6L54-LBHT]; FOIAONLINE, https://foiaonline.regulations.gov/foia/action/public/home [https://perma.cc/7FU7-3Z46]. The analysis above shows why, from an agency's perspective, any efficiency gains from these developments are likely to be offset by the costs of expanding the requester pool through free online submission tools.

162 Anecdotal accounts suggest that this drain may already be substantial in some agencies. *See, e.g.*, Michael A. Rodgers, *Freedom of Information Act Requests: Six Keys to Handling Them*, DEF. AT&L, Jan.–Feb. 2016, at 50, 50 (stating that, in the author's experience, FOIA requests "consistently caused program and contracting personnel to become distracted from their mission").

contracting and procurement costs by revealing what they were willing to accept or expend in contract negotiations and other transactions.[163] Once agencies have entered into commercial agreements, these costs may be raised still higher by their counterparts' use of FOIA to suss out potential claims that might be brought in litigation.[164] Other agencies worried in the 1960s that FOIA would increase their *information acquisition costs* by making regulated firms and their employees more reluctant to share frank accounts of their activities, lest those accounts (and the names of informants) be requested and then used to their detriment.[165] Although the development of reverse FOIA and related doctrines mitigates this risk,[166] there is some evidence to suggest that it continues to undermine "government efforts to collect information about industries, products, and markets."[167]

Along with other 1970s-era transparency measures such as the Federal Advisory Committee Act (FACA)[168] and the Government in the Sunshine Act (GITSA),[169] FOIA imposes *deliberation costs* as well.[170] To some unknown but seemingly nontrivial extent, the prospect of "being FOIA'd" deters candor among executive branch officials and leads them to avoid recordkeeping in favor of oral exchanges and "*sub rosa* deals."[171] The Act's deliberative privilege

163 *See* Lebovic, *Seeing FOIA Like the State*, *supra* note 93, at 5.

164 *See supra* note 99 and accompanying text.

165 *See* Lebovic, *Seeing FOIA Like the State*, *supra* note 93, at 6-8. Even if a firm felt reasonably confident that its data would be protected, this fear might nonetheless be invoked strategically as a basis for withholding.

166 *See supra* text accompanying notes 100–101.

167 Cate et al., *supra* note 108, at 44; *see also, e.g.*, BIPARTISAN POLICY CTR., HOMELAND SEC. PROJECT, CYBER SECURITY TASK FORCE: PUBLIC-PRIVATE INFORMATION SHARING 6 (2012) ("Another chilling effect on sharing [information with the federal government] comes from the concern that private proprietary information compiled in government databases will be discoverable through [FOIA] requests."). The fact that Congress took pains in the Homeland Security Act of 2002 to clarify that voluntarily submitted "critical infrastructure information" is exempt under FOIA, Pub. L. No. 107-296, § 214, 116 Stat. 2135, 2152-55 (codified at 6 U.S.C. § 133 (2012)), attests to the persistence of this "chilling" concern.

168 Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. §§ 1–16 (2012)).

169 Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of 5 and 39 U.S.C.).

170 Because FACA and GITSA require open meetings and not just accessible records, their deliberative costs may well be greater than FOIA's where they apply. *See, e.g.*, RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 425 (6th ed. 2014) ("It is increasingly clear that, while [GITSA] has opened commission meetings to public scrutiny, it has done so at some injury to the process of decisionmaking."); Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 360-67 (2011) (reviewing evidence that open meetings laws "chill discussion," hamper compromise, generate evasive behavior, and shift power to staff and lobbyists); *see also* Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, *in* POLITICAL NEGOTIATION: A HANDBOOK 141, 177 (Jane Mansbridge & Cathie Jo Martin eds., 2016) ("By now, the empirical evidence on the deliberative benefits of closed-door interactions seems incontrovertible.").

171 Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 393 (2013); *see also* Herz, *supra* note 16, at 584-85 ("FOIA imposes no obligation to generate, compile or interpret

exemption responds to this concern, but only partially.[172] Recent lawsuits, for example, have clarified that opinions by DOJ's Office of Legal Counsel (OLC) are not categorically covered by this exemption;[173] as FOIA users have increasingly started requesting such opinions, agencies have increasingly stopped turning to OLC for legal advice.[174] Researchers have identified similarly perverse consequences of FOI laws on the quality of decisionmaking, as well as the production of transparency, at the state level[175] and in foreign countries.[176]

FOIA imposes additional *political and agenda-setting costs* on agencies by giving those who oppose their work a low-cost tool with which to harass and embarrass them. Businesses and trade groups threatened by a new regulatory or enforcement policy use FOIA to "dig up dirt" on the policy and the people behind it.[177] They also use FOIA to extract large volumes of background documentation, which they then communicate back to the agency in an effort to "overload" its staff and shape the administrative record.[178] Nonprofit organizations that object on ideological grounds to an agency's mission or to its leadership employ similar tactics, backed up by a continuous succession of FOIA lawsuits.[179]

These tactics often have a partisan valence. On the libertarian right, FOIA is celebrated as a means to impede "the Statists" at disfavored agencies through "witch

information. The statute applies solely to 'records' which exist independently of the statute. Thus, it creates some disincentive to create records . . . ." (emphasis omitted)); Cass R. Sunstein, *Output Transparency vs. Input Transparency*, *in* TROUBLING TRANSPARENCY, *supra* note 93 (manuscript at 13) ("[O]ne of the consequences of FOIA is to reduce reliance on email and written documents."). *But see* Kreimer, *supra* note 89, at 1018 (identifying "[s]tructural features of the federal government, and of records themselves, [that] raise barriers to keeping initiatives entirely 'off the books'").

172 The volume of litigation over this exemption (Exemption 5) in itself suggests that officials cannot casually rely on it. *See* PATRICK BIRKINSHAW, FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL 466-67 (4th ed. 2010) (stating that Exemption 5 is the most litigated FOIA exemption).

173 *See* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. (forthcoming 2017) (manuscript at 40 nn.183–84), http://www.law.nyu.edu/sites/default/files/upload_documents/16_10_24_Renan_Law%20Presidents%20Make.pdf [http://perma.cc/C3WN-7AGD] (collecting such cases).

174 *See id.* at 39, 44; Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015), https://www.lawfareblog.com/decline-olc [https://perma.cc/93RF-LANV].

175 *See, e.g.*, R. Karl Rethemeyer, *The Empires Strike Back: Is the Internet Corporatizing Rather than Democratizing Policy Processes?*, 67 PUB. ADMIN. REV. 199, 206 (2007) (finding through interviews that state agency heads avoid using internet communications so as not to "leave[] traces that are subject to the FOIA").

176 *See, e.g.*, David Cuillier, *The People's Right to Know: Comparing Harold L. Cross's Pre-FOIA World to Post-FOIA Today*, 21 COMM. L. & POL'Y 433, 437 (2016) (describing studies that suggest certain FOI laws, such as Kosovo's, "actually *hinder* access by providing public officials legal rationales for delays, excessive copy fees, and denial"); Sandoval-Ballesteros, *supra* note 98, at 418-19 (discussing techniques used by Mexican bureaucrats to avoid FOI requests).

177 Rethemeyer, *supra* note 175, at 206.

178 *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1380 n.224 (2010).

179 *Cf.* James O'Reilly, *ACUS, FOIA & Arbitration: Breakthrough or Fool's Errand?*, ADMIN. & REG. L. NEWS, Fall 2013, at 9, 9 ("The 13,000-plus requesters who have sued under FOIA since 1967 have predominantly been financially motivated or ideologically hostile to an agency program.").

hunts" and "[f]ishing expeditions."[180] The conservative Judicial Watch foundation came to prominence over the past two decades largely by using FOIA to "trip up" Democratic officials.[181] Freedom Watch now plows the same ground.[182] There is no comparable outfit (Civic Solidarity Watch?) on the progressive left.[183] In the environmental area, FOIA-fueled witch hunts and fishing expeditions have become so serious that a legal defense fund was established in 2011 specifically to help climate scientists fend off "malicious freedom of information act requests."[184] These oppositional uses of FOIA not only exacerbate diversion and deliberation costs but also alter the political sociology of agency action, making it harder for administrators to formulate and carry out affirmative agendas of all kinds.

To be sure, while the FOIA "tax" on government service and agency decisionmaking may be uncommonly intrusive, some of these sorts of costs are familiar to American administrative law. FACA and GITSA, as already noted, have been critiqued on deliberative grounds,[185] and scholars continue to debate whether the APA itself excessively (or insufficiently) hampers regulation.[186] Whatever the best view of these other statutes, it is long past time for such sustained, sober attention to FOIA's impact on the administrative process, especially as the annual volume of requests heads toward the one million mark.[187]

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180 CHRISTOPHER C. HORNER, THE LIBERAL WAR ON TRANSPARENCY: CONFESSIONS OF A FREEDOM OF INFORMATION "CRIMINAL" 195, 229 (2012). Now a senior fellow at the Competitive Enterprise Institute, the author of this book is a prominent FOIA attorney and "climate-truth watchdog." Andrea Billups, *Chris Horner, FOIA Watchdog, Demands Transparency from Government's Global Warming Advocates*, WASH. EXAMINER (Feb. 26, 2014), http://www.washingtonexaminer.com/chris-horner-foia-watchdog-demands-transparency-from-governments-global-warming-advocates/article/2544632 [https://perma.cc/UAU8-K5CG].

181 Oliver Willis, *Meet Judicial Watch, A Driving Force Behind the Clinton Email Story That Keeps Duping the Press*, MEDIA MATTERS (Oct. 2, 2015), http://mediamatters.org/blog/2015/10/02/meet-judicial-watch-a-driving-force-behind-the/205941 [https://perma.cc/65SM-P4U3].

182 *See, e.g.*, Michael Macagnone, *Freedom Watch Guns for Clinton Emails at DC Circ.*, LAW360 (Apr. 2, 2015), http://www.law360.com/articles/638115/freedom-watch-guns-for-clinton-emails-at-dc-circ [https://perma.cc/W5DJ-Z3VY].

183 Civil libertarian organizations such as the American Civil Liberties Union and the Electronic Frontier Foundation use FOIA frequently and skillfully in the national security field. *See* Kreimer, *supra* note 89, at 1024. But the Act only skims the surface of this field, *see supra* subsection II.A.2, and the weaponization of FOIA is not a defining feature for these organizations, or for liberal-leaning transparency groups such as the National Freedom of Information Coalition or the Open Government Partnership, as it is for Judicial Watch.

184 *About*, CLIMATE SCI. LEGAL DEF. FUND, http://climatesciencedefensefund.org/about [https://perma.cc/U696-XZEG].

185 *See supra* notes 168–170 and accompanying text.

186 *See, e.g.*, Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97 nn.5–6 (2003) (collecting sources on both sides of this debate). Although beyond the scope of this Article, an analysis that situates FOIA within the historical development of the APA and compares their political economies could deepen our understanding of both statutes.

187 *See supra* note 32 and accompanying text (noting the 700,000-plus FOIA requests made in fiscal year 2015).

And to be sure, the burdens highlighted here are difficult to measure and must be considered alongside FOIA's potential benefits, not only for society at large but also for the administrative process. The principal benefit that is touted in this regard—seen by many as "the principal inspiration for the FOIA" and "its symbolic central pillar"—is the Act's promise "to ensure that public servants . . . serve the public and not themselves."[188] In other words, the costs that FOIA piles on agencies are thought to reduce agency costs for Congress and the American people by helping to keep executive branch officials on the straight and narrow. This, in turn, may redound to the bureaucracy's benefit by making its principals feel more confident in granting it authority and resources. Part III will raise a number of questions about the "watchdog" rationale for FOIA, including whether it has lost force over time. For the moment, though, it bears note that (i) there is no evidence that the Act has enhanced popular or congressional confidence in federal agencies and thereby laid a foundation for their long-term empowerment,[189] and that (ii) any positive effect on governance through this monitoring mechanism is itself highly speculative. Social scientists do not appear to have seriously investigated, much less developed a consensus on, FOIA's role in ensuring that public servants serve the public and not themselves.[190] Just as more empirical work is needed

188 Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 197 (1990); *see also* Cate et al., *supra* note 108, at 42 ("First and most important [of Congress's purposes], the FOIA plainly facilitates the watchdog function of the public over the government: The public must have access to the government information necessary to ensure that government officials act in the public interest."); William Safire, *Free Speech v. Scalia*, N.Y. TIMES, Apr. 29, 1985, at A17 (asserting that FOIA "has done more to inhibit the abuse of Government power . . . than any legislation in our lifetime").

