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# The Ecology of Transparency Reloaded

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## THE ECOLOGY OF TRANSPARENCY RELOADED<sup>1</sup>

### I. Introduction: The Flaws of FOIA?

The authors of the Federalist Papers disparaged a plural executive's tendency "to conceal faults, and destroy responsibility," believing that a unitary executive's actions were apt to be more "narrowly watched and readily suspected" by an informed public opinion.<sup>2</sup> The proposed Constitution left the task of informing the public to elements of constitutional structure. The mutual jealousy of the elective branches of national government provided one mechanism. State political structures were thought to be a second: "the executive and legislative bodies of each state will be so many sentinels over the person employed in every department of the national administration"; their "regular and effectual system of intelligence" will allow them to "communicate the same knowledge to the people."<sup>3</sup> But neither the Framers' Constitution nor the Bill of Rights went further. As Justice Stewart famously observed, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."<sup>4</sup>

What the Constitution's text omits, the last two generations have embedded in "small c"

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<sup>1</sup> This essay condenses and updates Seth F. Kreimer, "The Freedom of Information Act and the Ecology of Transparency," *University of Pennsylvania Journal of Constitutional Law* 10, no. 5 (2008): 1011. For fuller details and scholarly apparatus, consult that work and Seth F. Kreimer, "Rays of Sunlight in a Shadow 'War': FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency," *Lewis and Clark Law Review* 11, no. 4 (2007): 1141 [hereinafter "Strategy of Transparency"].

<sup>2</sup> Alexander Hamilton, *The Federalist Papers* (New York: New American Library, 1961), No. 70, 424-428.

<sup>3</sup> Alexander Hamilton, *The Federalist Papers* (New York: New American Library, 1961), No. 84, 516.

<sup>4</sup> Potter Stewart, "Or of the Press," *Hastings Law Journal* 26, no. 3 (1975): 631, 636.

constitutional law and practice. The Freedom of Information Act, in particular, was crafted to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>5</sup>

The late Justice Scalia argued that the Freedom of Information Act was unnecessary. While head of the Office of Legal Counsel, he coordinated the unsuccessful opposition to amendments strengthening the Act. Upon his return to academia, then-professor Scalia lamented

the obsession that gave [those amendments] birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate the press . . . . It is a romantic notion, but the facts simply do not bear them out. The major exposés of recent times, from CIA mail openings to Watergate to the FBI’s COINTELPRO operation, owe virtually nothing to the FOIA but are primarily the product of the institutionalized checks and balances within our system of representative democracy.<sup>6</sup>

FOIA has also suffered the converse criticism: that it is necessary but ineffective.

Journalists decry “a Rube Goldberg apparatus that clanks and wheezes, but rarely turns up the data.”<sup>7</sup> Dissenting judges protest uncritical deference to the government; commentators deplore suppression of information by an increasingly secretive security state.

A third constellation of criticism discerns a mismatch between the legal regime of transparency and the goals of good governance. FOIA is said to be the “Sistine Chapel of Cost Benefit Analysis Ignored,” burdening public servants in order to benefit “corporate lawyers” and “criminal defendants.”<sup>8</sup> Disclosure obligations, it is said, “exact financial, deliberative, and

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<sup>5</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (quoted with approval in *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 16 (2001)).

<sup>6</sup> Antonin Scalia, “The Freedom of Information Act Has No Clothes,” *Regulation: AEI Journal on Government and Society* (March 1982): 15, 19.

<sup>7</sup> David Carr, “Let the Sun Shine,” *New York Times*, July 23, 2007.