189 *See infra* notes 217–224 and accompanying text; *see also* Kreimer, *supra* note 89, at 1073 n.241 (observing that the claim 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 . . . seems less than fully persuasive in [the FOIA] setting" (citation omitted)).

190 It is clear (and not at all speculative) that the work of many federal officials has been publicized through FOIA, which generates retail accountability in the form of reputational and other consequences when that work is seen to be faulty. What is far less clear is whether FOIA has improved the quality of administrative action in a larger, lasting sense.

To my knowledge, no scholarship has tackled this question directly. At the state level, some research suggests that "stronger" FOI laws may be associated with reduced rates of public corruption convictions. *See* Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Act Laws on Public Corruption*, 115 J. PUB. ECON. 18, 30-36 (2014). Beyond the United States, a new cross-national study finds that FOI laws are associated with greater "bureaucratic efficiency," but only if accompanied by a high degree of media freedom, NGO activity, and political competitiveness. Krishna Chaitanya Vadlamannati & Arusha Cooray, *Do Freedom of Information Laws Improve Bureaucratic Efficiency? An Empirical Investigation*, 68 OXFORD ECON. PAPERS 968, 987-91 (2016); *see also id.* at 968-69 (describing the literature on FOI laws' impact on governance as "scant"). Other cross-national studies report negligible or negative correlations between FOI laws and governance indicators. *See* Samia Costa, *Do Freedom of Information Laws Decrease Corruption?*, 29 J.L. ECON. & ORG. 1317, 1317 (2012) (finding that "countries that adopted FOI laws saw an increase in perceived corruption and a decrease in the quality of governance");

to bear out the relatively novel concerns raised by this Article, more empirical work is needed to bear out the classic anti-abuse case for FOIA.

The normative structure of this watchdog rationale also warrants reflection. In a world in which bureaucrats are believed to be mendacious, corrupt, or otherwise ill-motivated, it may make sense to trade off some significant amount of administrative burden for the prospect of discipline through disclosure.[191] This tradeoff starts to look less sensible, however, when the relevant bureaucracies are already highly regulated and professionalized and when the disclosure policy largely gives a pass to the state's least visible, most violent components. FOIA's watchdog rationale ignores these complexities and embodies a deeply skeptical set of assumptions about the administrative process, along with an inherently delegitimating vision of government—a liberalism of fear.[192] It privileges a conception of accountability as restraint, rather than responsiveness. It conflates good agency action with non-abusive agency action.

So thoroughly has this vision shaped the academic and popular discourses on FOIA that when it is observed that officials sometimes try to avoid the Act by communicating orally[193] or that there is a "long standing FOIA-averse attitude common within most executive administrations,"[194] the observations are taken to confirm the very governmental crookedness that makes FOIA indispensable. These data points, however, are equally consistent with the

Monica Escaleras et al., *Freedom of Information Acts and Public Sector Corruption*, 145 PUB. CHOICE 435, 455 (2010) (finding "no significant relationship between FOI acts and corruption" in developed countries, and "rising levels of corruption" associated with FOI acts in developing countries). The qualitative literature is similarly thin and inconclusive. *See, e.g.*, Ben Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 GOVERNANCE 561, 571 (2010) ("In the United Kingdom, interviews with officials found little evidence of FOI having positively impacted upon the quality of advice given to ministers, the quality of records made, the evidence base, or relations with third parties.").

191 Transparency strategies, as Professor Frederick Schauer has observed, are inherently conservative insofar as they reduce the likelihood of both very bad and very good decisions. *See* Schauer, *supra* note 92, at 1351-54. "In some times and places," Schauer reflects, "such conservatism is well justified. If I were a Zimbabwean, I would worry considerably about bad decisions made outside of the gaze of the population and the international community, but I would not worry very much about preventing good decisions by the government of Robert Mugabe." *Id.* at 1353.

192 *See* JUDITH N. SHKLAR, ORDINARY VICES 237 (1984) (describing a "liberalism of fear," traceable to Montesquieu, that "concentrates . . . single-mindedly on limited and predictable government"); *see also* COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 147-60 (2004) (arguing that throughout the Cold War a liberalism of fear underwrote U.S. government moralism and violence abroad even as it underwrote minimalism and caution at home).

193 *See supra* note 171 and accompanying text.

194 Ben Wasike, *FoIA in the Age of "Open.Gov": An Analysis of the Performance of the Freedom of Information Act Under the Obama and Bush Administrations*, 33 GOV'T INFO. Q. 417, 418 (2016). Similar dynamics recur abroad. For a catalog of "informal methods of resistance" to FOI laws observed in Commonwealth bureaucracies, see Alasdair Roberts, *Dashed Expectations: Governmental Adaptation to Transparency Rules*, *in* TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 107, 111-18 (Christopher Hood & David Heald eds., 2006) (capitalization omitted).

premise that generally reasonable and well-intentioned public servants see FOIA as a serious hindrance to their statutorily assigned work. FOIA avoidance and aversion, on this premise, are not necessarily markers of crookedness so much as of the tension between the strictures of the Act and the demands of bureaucratic rationality. Exactly what to make of administrative resistance to any given law is a complicated, context-sensitive question. The fact that the latter interpretation never even seems to occur to most commentators suggests that, on top of the other burdens identified above, FOIA has been generating antigovernmental *ideological costs* for agencies and their personnel.

Once more, it is important to recall that FOIA is but one of many models for securing "open" government, as these implications may not generalize across the full set. Other transparency strategies, such as affirmative disclosure, ought to impose fewer practical and pecuniary burdens on agencies because they are not request-driven. They ought to impose fewer ideological costs because they are not fear-driven.

2. Representations of Government

> "I often describe the handling of my FOIA request as the single most disillusioning experience of my life."
>
> — anonymous twenty-six-year-old freelance journalist, 2016[195]

Compounding the foregoing concerns, FOIA helps to shape public perceptions of government through several more direct channels: journalism that relies on records obtained through FOIA, journalism about the Act itself, and ordinary citizens' experience of the requesting process. These channels collectively generate a relentless, and distorted, narrative of bureaucratic failure.

Arguments about FOIA's democratic value emphasize above all else its contributions to investigative reporting.[196] Although the news media account for only a small fraction of total requests—six percent, according to a generous estimate from 2005[197]—FOIA has played some part in hundreds of stories over

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195 FOIA IS BROKEN, *supra* note 7, at ii.

196 *See, e.g.*, Kwoka, *FOIA, Inc.*, *supra* note 33, at 1371 ("FOIA was . . . designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public . . . .").

197 *Frequent Filers*, *supra* note 34; *see also id.* (finding that "[n]onprofit groups" file three percent of all FOIA requests). The six percent estimate is generous because there was "a spike in journalistic activity" during the period under consideration (September 2005) on account of Hurricane Katrina and because the study considered only Cabinet departments and "large" agencies, which may tend to attract a disproportionate share of media requesters. *Id.* The media's use of FOIA, moreover, fell off steeply after 2005 as the newspaper industry contracted. *See* JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 168-70 (2016). Journalists

the decades.[198] Content analysis demonstrates several dominant motifs in this reporting. Professors Bruce Cain, Patrick Egan, and Sergio Fabbrini examined newspaper stories referencing FOIA from October 1999 to September 2000 and found that the largest share (twenty-five percent) "deal with wrongdoing, embarrassing information, and administrative incompetence" and that the "most popular type" of FOIA story in the United States, as in France, "focuse[s] on the exposure of bad management or the abuse of public money."[199] Consistent with these results, Professor James Hamilton examined stories submitted for an investigative reporting prize over the past several decades and found that, among those that utilized a state or federal FOI law, the largest share (over twenty-five percent) featured claims of misconduct, harassment, or waste.[200] In a more impressionistic vein, Professor Alasdair Roberts has observed that "the sort of news that is generated by [a FOI law] is unlikely to be flattering to government," with an emphasis on "internal bureaucratic conflicts or mismanagement, or contradictions between actual and professed policy."[201]

Government misconduct and mismanagement are serious matters, of course, and this brand of FOIA-facilitated journalism has generated meaningful forms of political deliberation and accountability. That said, there are many strategies for rooting out misconduct and mismanagement, and there is good cause to believe that such journalism systematically overrepresents the severity of the problem—and not merely because of the media's appetite for scandal. One reason is that FOIA applies only to government agencies, which raises the

account for a similarly small fraction of FOI requests at the state level. *See* Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, *in* TROUBLING TRANSPARENCY, *supra* note 93.

198 One should be skeptical of the "greatest hits" mode of argument frequently found in FOIA commentary, in which the Act is lauded on the basis of a small set of stories it helped make possible. But some researchers have looked into the matter more dispassionately and reported significant results. *See, e.g.*, HAMILTON, *supra* note 197, at 157 (finding that approximately fourteen percent of news stories submitted for an Investigative Reporters & Editors award in recent years have involved a request for government documents through the federal FOIA or a state open records law); Bruce E. Cain et al., *Towards More Open Democracies: The Expansion of Freedom of Information Laws*, *in* DEMOCRACY TRANSFORMED? EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES 115, 135 (Bruce E. Cain et al. eds., 2003) (finding that stories referencing FOIA appeared roughly three times per week across four of the largest U.S. newspapers from October 1999 to September 2000). The Sunshine in Government Initiative has collected over 700 stories that make use of FOIA in an online database. *The "FOIA Files*," SUNSHINE IN GOV'T INITIATIVE (2017), http://sunshineingovernment.org/wordpress/the-foia-files [https://perma.cc/5MPC-YQJD].

199 Cain et al., *supra* note 198, at 136.

200 *See* HAMILTON, *supra* note 197, at 157-58 ("The top three findings in terms of percentage of investigations involving government records requests were sexual harassment, misconduct, and waste.").

201 Roberts, *supra* note 194, at 119; *see also* Worthy, *supra* note 190, at 570 (remarking that "[h]igh-profile FOI stories" in the United Kingdom have "frequently featured . . . apparent smoking guns or evidence of inconsistency, poor behavior, or failure").

relative cost of reporting on nongovernmental actors.[202] The public sector becomes the public face of organizational incompetence and venality.

A subtler reason is that the Act applies only to "records," and federal employees are obligated under a separate set of laws to report waste, fraud, and abuse whenever these are observed.[203] None of FOIA's exemptions is designed to shield such conduct. Unlike many other agency activities, incidents of waste, fraud, and abuse thus produce a steady flow of requestable records, which become sitting ducks for media outlets. The fixation on government impropriety that characterizes FOIA stories is not an inevitable entailment of investigative journalism; it is partly an artifact of the Act's idiosyncratic design.

After stories about waste, fraud, and abuse, a second major category of stories that reference FOIA focuses on the alleged failings of the Act itself. The robustness of this genre becomes less surprising when one considers that FOIA is a machine built to fail. As explained above, FOIA's promise of full agency disclosure and the rhetorical sacralization that attends this promise are belied not only by bureaucratic resistance, but also by the Act's broadly framed exemptions and judicial deference to the executive.[204] Even if no records are ultimately withheld, FOIA's stringent disclosure deadline—currently twenty days, with one ten-day extension permitted in exceptional circumstances[205]—has never been realistic in light of compliance complexities and legislated funding levels. Agencies miss their time limits by months if not years,[206] and the courts excuse these statutory violations.[207] In addition to causing delays and denials, these practices socialize the journalists who use FOIA into an impersonal, adversarial, and seemingly lawless administrative culture.

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202 *See supra* notes 97–98 and accompanying text (discussing this feature of FOIA); *see also* HAMILTON, *supra* note 197, at 151 (explaining why corporations are often "hard targets" for investigative reporters); Mark Ames, *Seymour Hersh and the Dangers of Corporate Muckraking*, PANDO (May 28, 2015), https://pando.com/2015/05/28/seymour-hersh-and-the-dangers-of-corporate-muckraking [https://perma.cc/4WH8-D86P] (describing and critiquing the "trend in muckraking journalism over the past few decades, away from fighting private corporate power, in favor of fighting government power").

203 *See, e.g.*, 5 C.F.R. § 2635.101(b)(11) (2015) (requiring all federal employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities").

204 *See supra* notes 5–19 and accompanying text; subsections II.A.2–B.1.

205 *See* 5 U.S.C. § 552(a)(6) (2012).

206 *See, e.g.*, COAL. OF JOURNALISTS FOR OPEN GOV'T, STILL WAITING AFTER ALL THESE YEARS: AN IN-DEPTH ANALYSIS OF FOIA PERFORMANCE FROM 1998 TO 2006, at 3 (2007) (finding that only one of the twenty-six agencies under consideration, the General Services Administration, was "able to consistently meet the statutory deadline for FOIA responses to complex requests"); *see also* FOIA IS BROKEN, *supra* note 7, at 34 (stating that the "biggest barrier of all" experienced by FOIA users is "delay, delay, delay" (capitalization omitted)).

207 *See* 1 O'REILLY, *supra* note 12, § 7:30 (explaining that, even after Congress seemed to crack down on delays in its 1996 amendments, "relatively few cases have held agencies strictly to the statutory period").

A journalism of disenchantment follows. ProPublica recently devoted a feature to its reporters' "most frustrating public record failures."[208] Notwithstanding that FOIA "was designed to give the public the right to scrutinize the records of government agencies," the feature inveighs, "almost every reporter on our staff can recite aneurysm-inducing tales of protracted jousting with the public records offices of government agencies," as "[l]ocal, state and federal agencies alike routinely blow through deadlines laid out in law or bend them to ludicrous degrees."[209] These tales are told and retold as FOIA folklore. The Act "has been a disappointment to journalists" virtually from the day it was passed,[210] and "editorial scorn routinely greets the failure of federal agencies to respond promptly and fully to FOIA requests."[211] "Nothing in the world makes my blood boil faster," Pulitzer Prize–winning journalist David Barstow once wrote, "than the federal Freedom of Information Act."[212] With so many journalists left feeling frustrated, denied their legal due, and in want of leverage over the targeted agency as well as a story to file, the "brokenness" of FOIA frequently becomes the story.[213]

The thousands upon thousands of ordinary citizens who submit FOIA requests experience similar frustrations. Members of the mainstream media tend to be repeat players, at least, with the capacity to push back against agencies and a clear statutory entitlement to fee waivers.[214] Little wonder, then, that members of the general public regard the FOIA process as unreasonably slow and "desperately wrong."[215] The same holds true at the state level. In a 2007 report on "FOI responsiveness" by the Better Government

208 *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016), https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front [https://perma.cc/MG3D-VMQ9].

209 *Id.*

210 Carroll, *supra* note 53, at 195.

211 Richard A. Guida, *The Costs of Free Information*, 97 PUB. INT. 87, 87 (1989).

212 David T. Barstow, *The Freedom of Information Act and the Press: Obstruction or Transparency?*, 77 SOC. RES. 805, 805 (2010).

213 This pattern also recurs abroad. As Roberts astutely notes of FOI laws in Anglo-American democracies, "journalists and advocacy groups will learn that the filing of an [sic] FOIA request is itself an event around which a news story can be constructed; similarly a failure to provide information within a statutory deadline, or an outright denial of information . . . are all pretexts for further news coverage." Roberts, *supra* note 194, at 120.

214 *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2012) (prescribing reduced fees for "representative[s] of the news media"). *But cf.* FRANKLIN, *supra* note 58, at 511 (explaining that FOIA's fee waiver scheme has been "a significant source of friction between the media and government agencies").

215 FOIA IS BROKEN, *supra* note 7, at 38; *see also id.* at ii ("First-time or infrequent requesters . . . shared the most disheartening responses. Novice FOIA requesters were unprepared for the delay tactics and other obstacles to obtaining the information they were seeking."); Carroll, *supra* note 53, at 195 (noting "the near-universal agreement that FOIA is dysfunctional").

Association and the National Freedom of Information Coalition, thirty-eight states were given a grade of F and ten states a C or D.[216]

FOIA, accordingly, conveys negative messages about government through a set of mutually reinforcing mechanisms. The disillusioning experiences of users are validated and amplified both in media stories that deplore the Act's implementation and in stories that draw on released records to spotlight the bureaucracy's worst moments. The FOIA process *performs* the very sort of government dysfunction that the Act is then enlisted to expose. If one wished to design a transparency policy that would sow rampant cynicism and animosity toward the administrative state, it would be hard to do much better.

The ultimate consequences of these dynamics, it must be said, are hard to pin down. Measures of trust in government declined in the United States and other countries following the adoption of FOI laws.[217] Yet while there is some modest empirical evidence[218] and a burgeoning critical literature from abroad[219] to suggest a connection, causality would be all but impossible to prove given (among other things) the complex determinants of trust.[220] At a minimum, the claims made by many around the time of FOIA's enactment that the Act would secure "confidence in government"[221] look exceedingly naïve in light of subsequent developments. More specifically, this Section has shown how FOIA enables a political discourse and ideology of antigovernmentalism that continually challenge the notion of an administrative state capable of addressing social problems. In an essay titled *The Tyranny of Transparency*, the British anthropologist Marilyn Strathern once urged readers to ask, "What

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216 Charles Davis, *Report: Grading the United States on FOIA Responsiveness*, BETTER GOV'T ASS'N (Nov. 1, 2008), http://www.bettergov.org/news/report-grading-the-united-states-on-foia-responsiveness [https://perma.cc/7YM6-7JMQ]. No state received an A grade. *Id.*

217 *See* Worthy, *supra* note 190, at 575.

218 *See, e.g.*, *id.* at 576 (reporting that in a 2008 survey of UK FOI requesters, only three percent "felt FOI increased trust in government" whereas forty percent felt "it had decreased their trust"); *see also id.* at 575 (summarizing qualitative studies of Canada's and New Zealand's FOI laws that suggest a negative effect on trust).

219 *See* TERO ERKKILÄ, GOVERNMENT TRANSPARENCY: IMPACTS AND UNINTENDED CONSEQUENCES 25 (2012) (arguing that access-to-information policies can have paradoxical effects on political accountability and trust in government insofar as they "build[] on the idea of conflict in state–citizen relations"); ONORA O'NEILL, A QUESTION OF TRUST 61-80 (2002) (suggesting that growing demands for institutional transparency have damaged trust and promoted a "culture of suspicion"); Hans Krause Hansen & Mikkel Flyverbom, *The Politics of Transparency and the Calibration of Knowledge in the Digital Age*, 22 ORGANIZATION 872, 875 (2015) (reviewing a range of "critical studies [that] have argued that transparency, usually promoted as a trust-enhancing measure, can spur mistrust").

220 *See* Roberts, *supra* note 194, at 119 ("[D]eterminants of trust are multifarious.").

221 Victor H. Kramer & David B. Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49, 49 (1974) ("[FOIA] ranks with the Bill of Rights as a basis for the preservation of citizen's confidence in government . . . ."); *see also* 3 O'REILLY, *supra* note 12, § 24:13 ("FOIA was sponsored with the ideal of public requests and greater trust in government when openness had been achieved.").

does visibility conceal?"[222] The simple yet profound answer, in FOIA's case, is a bureaucracy that basically works pretty well.[223]

Once more, other transparency strategies may not have these same implications, at least not to the same degree. Affirmative disclosure requirements, for instance, have not generated such contemptuous media coverage or escalating cycles of cynicism where they have been tried. Whistleblowers can be channeled to inspectors general and congressional committees in advance of the press. "Leaks" can expose the inner workings of the crusading state while also, in many cases, serving the policy goals of senior officials.[224] Conditioning legal effect on prior publication leaves ample space for deliberation and negotiation. And each of these alternative approaches is apt to involve less litigation and administrative burden. The United States' enormous practical and symbolic investments in FOIA since 1966 have not only impeded federal agencies in the above-described ways, but have also impeded our ability to see what a costly, commercial, and limited version of transparency the Act supplies.

III. COMPLICATIONS AND COUNTERARGUMENTS

We now have in place all of the building blocks for a radical reassessment of FOIA: not the standard suggestion that the Act needs refinement on this or that margin to achieve its full potential, but rather the much starker proposition that its request-driven strategy may be flawed beyond repair. More empirical work is needed to substantiate several of the hypotheses outlined above. Yet, as I have tried to show, many of the interlocking arguments that support such a "radical" critique are already reasonably well-supported in theory and in fact. Taken together, I submit, these arguments raise serious doubts about the wisdom of FOIA from virtually any normative perspective—perhaps fatal doubts from certain left-liberal or efficiency-oriented perspectives. They ought to shift the burden to any supporter of FOIA who favors a vigorous administrative state to explain how those commitments can be reconciled.

Many readers may be keen to object at this point that even if the concerns raised in Part II are more or less valid, surely FOIA remains a structural necessity (or at least an important safeguard) in a real democracy on account of the other public values that it serves and the distinctive manner in which it serves them. I cannot take up every such objection in this Article, the main

222 Marilyn Strathern, *The Tyranny of Transparency*, 26 BRIT. EDUC. RES. J. 309, 310 (2000).

223 *See generally* CHARLES T. GOODSELL, THE NEW CASE FOR BUREAUCRACY (2015) (arguing based on a wide variety of evidence that U.S. public bureaucracies are among the best in the world and far more effective, efficient, and free of corruption than is commonly assumed).

224 *See* Pozen, *Leaky Leviathan*, *supra* note 67, at 515 (arguing that "the executive's toleration of" anonymous disclosures of confidential information to the press "is a rational, power-enhancing strategy and not simply a product of prosecutorial limitations").

goal of which is to introduce a revisionist account. But in this Part, I will aim to address, succinctly, what I see as the three strongest counterarguments to the claim that FOIA tends to degrade progressive features of state and society while contributing less to democratic flourishing than is generally assumed.

A. *Due Process Interests*

The classic justifications for FOI laws emphasize values already touched upon, such as accountability, anti-abuse, and an informed electorate. In American practice, FOIA has evolved to serve a distinct function in protecting the due process interests of certain groups. Most strikingly, tens of thousands of noncitizens facing removal or other immigration proceedings have filed FOIA requests in recent years to obtain the government's case file (or "A-File") on them.[225] Lacking an administrative discovery mechanism with which to access this information,[226] these individuals and their lawyers turn to FOIA as a workaround. Additional groups that have enlisted FOIA to obtain personal files in support of possible legal claims include prisoners seeking their presentence reports[227] and military veterans and Social Security recipients seeking records relating to their benefits.[228] These uses of FOIA, as Professor Kwoka has suggested, "arguably produce the public good of fairer . . . hearings and more accurate outcomes"[229]—or, in other words, due process benefits.