<sup>8</sup> Scalia, “No Clothes,” 15, 16. In this volume and elsewhere, Margaret Kwoka and David Pozen echo the charge. See, e.g., Margaret B. Kwoka, “FOIA, Inc.,” *Duke Law Journal* 65, no. 7 (2016): 1361; David E. Pozen, “Freedom of Information Beyond the Freedom of Information

bureaucratic burdens on government, even when disclosure serves no useful purpose.”<sup>9</sup> More recently, David Pozen has argued that the costs imposed are pathologically asymmetric. FOIA, he alleges, is “neoliberal” and “reactionary”; 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 doing little to further scrutiny or control of corporate exploitation.<sup>10</sup>

Drawing on case studies from the Bush-era “Global War on Terror” (or “Terrorism”) (hereinafter GWOT), this chapter argues that critics miss important normative and practical

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Act,” *University of Pennsylvania Law Review* 165, no. 5 (2017): 1097. Both observe that in FY 2015, FOIA’s direct economic costs clocked in at a bit less than \$.48 billion. Pozen suggests that this figure is conservative. Pozen, “Freedom,” 1123-1124.

The canonical comparator is the federal expenditure on military bands, \$.437 billion in 2015. Dave Phillipps, “Military is Asked to March to a Less Expensive Tune,” *New York Times*, July 1, 2016, <https://www.nytimes.com/2016/07/02/us/military-bands-budget.html>. Other benchmarks are the Corporation for Public Broadcasting at \$.445 billion in FY 2014, “CPB Operating Budget: Fiscal Year 2014 Operating Budget,” *Corporation for Public Broadcasting*, <http://www.cpb.org/aboutcpb/financials/budget>, a year of Trump travel to Mar a Lago at \$.12 billion, Drew Harwell, Amy Brittain, and Jonathan O’Connell, “Trump Family’s Elaborate Lifestyle is a ‘Logistical Nightmare’ - at Taxpayer Expense,” *Washington Post*, February 16, 2017, [https://www.washingtonpost.com/business/economy/trump-familys-elaborate-lifestyle-a-logistical-nightmare--at-taxpayer-expense/2017/02/16/763cce8e-f2ce-11e6-a9b0-ecee7ce475fc\\_story.html?utm\\_term=.ec12d4bc13fb](https://www.washingtonpost.com/business/economy/trump-familys-elaborate-lifestyle-a-logistical-nightmare--at-taxpayer-expense/2017/02/16/763cce8e-f2ce-11e6-a9b0-ecee7ce475fc_story.html?utm_term=.ec12d4bc13fb), and the carried interest deduction, costing between \$1.8 billion and \$18 billion annually in tax revenue forgone, Victor Fleischer, “How a Carried Interest Tax Could Raise \$180 Billion,” *New York Times*, June 5, 2015, [https://www.nytimes.com/2015/06/06/business/dealbook/how-a-carried-interest-tax-could-raise-180-billion.html?\\_r=0](https://www.nytimes.com/2015/06/06/business/dealbook/how-a-carried-interest-tax-could-raise-180-billion.html?_r=0).

Half a billion dollars is hardly inconsiderable, but as rent seeking goes in a \$4 trillion federal budget, this seems to me rather small beer. Even if a large tranche of the direct beneficiaries of FOIA are self interested, the monetary cost is not prohibitive in context. If nothing else, like public broadcasting, FOIA frequently provides edifying entertainment.

<sup>9</sup> Mark Fenster, “The Opacity of Transparency,” *Iowa Law Review* 91, no. 3 (2006): 885, 913, 928.

<sup>10</sup> Pozen, “Freedom,” 1100-1101, and at 1146 (describing “regressive, antiregulatory ecologies [of transparency] that do meaningful damage to the administrative state and the prospects for effective governance”).

issues. Critiques focused on denied requests and unsuccessfully litigated cases in isolation miss the ways in which information obtained through unlitigated or partially successful requests is facilitated by, and in turn has catalyzed, other elements of a broader ecology of transparency. Analysts of FOIA should be alert to the elements of that ecology. Critics should acknowledge its virtues of resiliency and efficacy. Reformers should neither slight nor squander them.