Beyond these discrete individual-rights contexts, the predominance of commercial requesters might also be defended on due process grounds.[230] If businesses are especially likely to be targeted by the regulatory and enforcement efforts of a given federal agency—as one would expect in areas ranging from securities law to environmental law to consumer protection—then it makes sense that businesses would be especially eager to learn about the agency's doings. They have the greatest need for notice and an opportunity to be heard before the law is interpreted or implemented by the agency to their disadvantage. Viewed through this lens, FOIA supports not only public knowledge about government in general, but also a more specific due process

225 For discussions of this development, see Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1843 n.272 (2013); and Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 537-41 (2011).

226 *See* Regina Germain, *Putting the "Form" in Immigration Court Reform*, 84 DENV. U. L. REV. 1145, 1146 (2007) ("What might appear most disturbing to an attorney coming to immigration court from a different area of practice is that even when there are rules, what is noticeably absent from them are some of the most common areas covered by civil rules of procedure and rules of evidence in other courts. For example, there are very limited rules of discovery.").

227 *See* U.S. Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988) (upholding this practice).

228 *See supra* note 34 and accompanying text.

229 Kwoka, *FOIA, Inc.*, *supra* note 33, at 1421 n.412.

230 I thank Fred Schauer for pressing me on this point.

interest on the part of those subject to coercive state action in knowing as much as feasible about the contours of that action. And because it is well-settled that procedural due process rights attach to adjudicative proceedings but not to quasi-legislative ones,[231] we can see FOIA as a tool for bridging the adjudication–rulemaking gap in due process doctrine.

These lines of argument caution against too-easy hand-wringing about FOIA's regressive elements or the large volume of commercial requesters. But they do not, in the end, supply compelling justifications for FOIA. Rather, they supply compelling justifications for the affordance of due process protections in various administrative settings. FOIA itself is ill-suited to the task. Noncitizens facing removal, for instance, may well find that the FOIA process is so slow as to be of little use[232] or that certain important documents, such as interview notes from an initial asylum interview, are not attainable under the Act.[233] Whatever due process interests businesses may have in learning about agencies are likewise hampered by FOIA's intractable delays, as well as by its processing fees and default norm of nondisclosure. At least in scenarios where coercive state action is threatened, an affirmative disclosure regime—with the burden on the government to supply relevant information to relevant parties in advance—could promote due process values more fully and efficiently than a request-driven approach.

FOIA, in short, is not a satisfying solution but an ersatz band-aid for various procedural deficits generated by the modern administrative state. Where we find FOIA doing due process work, we find due process interests being served poorly. These emergent uses of the Act do not redeem the FOIA strategy, although they may point to holes in the legal fabric that deserve more meaningful mending.

B. *Investigative Reporting and Fire Alarm Oversight*

The strongest arguments for FOIA, in my view, center on its ability to assist investigative reporting and, through this reporting, fire alarm oversight by members of Congress.[234] Even if journalists love to hate FOIA, they have relied on the Act and its state-level analogues to clarify, corroborate, and deepen their work on hundreds of significant stories about problematic agency behaviors.[235] Records obtained through FOI laws have proven especially useful

231 *See* Kagan, *supra* note 38, at 2362.

232 *See* Traum, *supra* note 225, at 540 & n.299.

233 *See* Larry R. Fleurantin, *Immigration Law: Nowhere to Turn—Illegal Aliens Cannot Use the Freedom of Information Act as a Discovery Tool to Fight Unfair Removal Hearings*, 16 CARDOZO J. INT'L & COMP. L. 155, 165-66 (2008).

234 *See supra* notes 69–74 and accompanying text (discussing FOIA's relation to fire alarm oversight).

235 *See supra* note 198 and accompanying text.

to newspapers with medium-sized circulations[236] and to journalists pursuing longer-term projects.[237] Their stories, in turn, have led to numerous hearings, audits, resignations, reassignments, and reform discussions.[238]

One of FOIA's seemingly odd characteristics—that the release of records to a specific requester has *not* been paired with release of those same records to the public at large—looks more defensible in light of investigators' incentives. Journalists, researchers, and advocates who go through the hassle of the FOIA process have been receiving a temporary, quasi-proprietary interest in the documents they obtain, which encourages them to submit requests and to write up articles based on what they find.[239] In line with these incentives, some "scoop-conscious journalists have panned" recent proposals to move toward a "release to one, release to all" model.[240] They fear, not implausibly, that this move would disintermediate them and in so doing compromise the intelligibility of administrative action.[241] FOIA's longstanding failure to ensure full dissemination of records may have enhanced public comprehension of certain subjects, even if it has limited the overall volume of information in the public domain.[242]

Notwithstanding these points, FOIA has always been a mixed blessing for American journalists, and in recent years the Act has become increasingly marginal to their craft. As already discussed, FOIA exacerbates the media's tendency to fixate on governmental actors rather than nongovernmental

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236 *See* HAMILTON, *supra* note 197, at 155 (finding that, in investigative reporting prize entries, references to FOI requests were most common "among newspapers with medium circulations, consistent with [the assumption] that these newspapers use documents as a way to differentiate themselves from larger newspapers, which are more likely to have direct access to policymakers"). Hamilton's recently published book contains by far the richest empirical study I have seen of how journalists use state and federal FOI laws.

237 *See id.* at 160; COAL. OF JOURNALISTS FOR OPEN GOV'T, *supra* note 206.

238 *See* HAMILTON, *supra* note 197, at 160.

239 *Cf.* Tai, *supra* note 10, at 463 ("Some requesters will only find it worth requesting documents if they can retain exclusive possession of them, at least for a time. Many journalists undoubtedly have this motivation . . . .").

240 John Dyer, *Fifty Years of FOIA*, NIEMAN REP., Winter 2016, at 36, 45 (capitalization omitted).

241 To mitigate this concern, a variant on the "release to one, release to all" policy could give the requester an exclusive window of, say, a week or two before the records she has received are released to the general public. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, SURVEY OF JOURNALISTS' VIEWS ON "RELEASE TO ONE, RELEASE TO ALL" UNDER THE FEDERAL FREEDOM OF INFORMATION ACT 4 (2016) (finding in an online survey of 107 journalists that a majority would support the policy "only with conditions, such as a delay in the public release"). Near the end of the Obama Administration, DOJ requested public comment on a draft version of this policy that expressly held open the possibility of incorporating such a delay. *See* Request for Public Comment on Draft "Release to One, Release to All" Presumption, 81 Fed. Reg. 89,023 (Dec. 9, 2016).

242 Put differently, FOIA may have helped increase the ratio of useful information to "noise" in the public sphere. *Cf.* Schauer, *supra* note 92, at 1344-45 (distinguishing knowledge from transparency and emphasizing that the latter "is, at best, a facilitator of knowledge").

actors and on scandalous failures rather than instructive successes.[243] Beyond the realm of in-depth investigative reporting, many forms of journalism are barely supported by FOIA. Journalists who work on tight deadlines, cover national security or foreign policy subjects, or lack personal familiarity with a particular agency or the institutional resources to litigate denials complain that the Act is too sluggish, too difficult to navigate, and too limited in its substantive scope to be of much use.[244] Anecdotes abound of government officials fending off uncomfortable inquiries by telling the reporter to go file a FOIA request or by pointing to a FOIA exemption—reproducing the culture of "access journalism" that the Act was supposed to erode and leading some journalism scholars to wonder whether the industry would be "'better off without a law at all.'"[245] Functionally, the industry has been heading in this direction. Newspaper reporters have long been FOIA's key constituency within the profession, and as newspaper sales and staffs have dwindled over the past decade, the overall volume of media requests has fallen off sharply.[246]

In response to these developments, some have suggested that FOIA be revised to "preference the press."[247] FOIA, however, already preferences the press: both by limiting fees to "reasonable standard charges for document duplication" when the requester is from the news media (or "an educational or non-commercial scientific institution"),[248] and by providing for expedited processing of requests "made by a person primarily engaged in disseminating information."[249] Critics point out that even when expedited processing is granted, FOIA remains far too slow and unreliable to serve most media needs.[250] Yet while media requesters could be prioritized more aggressively at the expense of nonmedia requesters,[251] FOIA's deadlines cannot realistically

243 *See supra* subsection II.B.2.

244 *See, e.g.*, FOIA IS BROKEN, *supra* note 7, at ii ("Members of the media described their complete abandonment of the FOIA request as a tool because delays and redactions made the request process wholly useless for reporting to the public."); Rachel Bunn, *Fossil FOIA Requests: At Least One Records Request Goes Back 20 Years . . . and Counting*, NEWS MEDIA & L., Spring 2012, at 26 ("For some, especially journalists, the time spent waiting for information requested through FOIA can render the information almost useless."); Carroll, *supra* note 53, at 215 (remarking that even if agencies were to comply with the statutory response deadlines, the wait time would still be "a journalistic eternity"); Derigan Silver, *The News Media and the FOIA*, 21 COMM. L. & POL'Y 493, 494 (2016) (stating that "FOIA is failing journalists for many reasons," including "long delays," "processing inefficiencies," and crowding out by nonmedia requesters).

245 Dyer, *supra* note 240, at 40 (quoting Professor David Cuillier).

246 *See* HAMILTON, *supra* note 197, at 168 (finding that media outlets submitted over twenty-five percent more FOIA requests to a sample of fourteen federal agencies in 2005 than they did in 2010).

247 Carroll, *supra* note 53, *passim*.

248 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2012). Other requesters may be required to pay search and review charges on top of document duplication charges. *Id.* § 552(a)(4)(A)(ii)(I), (III).

249 *Id.* § 552(a)(6)(E)(i), (v)(II).

250 *See* Carroll, *supra* note 53, at 226-29.

251 For a cogent proposal, see *id.* at 234-43.

be brought in line with journalists' deadlines given the challenges involved in searching for and reviewing responsive records and then applying the Act's exemptions.[252] FOIA's radically decentralized model of disclosure is inherently labor-intensive and hence inherently time-consuming. A greatly enhanced press preference, furthermore, would only increase FOIA's already substantial costs for the administrative state;[253] compound concerns about defining "the news media" in an age of ubiquitous blogging; and contravene deep-seated norms, embodied in FOIA's "any person" standard, of treating ordinary citizen-investigators at least roughly the same as professional investigators.

Congressional reliance on FOIA to support its oversight work has been a mixed blessing as well. Recent scholarship furnishes some evidence that agencies that are more responsive to FOIA requests tend to be less responsive to congressional requests for documents, suggesting a possible tradeoff between police patrol and fire alarm monitoring in this context.[254] More generally, although FOIA was developed in part to enable Congress to obtain executive branch information,[255] "the project was soon subsumed into a wider discourse of civil rights, and redefined itself within a framework of the (individual) citizen's relationship to the state."[256] The idea that FOIA's function is to safeguard legislative supremacy is entirely absent from most contemporary commentary on the Act. If one believes, as most constitutional scholars do, that Congress has expansive authority to demand executive branch information that may be relevant to its legislative duties,[257] then the Vietnam-era turn to "citizen suits" and the indirect FOIA route—at the height of the executive's credibility gap and Congress's commitment to imposing statutory constraints[258]—may be an instance in which Congress "underplayed its constitutional hand and undercut its own aims."[259]

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252 *See supra* notes 158–162 and accompanying text.

253 So, too, with any proposal to increase attorneys' fees for prevailing plaintiffs, allow for the recovery of monetary damages, or strengthen FOIA's sanctions provision.

254 *See* Abby K. Wood & David E. Lewis, Agency Performance Challenges and Agency Politicization (May 31, 2016) (unpublished manuscript), http://ssrn.com/abstract=1884392 [https://perma.cc/63VM-46VA].

255 *See, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 49, at 118 (stating that FOIA was intended to "help Congress reconstruct its lost authority over the overgrown administrative, national security state, empowering it to carry out its oversight tasks more effectively").

256 Colin Darch & Peter G. Underwood, *Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience*, 37 INT'L INFO. & LIBR. REV. 77, 78 (2005).

257 *See, e.g.*, William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 785 ("[T]he proposition that a legislative body generally possesses investigative powers is not controversial as a historical matter. Legislative investigative power is almost as old as legislative institutions themselves.").

258 *See supra* text accompanying note 138.

259 Chafetz, *supra* note 71, at 739; *see also supra* notes 134–145 and accompanying text (developing this argument with regard to Congress's failure to regulate the classification system).

As the volume of media requests has declined, moreover, FOIA's continuing utility as a fire alarm trigger has been called into question. It is telling that in the Congressional Record of the 113th Congress, FOIA appears only a handful of times in conjunction with a new call for legislative action or a new complaint about substantive misconduct[260]—a fraction of the times that congresspersons invoked FOIA to complain about the Act itself or its implementation.[261] Many of the latter

260 *See* 160 CONG. REC. H5788 (daily ed. June 26, 2014) (statement of Rep. Capps) ("Last year, a FOIA request revealed that at least 15 fracks have taken place in Federal waters off the coast of California during the last two decades . . . ."); 160 CONG. REC. H5226 (daily ed. June 10, 2014) (statement of Rep. Gingrey) (citing a FOIA request by Americans for Limited Government for the claim that "there are 35 employees at the Department of Transportation alone . . . who spend 100 percent of their workday working on behalf of a union"); 160 CONG. REC. H1726 (daily ed. Feb. 11, 2014) (statement of Rep. Speier) ("A deluge of sex crime reports [in the military] . . . have been revealed, thanks not to the military disclosing them, but to the Associated Press through FOIA requests."); 159 CONG. REC. H7204 (daily ed. Nov. 19, 2013) (statement of Rep. Capps) (calling attention to hydraulic fracturing operations disclosed through FOIA); 159 CONG. REC. E874 (daily ed. June 14, 2013) (statement of Rep. Grayson) (discussing "documents released pursuant to a FOIA request" allegedly showing, among other things, the involvement of the Department of Homeland Security "in monitoring peaceful, lawful protest activities"). This footnote provides what I believe is an exhaustive list of instances in which members of the 113th Congress referenced FOIA in floor debates as the source of a novel disclosure. This information was collected by searching for "FOIA" and "Freedom of Information" within the Congressional Record for the 113th Congress using the Query Builder function of the advanced search tool on Congress.gov.

Republican legislators' criticism of the Obama Administration in the wake of the 2012 Benghazi embassy attacks also relied in part on documents obtained through FOIA. *See, e.g.*, 160 CONG. REC. H3281 (daily ed. Apr. 29, 2014) (statement of Rep. Gohmert) (referencing a FOIA request by Judicial Watch in accusing the Administration of misleading the press). These FOIA requests did not stimulate new congressional inquiry in classic fire alarm fashion, but rather supplemented an ongoing investigation.

261 *See, e.g.*, 160 CONG. REC. S5656 (daily ed. Sept. 17, 2014) (statement of Sen. Blunt) (criticizing the response time for a FOIA request concerning the number of applications submitted to an Affordable Care Act processing center); 160 CONG. REC. H1890 (daily ed. Feb. 25, 2014) (statement of Rep. Issa) (calling on Congress to amend FOIA to meet its objective of openness); 159 CONG. REC. S8704 (daily ed. Dec. 12, 2013) (statement of Sen. Cornyn) (commenting negatively on the Obama Administration's handling of FOIA requests); 159 CONG. REC. S5739 (daily ed. July 17, 2013) (statement of Sen. Vitter) (criticizing the EPA for "dragg[ing] its feet and frustrat[ing] a lot of legitimate FOIA requests"); 159 CONG. REC. S5485 (daily ed. June 27, 2013) (statement of Sen. Leahy) ("We in Congress . . . have much more work to do to help ensure that FOIA's values of openness and accountability remain in place for future generations of Americans."); 159 CONG. REC. H3925 (daily ed. June 19, 2013) (statement of Rep. Crawford) (asserting that the EPA improperly released through FOIA "the personal information of livestock and poultry producers to various environmental activist groups"); 159 CONG. REC. S4589 (daily ed. June 18, 2013) (statement of Sen. Grassley) (criticizing requesters' lack of access to Medicare payments made to physicians and suppliers); 159 CONG. REC. H2771 (daily ed. May 17, 2013) (statement of Rep. Gohmert) (criticizing the Obama Administration for directing agencies to include union bosses in predecisional discussions exempt under FOIA); 159 CONG. REC. H2651 (daily ed. May 15, 2013) (statement of Rep. Perry) (asserting that the EPA waived fees associated with FOIA requests for left-wing groups but not for right-wing ones); 159 CONG. REC. H2611 (daily ed. May 15, 2013) (statement of Rep. Whitfield) (same); 159 CONG. REC. S1767 (daily ed. Mar. 13, 2013) (statement of Sen. Vitter) (accusing the EPA and the Obama Administration of "produc[ing] a lot of pieces of paper under FOIA" but withholding meaningful content through excessive redaction).

invocations of FOIA are notably partisan in nature. Because FOIA is a machine built to fail,[262] it gives opposition members of Congress a ready cudgel with which to bash the sitting administration and denounce executive lawlessness.[263]

In sum, while FOIA has made significant contributions to investigative reporting and congressional oversight, the Act's relationship with each has always been fraught and is increasingly fraying. To believe that these contributions justify all of the costs highlighted in Part II, one must not only place a high premium on accountability journalism but also believe that the contributions could not be replicated with other, less costly regulatory strategies. Again, FOIA is not the only game in town. Over the course of FOIA's life, numerous other instruments of police patrol and fire alarm oversight have arisen or expanded, from reporting requirements[264] to whistleblower protection statutes[265] to qui tam proceedings[266] to leaks of classified information[267] to GAO audits[268] to old-fashioned committee hearings and meetings.[269] Within the federal bureaucracy, many offices of inspectors general and ombudspersons have arisen or expanded as well.[270] All of these

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262 *See supra* notes 204–207 and accompanying text.

263 For the most prominent recent example, see FOIA IS BROKEN, *supra* note 7, at 1, which accuses the Obama Administration of being "willfully blind to the condition of the FOIA process." *See also* MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., SECRECY IN THE BUSH ADMINISTRATION, at iv (Comm. Print 2004) (endorsing the claim that Bush Administration policies were "not only sucking the spirit out of the FOIA, but shriveling its very heart" (internal quotation marks omitted)).

264 *See* Beermann, *supra* note 70, at 106 ("Reporting requirements are also an effective tool that Congress uses to exert control over the executive branch. In recent decades, the number and range of reporting requirements have increased exponentially . . . .").

265 *See* SHIMABUKURO ET AL., *supra* note 66, at 57-58 (collecting federal whistleblower and anti-retaliation laws, the vast majority of which were enacted after 1966).

266 *See* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 7-8 (2009) (describing 1986 and 2009 amendments that "reinvigorated qui tam procedures" under the False Claims Act). In 2011, the Supreme Court ruled that the government's fulfillment of a FOIA request precludes qui tam suits based on that information when the relator does not also have firsthand information about the fraud. Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401 (2011). FOIA thus competes with the qui tam antifraud strategy to some extent.

267 *See* Pozen, *Leaky Leviathan*, *supra* note 67, *passim* (discussing the prevalence of such leaks, the robust tradition of tolerating them, and arguments "that the volume of classified information leaks has been increasing in recent years").

268 *See* FREDERICK M. KAISER, CONG. RESEARCH SERV., RL30349, GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 4-8 (2008) (reviewing the "expansion and extension of [GAO's] authority and jurisdiction" (capitalization omitted)); *see also id.* at 11 (showing that while GAO's budget level fluctuated in the mid-1990s, it rose steadily after fiscal year 1998).

269 *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 34-37 (1990) (tracking the growth from 1961 to 1983 of congressional committee hearings and meetings devoted primarily to oversight).

270 *See* ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 91 (2014) (explaining that offices of inspectors general, "whose origins date back to the mid-1970s, have been granted substantial independence and powers to combat waste, fraud, and

developments make it more realistic today than in 1966 that Congress and its allies in civil society could compel agencies to produce legally and politically significant information outside of the FOIA process.

While shrinking, the media has been evolving in some complementary ways. The Obama Administration's much-touted push to publish "high-value" datasets online,[271] along with the contraction of the traditional news industry, helped encourage a range of innovative organizations and technologies that use these sorts of datasets to evaluate existing policies and engage with government bureaucracies.[272] And even in a fully realized world of "open data," there would still be a need for sophisticated intermediaries to translate all those terabytes of information into stories the public can understand.[273] The "death of FOIA"[274] contemplated by certain open data visionaries would not kill off accountability journalism, although it may require some investigative reporters to develop new skills or sources.

I do not mean to deny that FOIA has provided investigative reporters with a unique and valuable resource, not easily replaced. I certainly do not mean to endorse the techno-utopian vision of governance that underwrites parts of the open data movement.[275] Even if all of the critiques raised in this Article were agreed to be both empirically accurate and normatively alarming, the best overall solution might still involve preserving or repurposing FOIA for journalists while shrinking its footprint elsewhere (for example, by substantially increasing

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abuse within . . . more than 70 federal agencies"); Fenster, *supra* note 46 (tracing the rise of ombudsperson offices, both of general jurisdiction and focused on "open government" specifically); Nadia Hilliard, *Monitoring the U.S. Executive Branch Inside and Out: The Freedom of Information Act, Inspectors General, and the Paradoxes of Transparency*, *in* TROUBLING TRANSPARENCY, *supra* note 93 (manuscript at 5) ("The Inspector General Act of 1978 led to the establishment of an army of IGs on the federal level . . . . [T]ogether, the federal IG system adds over 14,000 personnel to the ranks of the government.").

271 *See generally* Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies (Dec. 8, 2009) (issuing an Open Government Directive).

272 *See generally* Beth Simone Noveck, *Re-Imagining Government Through Civic Media: Three Pathways to Institutional Innovation*, *in* CIVIC MEDIA: TECHNOLOGY, DESIGN, PRACTICE 149 (Eric Gordon & Paul Mihailidis eds., 2016) (examining the role of "civic media" and "civic technologies" in contemporary "open government" practice).

273 *See* Jonathan Stoneman, *Does Open Data Need Journalism?* 10 (Univ. of Oxford, Reuters Inst. for Study of Journalism, Working Paper, 2015) (reviewing examples of "smaller US papers" that have "produce[d] useful stories on the basis of Open Data" and suggesting that media uptake of such data is crucial).

274 Beth Simone Noveck, *Is Open Data the Death of FOIA?*, 126 YALE L.J.F. 273 (2016). In this provocatively titled essay, Professor Noveck suggests that "open data would seem to be a natural evolution from, and improvement over, FOIA," but ultimately concludes that the two regimes are better treated as "supplement[s] rather than . . . substitute[s]." *Id.* at 281.

275 For a scathing critique of open-data policies in Canada, see Tom Slee, *Why the "Open Data Movement" Is a Joke*, WHIMSLEY (May 1, 2012), http://whimsley.typepad.com/whimsley/2012/05/why-the-open-data-movement-is-a-joke.html [https://perma.cc/VS4X-4AR9]. For a rebuttal, see David Eaves, *Open Data Movement Is a Joke?*, EAVES.CA (May 2, 2012), https://eaves.ca/2012/05/02/open-data-movement-is-a-joke [https://perma.cc/HEE2-Z9DP].

fees for commercial requesters[276]). At least, some such intermediate solution may be preferred by readers who are troubled by FOIA's downsides yet willing to accept a large burden on the administrative state for even a modest boost to investigative reporting.