## II. The Ecology of Transparency: FOIA and Structure

In claiming that the “institutionalized checks and balances” of the constitutional text render FOIA unnecessary, then-professor Scalia’s historical claims oversimplified matters considerably--indeed disingenuously. The “institutionalized checks and balances” he praised proved efficacious during Watergate and its aftermath only with the goad and aid of extra-institutional actors: leakers, investigative reporters, publishers, and civilly disobedient sneak thieves. Indeed, FOIA itself punctured the secrecy of COINTELPRO, a fact of which then-Assistant Attorney General Scalia was manifestly aware.<sup>11</sup> FOIA was strengthened after Watergate, along with a network of other structural checks, precisely in the hope that in future crises, it could serve not as a first line of defense, but a last.

In the aftermath of September 11, the second Bush administration undertook initiatives of

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<sup>11</sup> Antonin Scalia, “FOIA Appeal from Denial of Access to FBI COINTELPRO Files Regarding Professor Morris Starsky,” *Federation of American Scientists*, November 27, 1974, <https://fas.org/irp/agency/doj/olc/starsky.pdf> (citing *Stern v. Richardson*, 367 F. Supp. 1316 (D.D.C. 1973) (requiring initial FOIA release of documents disclosing COINTELPRO)). For accounts of the ecology in which an initial FOIA inquiry based on references to the program in purloined documents blossomed into public scandal and congressional remediation, see, e.g., James Kirkpatrick Davis, *Spying on America* (New York: Praeger, 1992), 1-9, 161-178; and Betty Medsger, *The Burglary* (New York: Alfred Knopf, 2014), 331-333, 497-499 (2014).

demonstrably dubious legality and morality. But “institutionalized checks and balances” remained largely quiescent. Congress was paralyzed by the aftershocks of the attacks, and-- after the President’s party gained control of the Senate in 2002-- by party loyalty. The courts awaited justiciable controversies, delayed by secrecy and by sequestration of potential plaintiffs. When confronted with legal challenges, most judges proved unwilling to confront GWOT overreach.

One of the few arenas where efforts to constrain abuses met success lay in the mechanisms of transparency outside the tripartite constitutional structure. During the first five years of political stasis regarding the GWOT, what Justice Scalia derided as the “romantic notion” of “do it yourself oversight” provided crucial building blocks of public resistance to abuses.

Justice Scalia’s appeal to “institutionalized checks and balances” nonetheless points to an important insight. The successes of FOIA in calling GWOT to account were predicated upon and facilitated by institutions beyond the statute itself. FOIA functioned only as part of an ecology of transparency that included an infrastructure of federal civil servants who fill their roles with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors willing to undertake prolonged campaigns for disclosure.

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

Disclosure mechanisms can have no effect in the absence of information to disclose. One could imagine a regime in which government officials seeking to conceal their actions destroy all

records of them, and thereby immunize themselves from subsequent accountability. In prior administrations, these efforts took the form of “operational secrecy” and document destruction. The second Bush regime deployed the gambits of “ghost detainees,” missing documents, sanitized e-mail records and destruction of hundreds of hours of video recordings of “enhanced” interrogation. But effective bureaucracies run on records, and modern technology has exponentially enhanced the array of information recorded. It is difficult to eradicate entirely the evidence of any widespread policy.

Efforts to avoid record keeping, or to sanitize files once kept, require unanimous consent of all participants. A secretary who declines to shred or delete his copy of a memorandum, like a computer technician who retains the prescribed backup copy, preserves information as effectively as a general or department head. A civil service endows the federal government with a cadre of individuals whose allegiance to the current regime cannot be counted on to eliminate inconvenient information. They have been appointed by previous regimes, and they will work for subsequent ones.

Equally important, the federal bureaucracy is multivocal and professionalized. Officials build careers not on fealty to the current administration but on commitment to a set of departmental goals and professional norms. Some, indeed, like the National Archives, are charged with preserving information. Such commitments generate records inconvenient to administrations bent on concealment. Further, statutes provide the State Department, Defense Department, Justice Department, Department of Homeland Security, and CIA with an independent Inspector General specifically tasked with discovering and recording malfeasance. In the Bush-era GWOT, the integrity of civil servants who committed to writing their opposition

was a prominent source of documentation for abuse.

### **B) A Machine that Won't Go of Itself: FOIA Requesters**

The existence of records does not entail their dissemination. By its terms, FOIA imposes few affirmative disclosure obligations on federal record holders. Recent initiatives have moved toward proactive disclosure, but the burden of effectuating inconvenient transparency still often rests on requesters who seek information.

From the beginning of the GWOT, efforts to obtain substantive judicial review were impeded because those most directly affected by the excesses were unavailable as plaintiffs; they were hidden, absent, or exiled. Plaintiffs who objected to the abuses on principle alone were said to lack “standing.” FOIA, which gives “any person” the right to seek information, provided a forum in which principled opponents of GWOT could pass the courthouse doors. And--a matter not to be taken for granted in international comparison--black-letter First Amendment doctrine precluded the government from retaliating against citizens who ask inconvenient questions.

Legal entitlement to seek information, however, was only the first step. To press a recalcitrant administration for disclosure under FOIA requires time, money, and expertise.

Successful efforts by the Associated Press to pry loose information regarding the Combatant Status Review Proceedings in Guantanamo began in November 2004 and extended through tenacious litigation over the course of two years. Attempts by a coalition of civil liberties organizations, librarians, and booksellers to obtain information regarding the use of the “USA Patriot Act” commenced in August 2002, and generated disclosures fitfully over the next three

years as continued FOIA requests combined with litigation and political pressure. ACLU's "Torture FOIA" campaign began with a request filed in October 2003; the release of over 100,000 pages of documents required three and a half years of the legal equivalent of trench warfare.

Some requesters were members of the news media--like the Associated Press. For the most part, only news organizations sufficiently large and solvent to allow speculative investigation and investment that might bring reputational gains in the medium-term future will undertake the expenditures necessary to bring FOIA effectively to bear. Constitutional structures protect an independent press. But the press is subject to the vicissitudes of public opinion, the pressure of advertisers, the need to remain on good terms with government sources, and the demands of competing priorities for their resources.

News media were not prominent at the vanguard of many successful FOIA inquiries directed at the GWOT. Well-financed NGOs, combined with assistance from the private bar, made FOIA a force to be reckoned with in this arena. The most effective requesters included the National Security Archives, the ACLU, the Electronic Privacy Information Center (EPIC), the Electronic Frontier Foundation, the Center for Constitutional Rights, Judicial Watch, and the Center for National Security Studies.<sup>12</sup> An independent civil society sector, protected by rights of association, backed up by the pro bono litigation muscle of private law firms, and nourished by 501(c)(3) status proved to be the institutional matrix within which successful FOIA requests were seeded.

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<sup>12</sup> See Kreimer, "Strategy of Transparency," 1168-1185 (describing FOIA campaigns); Alasdair Roberts, *Blacked Out* (New York: Cambridge University Press, 2006), 117-120.

### **C) FOIA and Prerequisite Knowledge**

Professor Alexander Bickel famously observed with regard to constitutional theory, “No answer is what the wrong question begets.” The aphorism applies a fortiori to FOIA requests posed to a recalcitrant administration. For FOIA requests to generate illuminating documents, they must be framed to call forth those documents. And framing effective questions requires knowledge of the activities to be illuminated.

Some of the GWOT activities subject to FOIA requests were publicly announced. The prison camp at Guantanamo has never been a secret. The USA Patriot Act was enacted with great fanfare though relatively cursory consideration. But the existence of many initiatives was shrouded in secrecy.

The use of coercive methods of interrogation was hinted at, while the administration officially denied engaging in “torture.” Secret legal opinions advised officials that the president’s power as commander-in-chief superceded legal limitations, and that infliction of abuse short of lethal pain comported with the law. Programs of “extraordinary rendition” covertly seized suspects and ferried them to CIA “black sites” and foreign interrogators. Intelligence agencies engaged in broad, surreptitious, and often illegal surveillance of wire and internet communications without judicial oversight, while the administration disavowed any program of “warrantless wiretaps.”