For readers who do not have such a strong a priori commitment to the late twentieth-century paradigm of accountability journalism, the end point of this Article's critique is less clear. In a passage from his 2015 book, *The Rise of the Right to Know*, media sociologist Michael Schudson recalls a Pulitzer Prize–winning exposé enriched by a FOIA request and then pauses to consider:

> Would a hundred such stories a year justify all the expense and trouble of FOIA? Ten such stories? One? The question is rhetorical, but it can be tethered to dollars and cents when the actual costs of responding to FOIA requests are examined . . . . In fiscal year [2008], the federal government [shouldered] . . . a total cost of $338 million.[277]

The true cost of FOIA, this Article has suggested, is far greater than the official monetary compliance figure; the number of major stories that could not have been written without FOIA has been steadily falling; and a host of alternative transparency strategies already support significant investigative journalism and could support much more if better funded and promoted by Congress, watchdog groups, and the media itself. Redirecting the FOIA budget toward new subsidies for the press might have an especially dramatic impact.[278] Why should the question posed by Schudson be merely rhetorical?

C. *Antityranny and the Ecology of Transparency*

Finally, it is worth saying a few words about a suite of arguments advanced in what I take to be the canonical recent defense of FOIA. In an article examining FOIA in the context of the "Global War on Terror," Professor Seth Kreimer ingeniously takes the standard criticisms of the Act and turns them on their head.[279] The heavy use of FOIA by "special interests," for example, is

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276 For a proposal to increase processing fees substantially for commercial requesters and modestly for other requesters, see Tai, *supra* note 10, at 483-88.

277 MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, at 31-32 (2015).

278 A variety of direct and indirect subsidies for investigative journalism have been proposed over the past decade in response to the newspaper industry's decline. For a sampling of such proposals, see GEOFFREY COWAN & DAVID WESTPHAL, USC ANNENBERG CTR. ON COMMC'N LEADERSHIP & POL'Y, PUBLIC POLICY AND FUNDING THE NEWS (2010); Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Nov./Dec. 2009, at 28, 45-50; and Brad A. Greenberg, Comment, *A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189, 197-98 (2012).

279 Kreimer, *supra* note 89, *passim*. Kreimer's article also makes a number of descriptive and analytic contributions. I focus here on the most novel, normative elements.

said by Kreimer to supply a valuable hedge against political retrenchment.[280] (Kreimer might have added that private enforcement regimes, in general, are sometimes said to guard against bureaucratic and policy drift.[281]) The processing delays and protracted litigation that characterize requests about sensitive policies can enable a salutary form of "[t]ime-shifted review."[282] Even when plaintiffs lose in challenges to the Act's national security exemption, as they usually do, their actions may generate partial disclosures and stimulate other modes of transparency—for example, by emboldening a civil servant to leak or prompting Congress or the media to dig deeper.[283] Regardless of whether FOIA looks like a deadbeat under conventional cost–benefit analysis, Kreimer insists, the Act nonetheless serves a critical democratic function in checking against "tyrannical or barbaric decisions and . . . catastrophic government failures."[284]

Kreimer is clearly correct to observe that laws like FOIA contribute to a larger "ecology of transparency" in ways we would miss if we focused too narrowly on their discrete outputs.[285] This point alone is sufficient to counsel caution about radical reform. It does not necessarily follow from Kreimer's observations, however, that the ecology of national security information would be impoverished if FOIA were curtailed and other transparency strategies were expanded in its stead. To show that FOIA interacts synergistically with certain other disclosure tools is not to show that FOIA is critical to those tools, which seems implausible in the case of leaking, whistleblowing, congressional scrutiny, and media scrutiny. Outside of the national security area, moreover, this Article has argued that FOIA contributes more significantly to *other* ecologies of transparency—regressive, antiregulatory ecologies that do meaningful damage to the administrative state and the prospects for effective governance. The political economy and political sociology of FOIA look very different with regard to domestic policy matters than with regard to national security matters. If we are moving the

280 *See id.* at 1073 ("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.").

281 *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 5 (2010).

282 Kreimer, *supra* note 89, at 1078.

283 *See id.* at 1056-61. This can be seen as a variant on the "winning through losing" phenomenon explored in Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

284 Kreimer, *supra* note 89, at 1074; *see also id.* at 1072 ("[FOIA's] 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.").

285 *Cf.* Ben Worthy & Robert Hazell, *Disruptive, Dynamic and Democratic? Ten Years of FOI in the UK*, 70 PARLIAMENTARY AFF. 22, 36 (2017) (suggesting that the UK FOI law is likewise "best seen as part of a wider political ecosystem of formal and informal mechanisms designed to scrutinise government and hold [it] accountable").

analysis to the "ecological" level, we should not limit our view to one particular cluster of trees.

I also have some doubts about Kreimer's discrete arguments. It is not at all clear to me, for instance, that FOIA would be vulnerable to political retrenchment without so much commercial use, given the ideological fervor with which the law is now supported in the media and the general public. No congressperson wishes to be seen as "anti-freedom of information." If time-shifted review allows sensitive policies to be assessed in the more sober light of history, it also attenuates the watchdog accountability that lies at the heart of the FOIA project and allows some of those policies to become entrenched in the interim. Perhaps most importantly, the claim that FOIA checks against tyrannical and barbaric decisions is vulnerable on a number of levels. Historically, leaks appear to have done far more than FOIA to expose the underbelly of the national security state.[286] Even when FOIA has been used to confirm abuses such as torture, as Kreimer acknowledges, "revelation has not been followed by repudiation" in all cases.[287] As this Article was being drafted, the most authoritarian, pro-torture presidential candidate in memory was not being cowed by FOIA but rather energetically supporting its use to attack his general election opponent.[288]

The relationship between FOIA and tyranny prevention is far from straightforward, then. Philosophically, Kreimer is operating solidly within a liberalism of fear in defending the Act on these grounds.[289] Yet, especially when we move beyond the national security field where FOIA is weakest, why should

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286 Consider, for example, President Truman's 1951 claim that "95 percent of our secret information" had been exposed through leaks, The President's News Conference, 247 PUB. PAPERS 254, 255 (Oct. 4, 1951), or Edward Snowden's recent disclosures about NSA surveillance programs that had been FOIA-proof under Exemptions 1 and 3. Kreimer would presumably reject any dichotomy between leaks and FOIA and emphasize instead their productive relation—as reflected in the surge of FOIA requests to the NSA following Snowden's revelations. *See* Jason Leopold, *NSA Logs Reveal Flood of Post-Snowden FOIA Requests*, AL JAZEERA AM. (Apr. 8, 2014), http://america.aljazeera.com/articles/2014/4/8/nsa-after-snowden.html [https://perma.cc/WK4K-BSGB]. Not all components of an ecosystem are equally important, however. The point remains that leaking, not FOIA, appears to be the alpha predator in the area of national security transparency.

287 Kreimer, *supra* note 89, at 1015.

288 *See, e.g.*, Danielle Bernstein, *RNC Requests Clinton E-Mails Through FOIA*, BLOOMBERG: POL. (July 7, 2016), http://www.bloomberg.com/politics/trackers/2016-07-07/rnc-requests-clinton-e-mails-through-foia [https://perma.cc/C598-XRXX] (discussing a Republican National Committee FOIA request seeking then–Democratic presidential candidate Hillary Clinton's emails from when she was Secretary of State). As President, Donald Trump's own communications and those of his immediate advisers are not covered by FOIA. *See supra* text accompanying note 25.

289 *See supra* notes 191–194 and accompanying text (arguing that standard justifications for FOIA are premised on a liberalism of fear). In other writings, Kreimer has eloquently defended the "need to constrain the exercise of official violence" as the central concern of "a legitimate liberal polity." Seth F. Kreimer, *Rejecting "Uncontrolled Authority over the Body": The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 446 (2007).

the specter of tyranny loom so large in our assessments of an administrative disclosure policy? As already discussed, FOIA has the greatest impact on domestic regulatory agencies; there is no evidence that these agencies are rife with villainy; and there are now many other mechanisms that guard against abuse. As a matter of principle, it is debatable whether repelling barbarism ought to be the touchstone of a general freedom of information law. As a matter of practice, it is debatable whether FOIA materially advances any such objective.

Some of Kreimer's key empirical and normative premises thus strike me as strained, although they deserve closer attention than I can give them in this Article. Even if we were to grant his points, though, just pause to consider that the single most sophisticated defense of FOIA in the literature is so creative and, often, so counterintuitive in its argumentation. Kreimer is grasping to find something redemptive about this super-statute in the national security context. His nuanced, highly qualified argument is worlds apart from the prevalent notion that FOIA is a bedrock of democracy and good government.

IV. ALTERNATIVE PATHS

This Article has suggested that FOIA not only fails to deliver on ostensible goals such as participatory policymaking, equal access to information, and full agency disclosure, but also has evolved to *subvert* some of these goals as well as other public law values. The Article has further suggested that if FOIA ever really was an indispensable instrument for generating executive branch transparency, it no longer is. Today's information access landscape looks very different from the one that confronted FOIA's framers. Even putting FOIA requests to the side, the proliferation of mass communication technologies, statutory reporting requirements, whistleblower protection laws, qui tam proceedings, GAO audits, external watchdog groups, internal oversight mechanisms, web-based open government initiatives, and leak culture has made the administrative state a substantially more visible and checked space than it was fifty years ago. At this point, "administrative agencies in the United States are some of the most extensively monitored government actors in the world."[290]

If these arguments have merit, then we ought to be considering how we can reduce reliance on FOIA's request-and-respond paradigm while strengthening the role of alternative transparency models—at least to the extent that these models do not replicate the deficiencies and downsides of FOIA. There are many possible paths forward, several of which have already been mentioned in passing. Open government advocates might, for example, focus their efforts on

290 Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1161 (2009).

obtaining new public subsidies for investigative journalism,[291] new limitations on agencies' ability to incorporate private industry standards by reference into their regulations,[292] new protections for whistleblowers and public-motivated leakers,[293] or new procedures for reining in the national security classification system[294]—where so many secrets reside outside FOIA's grasp—and the system of prepublication review of statements and writings by former government employees.[295] Established tools such as inspector general audits or GAO investigations could also, of course, be used more intensively.

The most scalable approach (or family of approaches) to transparency policy, and the most plausible substitute for the traditional FOIA model, is affirmative disclosure. Rather than wait for a request for specific records to be filed, whole categories of records deemed appropriate for release can be posted online or otherwise published on a regular schedule.[296] FOIA has always contained some limited provisions to this effect,[297] but a stronger version of affirmative disclosure was the major road not taken when FOIA was enacted. As a constitutional matter, the Article III requirement that plaintiffs show a particularized "injury in fact" to establish standing[298] means that an affirmative disclosure policy cannot rely on citizen suits to the same degree as a request-driven policy. And in 1966, the idea of creating broad new transparency requirements without private enforcement may have seemed unwise to members of Congress, given prevailing levels of interbranch

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291 *See supra* note 279 and accompanying text.

292 *See supra* note 64 and accompanying text. For discussion of reform options, see Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 799-807 (2014); and Strauss, *supra* note 64, at 529-61.

293 *See supra* note 67 and accompanying text. Recent reform proposals in the national security area include Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281 (2014); and Daniel D'Isidoro, *Protecting Whistleblowers and Secrets in the Intelligence Community*, HARV. NAT'L SEC. J. (Sept. 29, 2014, 9:01 PM), http://harvardnsj.org/2014/09/protecting-whistleblowers-and-secrets-in-the-intelligence-community [https://perma.cc/9DSB-YMJW].

294 *See supra* notes 125–130 and accompanying text. For illustrative reform proposals, see GOITEIN & SHAPIRO, *supra* note 128, at 33-49; and Aftergood, *supra* note 136, at 411-16.