Veiled initiatives could not be the subject of FOIA requests until requesters discerned their existence. Mere hints and suspicions were inadequate; until identified with sufficient specificity that they could be the subject of reasonably precise inquiry, FOIA requests regarding

such programs were likely to be fruitless. FOIA's efficacy depended on institutions that revealed the "deep secrets" of the existence and nature of the problematic GWOT initiatives.

Prior revelations formed a prerequisite to successful FOIA requests for statutory reasons as well.

First, the stock of FOIA requests always exceeds the available resources to process them, and an inconvenient request can rest at the back of a long queue for processing. FOIA regulations provide that expedited processing should be made available in cases where the requester is "a person primarily engaged in disseminating information" who makes a showing of "urgency to inform the public concerning actual or alleged Federal Government activity,"<sup>13</sup> and for matters "of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."<sup>14</sup> These showings require that prerequisite information already be a part of public discourse.

GWOT inquiries regarding the interrogation of immigrants, data mining, and a covert attempt to enlist U.S. Attorneys to lobby for funding for Patriot Act programs were denied expedited processing because the requesters could not demonstrate adequate media discussion of the requested material. Conversely, requests regarding controversial military surveillance of political dissidents, the use of publicly disputed provisions of the Patriot Act, and the revelation of illegal wiretapping programs by the NSA were held to be entitled to expedited processing on the basis of prerequisite public contention.

Second, alongside disclosure obligations, FOIA provides a series of statutorily crafted

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<sup>13</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II) (2000); see also 28 C.F.R. § 16.5(d)(1)(ii) (2006).

<sup>14</sup> 28 C.F.R. § 16.5(d)(1)(iv) (2006).

exemptions. Exemption 6 for “ files... the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” and Exemption 7( c) for law enforcement files that “could reasonably be expected to constitute an unwarranted invasion of personal privacy” were frequently invoked without conscious irony by the second Bush regime to resist GWOT FOIAs. In addressing these claims, courts balanced the degree of intrusion against the degree of public interest. A requester who presses the “public interest” side of this balance plays a stronger hand the more she already knows: a deep secret or a program whose outlines are only dimly known will not generate the requisite evidence of impropriety.

GWOT requesters were most successful in overcoming claims of these FOIA exemptions where they adduced already-available evidence of abuse or public contention. Public evidence of abuses at Guantanamo led to the release of the identities of detainees who charged abuse by their captors, Public controversy concerning the existence of “no fly lists” provided the predicate for disclosing the identity of policy makers involved. The FOIA release of pictures of the Abu Ghraib abuses was based on the active public debate engendered by the versions previously leaked to the press.

Successful FOIA requesters stood on the shoulders of prior revelation for a third and final reason. Judges in FOIA cases are called upon to make discretionary judgments regarding the reasonableness of timing, the adequacy of searches, the balance between privacy and public interests, and the plausibility of predictions of future impacts on government and private parties. Without public information regarding government abuses, courts are inclined to give the administration the benefit of the doubt. But once evidence emerges to prove an administration untrustworthy in one set of public controversies, it is likely to affect the credence granted in

others. Many of the successes of requesters in GWOT FOIA cases followed initial revelations of abuses by other means and the admonition by the Supreme Court that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>15</sup>

Prior revelations critical to many successful FOIA requests, can be impeded by a secrecy-minded executive. The second Bush administration went to great lengths to keep potential internal, as well as external, opponents ignorant of policies that would usually have fallen within their purview. These efforts at concealment, if entirely effective, could have immunized the initiatives from FOIA inquiry. They failed because of institutions and legal practices beyond FOIA itself.