295 *See, e.g.*, Kevin Casey, Note, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417, 452-60 (2015); Jack Goldsmith & Oona A. Hathaway, *The Government's Prepublication Review Process Is Broken*, WASH. POST (Dec. 25, 2015), https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story [http://perma.cc/9DFB-H5XC]. *But see* Steven Aftergood, *Fixing Pre-Publication Review: What Should Be Done?*, JUST SECURITY (Jan. 15, 2016), https://www.justsecurity.org/28827/fixing-pre-publication-review-done [https://perma.cc/6K39-M5NZ] (arguing that it would be more fruitful to "focus instead on classification reform").

296 *See supra* subsection I.B.1.

297 *See supra* note 58 and accompanying text.

298 *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-85 (2000); Lujan v. Defs. of Wildlife, 504 U.S. 555, 572-78 (1992).

distrust.[299] A robust affirmative disclosure policy may have also seemed impractical, given the technical difficulty and expense of disseminating documents to the American people—who, for their part, were far less invested than today in the notion of a "right to know" what government is up to.[300]

While popular demand for government openness has risen over the past five decades, the barriers to affirmative disclosure have fallen. Agency records have gone electronic. Websites with virtually unlimited storage capacity have replaced physical reading rooms as the locus of dissemination.[301] And relatively independent offices that oversee administrative compliance have multiplied and matured within the federal bureaucracy.[302] By the mid-1970s, the executive branch's system for managing national security information, developed in parallel with FOIA, was already relying on an affirmative disclosure scheme for the "automatic declassification" of material deemed no longer sensitive, albeit with long time lags and large backlogs.[303]

FOIA's unheralded affirmative disclosure provisions have suffered from neglect at the hands of numerous agencies, as explained above.[304] But in a variety of other contexts, affirmative disclosure of government-generated information has begun to come into its own. For example, the environmental impact statements required by the National Environmental Policy Act of 1969 are widely seen as a central (if controversial) feature of environmental regulation in the United States and abroad.[305] The New Mexico legislature mandated the creation in 2010 of a "single internet web site that is free, user-friendly, searchable and accessible to the public . . . to host the state's financial information," including operating budgets, revenue inflows, and contracts worth more than $20,000.[306] Consistent with a series of

299 *See* Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1401 (2000) (asserting that FOIA "resulted" in part from Vietnam-War-inspired "distrust of government"); *see also* 1 O'REILLY, *supra* note 12, § 3:8 (stating that FOIA, as amended in 1974, "reflect[s] congressional distrust for agency withholding").

300 *See* SCHUDSON, *supra* note 277, at 30 (explaining, with reference to FOIA, that "American society in the past half century has adopted more demanding norms and more widespread and enforceable practices of public disclosure in government").

301 *See, e.g.*, *About Us*, REGULATIONS.GOV, https://www.regulations.gov/aboutProgram [https://perma.cc/5V55-E7KJ] (explaining that since 2003, Regulations.gov has allowed users to search "all publicly available regulatory materials, e.g., posted public comments, supporting analyses, [*Federal Register*] notices, and rules").

302 *See supra* note 270 and accompanying text (discussing inspectors general and ombudspersons).

303 Exec. Order No. 11,652, § 5, 3 C.F.R. 375, 380-82 (1973); *see also* Exec. Order No. 13,526, § 3.3, 3 C.F.R. 298, 307-10 (2010) (prescribing the current rules for automatic declassification); GOITEIN & SHAPIRO, *supra* note 128, at 17-18 (discussing delays and backlogs).

304 *See supra* notes 58–60 and accompanying text.

305 *See* SCHUDSON, *supra* note 277, at 180-227.

306 Daxton R. "Chip" Stewart & Charles N. Davis, *Bringing Full Disclosure Back: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515, 531 (2016) (quoting 80 N.M. STAT. ANN. § 10-16D-3(A)). This "sunshine portal" must be updated "as frequently as possible but at least monthly." *Id.* (quoting 80 N.M. STAT. ANN. § 10-16D-3(D)).

executive branch initiatives to promote "open data,"[307] the federal DATA Act of 2014 requires the Treasury Department and the White House Office of Management and Budget to publish standardized spending information on the USASpending.gov website by May 2017.[308] Building on these examples, one could imagine a future in which FOIA requests are phased out, at least with regard to records created after a certain date, in favor of a comprehensive affirmative disclosure regime. Congress recently instructed agency heads to establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format,"[309] and commentators have increasingly expressed interest in "breaking out of the antiquated FOIA file-a-request approach" on both transparency and efficiency grounds.[310]

As suggested by the story of FOIA's own affirmative disclosure provisions, however, any such move would confront a number of significant challenges. First, the affirmative disclosure duties may suffer from inattention, narrow construction, or worse. Although compliance issues bedevil FOIA's request system too,[311] privately initiated lawsuits and news stories about those lawsuits provide some check against recalcitrant agencies. Second, owing to the limits of foresight and the transaction costs of delineating new access rights and responsibilities, drafters of an affirmative disclosure regime may find it hard to predict which sorts of information will be most relevant to future citizens, journalists, and legislators. One virtue of FOIA's decentralized discovery model is that it minimizes the need for such predictions to be made and then reduced to statutory language; whatever records people come to crave, they can demand

307 *See supra* notes 271–275 and accompanying text; *see also* Noveck, *supra* note 275, at 274-79 (chronicling these initiatives). Since 2009, the central clearinghouse for open data from the federal executive branch has been Data.gov. *See* DATA.GOV, https://www.data.gov [https://perma.cc/TR4U-T5Q3].

308 Digital Accountability and Transparency Act of 2014 (DATA Act), Pub. L. No. 113-101, 128 Stat. 1146. For more details on the Act's implementation, see DATA ACT, https://www.usaspending.gov/Pages/data-act.aspx [https://perma.cc/HUX5-28ND].

309 FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 4, 130 Stat. 538, 544 (to be codified at 44 U.S.C. § 3102(2)).

310 Gary D. Bass & Sean Moulton, *Bringing the Web 2.0 Revolution to Government*, *in* OPEN GOVERNMENT 289, 298 (Daniel Lathrop & Laurel Ruma eds., 2010); *see also id*. (arguing in favor of "affirmative dissemination of nearly all government spending on an ongoing basis"); Melissa Guy & Melanie Oberlin, *Assessing the Health of FOIA After 2000 Through the Lens of the National Security Archive and Federal Government Audits*, 101 LAW LIBR. J. 331, 352 (2009) (asking whether "a sophisticated, searchable, central clearinghouse of government information [might] be more appropriate" than FOIA); Stewart & Davis, *supra* note 306, at 518 (characterizing FOIA's reliance on requests as its "original sin" and urging its replacement with "proactive openness"); Vladeck, *supra* note 58, at 1789 (calling FOIA's reliance on requests its "Achilles' heel").

311 *See supra* notes 204–216 and accompanying text.

them.[312] And third, a broad affirmative disclosure regime may produce so much information as to overwhelm outside audiences, ultimately degrading rather than enhancing media coverage and public comprehension of whatever is released. This "overload" critique has been forcefully leveled against laws mandating disclosure in the consumer context.[313] Perhaps the critique would carry over to mandatory disclosures of agencies' own information.

On account of these challenges and the bureaucratic-capacity considerations identified in subsection II.B.1, any migration away from the traditional FOIA model and toward affirmative disclosure would need to be pursued cautiously. Privacy and deliberative concerns, for instance, may counsel against applying affirmative disclosure to certain inherently sensitive records, such as documents relating to an administrative adjudication of a disability claim, as well as to personal emails and predecisional materials. The challenges to making this migration are not necessarily insurmountable, however, and the case for affirmative disclosure of most material obtainable through FOIA remains compelling—indeed, more compelling than its advocates may have realized, given the political and distributional stakes highlighted in this Article. Although I cannot delve deeply into design issues here,[314] let me close with some tentative suggestions to guide legislative reform in light of the criticisms advanced in Part II and the complications just noted.

Nonjudicial enforcement. To minimize the risk of noncompliance while moving away from the citizen-suit model, Congress may wish to give a larger enforcement role to governmental actors such as ombudspersons and GAO analysts and to techniques such as audits and inspections. Routine monitoring of agencies' disclosure practices could be reinforced with randomized reviews or with investigations triggered by a complaint process. Federalism offers guidance in this area, as many states have developed administrative strategies to enhance compliance with their open government laws.[315]

FOIA filings as a (temporary?) safeguard and supplement. At least for an initial transition period, the decentralized FOIA system could remain in place to compensate for the limits of legislative drafting and to support the foregoing enforcement strategies—with requests allowed for records that fall outside of an

312 While any given FOIA requester may face a problem of "prerequisite knowledge" in that she must know what documents to ask for, *see* Kreimer, *supra* note 89, at 1025-32, FOIA itself thus reduces the burden of prerequisite knowledge on legislative drafters and overseers.

313 For the leading critique of such mandatory disclosure, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014). For a trenchant response, see generally Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021 (2015) (book review).

314 For preliminary efforts to think through the practicalities of implementing a broader affirmative disclosure policy, see Fenster, *supra* note 129, at 941-49; Kwoka, *FOIA, Inc.*, *supra* note 34, at 1429-36; and Stewart & Davis, *supra* note 306, at 528-36.

315 *See* Fenster, *supra* note 46, at 281-90 (cataloging state enforcement mechanisms).

affirmative disclosure mandate or for the specific purpose of checking against affirmative disclosure's misuse or underuse.[316] An analogy might be drawn here to the "books and records" requests that stockholders may make under section 220 of the Delaware corporate code to ensure, among other things, a firm's compliance with the securities laws and those laws' disclosure obligations.[317] Over time, depending on how affirmative disclosure is faring, FOIA requests for either or both of these purposes might be curtailed or eliminated.

Standardization of disclosure methods. To reduce the risk of strategic disclosure behavior, Congress may wish to specify the timing and format as well as the substance of core publication requirements. Timing and formatting standards facilitate analysis and oversight. They can also make it harder for agencies to release material in a biased or opportunistic manner, so as to benefit certain political agendas or special interests,[318] or in a manner designed to hide controversial items in a "flood" of information.[319]

Facilitating search and navigation. To further manage the problem of information overload, Congress could push agencies to provide enhanced search and navigation tools in their electronic "reading rooms,"[320] along with enhanced technical support for users. NARA, the National Science Foundation, or other government funding bodies might support research and pilot projects toward this end.[321] More ambitiously, Congress could seek to leverage emerging interagency platforms such

316 *See* Noveck, *supra* note 274, at 282 ("[W]here gaps exist in [an] open data regime, FOIA provides the legal right of action to fight for the data that government refuses to disclose when it should.").

317 *See generally* Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 CARDOZO L. REV. 1595 (2005). These requests must be made for "a proper purpose" and may not amount to a "broad fishing expedition." *See id.* at 1610-16, 1610 n.105 (reviewing case law on this point).

318 *Cf.* Jo Bates, *The Strategic Importance of Information Policy for the Contemporary Neoliberal State: The Case of Open Government Data in the United Kingdom*, 31 GOV'T INFO. Q. 388, 394 (2014) (arguing that while open data initiatives may be enlisted to ameliorate "the trend towards proprietisation and commercialisation of information," the evidence "suggests that the Open Government Data agenda is also being used strategically, and often insidiously, by the UK government to fuel a range of broader and more controversial policies"). U.S. agencies generally "cannot hide their decisions" through strategically timed disclosures, but "timing can be used to change the cost structure of the public and private interest groups who are in the business of monitoring them." Gersen & O'Connell, *supra* note 290, at 1163.

319 *See generally* Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755 (2015) (examining the phenomenon of "information flooding" in the consumer context).

320 Such reading rooms already exist under FOIA. *See* DOJ FOIA GUIDE, *supra* note 15, at 12.

321 *See, e.g.*, Columbia Univ. Global Pol'y Initiative, Archives Without Borders, http://globalpolicy.columbia.edu/projects/archives-without-borders [https://perma.cc/V3N6-KK4H] (describing an interdisciplinary project that develops new methods for storing, retrieving, and processing government data and "exploring extremely large document collections").

as FOIAonline[322] and USAspending.gov[323] and mandate that disclosures be made accessible through a centralized online portal or set of portals.

Learning from logs. While it can be hard to predict which sorts of records will be of greatest interest to people in the future, it is relatively easy to ascertain which sorts of records have been of greatest interest to requesters in the past. By studying their own FOIA logs, agency officials and their legislative and administrative overseers can identify categories of records that tend to be requested in bulk and to be released without detailed review for privacy or other exemption concerns—and that are therefore prime candidates for affirmative disclosure.[324] As amended in 1996 and 2016, FOIA already requires that agencies engage in a version of this self-scrutiny.[325]

Petitions, not requests. Because studying FOIA logs is a backward-looking enterprise, additional tools may be needed to identify and close holes in an affirmative disclosure mandate's coverage, without falling back to the FOIA strategy of permitting limitless personal requests for information. Petitions provide an intermediate solution. Just as the Obama White House committed to review and respond to all petitions on policy issues that garnered a certain number of online signatures within thirty days,[326] so too might agencies be required to address all qualifying petitions for disclosure of specific documents.

Expanded incident reporting. Incident reporting offers yet another partially decentralized strategy for ensuring that significant developments trigger a public reckoning. In recent decades, government agencies in the United States and abroad have imposed incident reporting obligations on regulated firms to help identify, investigate, and respond to unforeseen (and perhaps unforeseeable) adverse events in fields ranging from aviation to drug development to nuclear

322 FOIAONLINE, https://foiaonline.regulations.gov/foia/action/public/home [https://perma.cc/6XKC-ZCEJ]; *see also supra* note 161.

323 USASPENDING.GOV, https://www.usaspending.gov/Pages/Default.aspx [https://perma.cc/MKH8-HPY2].

324 Based on her examination of FOIA logs and conversations with senior officials, Professor Kwoka has recently identified several "highly promising areas in which affirmative disclosure could preempt the need for routine commercial FOIA requesting" at agencies such as the EPA, the FDA, and the Securities and Exchange Commission. Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 YALE L.J.F. 265, 270 (2016); *see also id.* at 272 (urging caution before using affirmative disclosure in cases "where detailed record-by-record review is required and where a minority of the total records in a given category are currently requested under FOIA").

325 Under the E-FOIA Amendments of 1996, agencies must make available for public inspection records released to any person "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (1996) (codified at 5 U.S.C. § 552(a)(2)(D) (2012)). Under the FOIA Improvement Act of 2016, agencies must do the same for records "that have been requested 3 or more times." Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (to be codified at 5 U.S.C. § 552(a)(2)(D)(ii)(II)).

326 *See We the People*, WHITE HOUSE, https://petitions.whitehouse.gov [https://perma.cc/U8F5-DSXW].

power.[327] The "incidents" that trigger these processes of review vary widely, as do the processes themselves. There is no reason in principle why such systems could not be developed across more policy domains and applied to the regulators themselves, as through reporting requirements triggered by credible claims of dangerous or improper operations within the agency.

Continual reassessment and revision. As petitions, incident reports, oversight hearings, media exposés, and other sources reveal ways in which an affirmative disclosure policy is over- or under-inclusive, the policy itself ought to be dynamically reconsidered in light of these revelations. Congress could require periodic agency self-evaluations or independent reviews toward this end. An entity such as OGIS or the Administrative Conference of the United States, for example, could be tasked with collecting criticisms of existing affirmative disclosure laws and generating reports and recommendations on how these laws might be improved.

At some point, of course, affirmative disclosure norms may be taken so far that they impose stifling costs of their own. It is useful to recall in this regard that well before the open data movement burst onto the scene, FOIA already directed agencies to post online not only final opinions, orders, and rules but also all records "released to any person" and "likely" to be requested multiple times.[328] This is a fairly sweeping directive; change the word "released" to "releasable" and it starts to look like the sort of comprehensive publication policy that Congress now appears to demand.[329] As this observation suggests, advancing access to information while moving away from FOIA's request-driven model may not require any elaborate new schemes. All that it would require, at least at the start, is a commitment to building on the affirmative disclosure measures we already have and enforcing them with more creativity and care.

CONCLUSION: GETTING OVER, AND BEYOND, FOIA

There is a standard way to write a law review article about FOIA. The author assumes, implicitly or explicitly, that the Act is an indispensable achievement the implementation of which has, regrettably, fallen short in certain respects: inadequate judicial stewardship, overlong processing times, bureaucratic roadblocks, and so forth. The basic structure and value of the Act are taken for granted. The criticisms and prescriptions offered are internal to FOIA's request-driven paradigm.

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327 *See* Charles Sabel et al., Regulation Under Uncertainty: The Co-Evolution of Industry and Regulation 7-13 (Nov. 2016) (unpublished manuscript), http://www2.law.columbia.edu/sabel/papers/Final%20Uncertainty.pdf [https://perma.cc/F5QP-LEGX].

328 5 U.S.C. § 552(a)(2)(D) (2012); *see supra* notes 56–57, 325 and accompanying text.

329 *See supra* notes 308–309 and accompanying text (discussing affirmative disclosure provisions in the DATA Act of 2014 and the FOIA Improvement Act of 2016).

FOIA's fiftieth anniversary provides an opportune occasion to reassess the Act in more holistic terms. This Article has argued that if we step outside of the FOIA paradigm—if we denaturalize its approach to disclosure and consider the vision of the state that it embodies and reinforces—we will find that the problems with the Act run deeper. FOIA does not simply fall short of its transparency and accountability aspirations; it systematically skews the production of information toward commercial interests and facilitates powerful antiregulatory agendas. The inadequacies of FOIA's original design have been exacerbated by external developments, including the decline of the traditional news media and the rise of hyper-adversarial watchdog groups on the right. *Our veneration of FOIA has blinded us to the politics of FOIA.*[330] Moreover, the implementation issues that have sucked up so much critical attention are both more predictable and less tractable than is generally assumed. Processing delays, judicial skepticism, bureaucratic resistance, and corporate crowding out of other requesters could be curtailed only at great cost, if at all, as they follow from the Act's radically decentralized structure.

The most promising path forward, I have suggested, involves displacing FOIA requests as the lynchpin of transparency policy and shoring up alternative strategies, above all affirmative disclosure frameworks that release information in the absence of a request.[331] A large-scale affirmative disclosure regime seemed technologically infeasible and practically unenforceable in 1966. It is neither at this point. While fully implementing such a regime would raise significant challenges, the tools to meet them are at hand. Congress has established a growing set of affirmative disclosure mandates and administrative oversight mechanisms over the past several decades. And the request-driven FOIA model might remain in place in a number of supplementary or transitional capacities, whether as a platform especially for journalists, for disclosures of personal or privacy-sensitive information, or for checking against affirmative disclosure's underutilization. Adopting this suggestion, then, need not involve a legal revolution so much as a refocusing of resources, reformist energy, and political will.

Although I have sketched an alternative path, I have hedged on the details in part because of my uncertainty about whether FOIA requests ought to be

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330 Within certain nonlegal, non-American literatures on transparency, this observation would not seem so surprising. *See, e.g.*, Clare Birchall, *'Data.gov-in-a-box': Delimiting Transparency*, 18 EUR. J. SOC. THEORY 185, 196 (2015) (arguing that we "need to politicize data, transparency, and openness in general—to ask what role revelation should play in democratic representation"); Calland, *supra* note 97, at 84 (arguing that "there needs to be a recognition of [access to information] as fundamentally a matter of politics and political economy" (internal quotation marks omitted)).

331 I am hardly alone in this conclusion, even if I arrive here by a different route. *See supra* note 310 (collecting sources that advocate greater affirmative disclosure); *see also* Sunstein, *supra* note 171 (manuscript at 2-3) (arguing on welfarist grounds that the government should usually disclose information about its outputs "even without request").

phased out wherever feasible or retained in some modified form that reduces the "tax" they impose on government agencies and employees. At the end of the day, I remain genuinely ambivalent about how far to take this Article's arguments. An appreciation of FOIA's complex and often unintended consequences counsels humility as well as openness to reform. Whatever the best solution, however, I hope this Article has established that there is a serious problem in need of solving—that FOIA not only does less good than its stature would suggest but also is itself a threat to a range of public law values.

The election of a President believed by many to be a dangerous demagogue points up an additional complication. In exploring the dark side of FOIA, this Article has called attention to the ways in which the Act can be weaponized to obstruct federal agencies (with the crucial caveat that this weapon is largely ineffective in the national security realm, as well as inapplicable to the President himself). Such uses of FOIA now look more attractive to some. If, in a given period, one believes these agencies are likely to do terrible things, then it may be rational to accept any number of tradeoffs in the hope of frustrating their efforts.[332]

I have tried to show why the antityranny case for FOIA is doubtful[333]—and prone to devolve into a broader antistatism—and why, more generally, FOIA fails to secure the production of truth or good governance. I have tried to show further how a variety of other disclosure devices could be made even more effective at rooting out agency abuse. This Article's critique of FOIA does not depend on any especially optimistic view of the executive. But it must be conceded that this critique will seem less urgent to those who place a high moral value on the obstruction, however indirect and piecemeal, of current officeholders. Even if I am right that a transparency strategy based on relentless FOIA requests will ultimately redound to the detriment of progressives, immediate tactical imperatives may cut in the other direction.[334]

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332 *See supra* notes 191–192 and accompanying text. I take this to be the spirit in which some activists declared they would "relentlessly" file and litigate FOIA requests against the incoming Trump Administration. Ben Norton, *"FOIA Superhero" Launches Campaign to Make Donald Trump's Administration Transparent*, SALON (Nov. 27, 2016), http://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent [https://perma.cc/Z3NT-H2RS]. The prospect of a partisan FOIA arms race is raised, more starkly, by reports that "top liberal donors" are considering "forming a liberal equivalent to the right's Judicial Watch, which spent much of the past eight years as a thorn in the Obama administration's side filing legal petitions under the Freedom of Information Act." Anna Palmer & Daniel Lippman, *Liberal Groups Steel Themselves to Battle Trump*, POLITICO (Nov. 15, 2016), http://www.politico.com/story/2016/11/liberal-groups-donald-trump-231383 [https://perma.cc/6ZPH-BV7R].

333 *See supra* Section III.C.

334 Other countries, furthermore, might need a different mix of transparency policies. Just as Professor Jeremy Waldron's well-known "case against judicial review" is designed only for societies with a strong commitment to the idea of rights and with democratic and judicial institutions in reasonably good working order, *see* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115

Important as they are, these caveats and contingencies do not qualify the Article's basic message. If FOIA's fiftieth anniversary is to be a meaningful event, we will need to set aside FOIA fetishism even as we recognize the Act's accomplishments. The Supreme Court, among many others, has opined that the Act amounts to "a structural necessity in a real democracy."[335] Perhaps certain freedom of information laws live up to this billing in certain societies. In the United States, however, the notion has become increasingly implausible—and distracting. The structural question that demands our attention is whether FOIA amounts to a long-term impediment to administrative capacity, trust in government, and an egalitarian democracy.

YALE L.J. 1346, 1360-66 (2006), the "case against FOIA" offered in this Article does not necessarily generalize to other contexts. Transparency policies can have "highly idiographic" impacts, COLIN DARCH & PETER G. UNDERWOOD, FREEDOM OF INFORMATION AND THE DEVELOPING WORLD 7 (2010), and the cost–benefit profile of a FOIA-style law may look substantially more compelling in a state with weak administrative oversight institutions, a highly concentrated media market, or an entrenched culture of political patronage. *Cf.* Calland, *supra* note 97, at 84-85 (arguing that FOI laws can have "progressive" effects under certain conditions, including robust use by "marginalised communities" and coverage of "private as well as publicly held information").

335 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).