GWOT concealment efforts ran aground in part on the phenomenon that, as the internet adage puts it, “information wants to be free.” Most actions leave informational spoor that can be discerned over time by sufficiently determined observers. Passers-by will notice forcible kidnaping on busy streets, family members will complain of disappearances, airport mechanics and observers will see unusual departure patterns, flight plans will be recorded in air traffic control databases. And of course, once the subjects of initiatives are allowed to communicate with the outside world, they will tell their own tales.

The twenty-first century information environment has brought interested private researchers and reporters the capacity to gather and sift large volumes of information seeking patterns, and to share those patterns across continents. Further, the internet has allowed researchers to leverage a previously unavailable cadre of interested amateurs. These trends converged when covert CIA involvement in “extraordinary rendition” flights was publicly

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<sup>15</sup>Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

established through the combination of corporate registration statements, routine disclosures of FAA flight data, and the existence of a network of “plane spotter” hobbyists who track arrivals and departures at airports, all analyzed by a loose collaboration of news reporters and European prosecutors.<sup>16</sup>

Partial concealment is insufficient to preserve “deep secrets,” and in an open society, total concealment is a challenging task. The American legal scene is not graced with an equivalent of the “Official Secrets Act”; the law does not purport to impose criminal punishment on most who disclose, convey, or publish inconvenient information. And even leakers of classified information, who may nominally be subject to criminal liability, are rarely prosecuted. In the absence of a tradition and infrastructure of suppression, retrofitting a system of public justice and administration to assure total secrecy becomes a substantial, and often insuperable, challenge. And once information is disclosed, the constitutional strictures against restraining publication of truthful information,<sup>17</sup> combined with the protean capacities of the internet, foil effective suppression.

Free-range GWOT disclosures were supplemented by intentional releases of information by civil servants. Sometimes the releases of information followed from official action. Thus in January 2002, as the administration struggled to suppress the dimensions of its dragnet detentions of non-citizens, the Immigration and Naturalization Service effectively revealed the identity of detainees held in Passaic and Hudson County jails when it allowed detainees to meet

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<sup>16</sup> E.g., Stephen Grey, *Ghost Plane* (New York: St. Martin’s Press, 2006), 114-126; Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA’s Rendition Flights* (Hoboken, NJ: Melville House, 2006), 45-74, 95-121.

<sup>17</sup> E.g., *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

with advocacy groups for standard “know your rights” presentations. The Department of Justice Inspector General’s critical report on the treatment of those detainees and the post-September 11 dragnet was leaked, then officially released a year later.

GWOT secrecy was breached more tellingly in unofficial disclosures by disaffected government employees. Internal disclosures first catalyzed opposition within the government, and that opposition laid the basis for leaks to the public. The arc of disclosure regarding torture is emblematic.

In late 2002, Navy investigators repelled by the recorded abuse of suspects at Guantanamo notified sympathetic superiors.<sup>18</sup> In December 2002, government sources provided the basis for a front page article in the Washington Post providing accounts of abusive interrogation techniques. As a result of the internal opposition and the external critique, some of these techniques were temporarily suspended.<sup>19</sup> In April 2003, internal military dismay with the prospect of abandoning limits that had constrained abuse for two generations impelled military lawyers to confidentially approach civilian human rights advocates to spark opposition. In January 2004, after Specialist Joseph Darby submitted a complaint and a CD of Abu Ghraib pictures to a military investigator, reports of the nature of the abuse began to circulate. The administration sought to suppress the results of the ensuing investigation of that abuse,

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<sup>18</sup> Jane Mayer, “The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted,” *New Yorker*, February 27, 2006 (describing report to Alberto Mora, General Counsel to the Navy, by Naval Criminal Investigative Service head David Brant, relying on information obtained by N.C.I.S. psychologist Michael Gelles, who “had computer access to the Army’s interrogation logs at Guantánamo”).

<sup>19</sup> See discussion of the Mora memorandum in Kreimer, “Strategy of Transparency,” 1163 n.88 and 1192 n.216. A discussion of the broader array of FOIA-potentiating leaks can be found at Kreimer, “Ecology of Transparency,” 1037- 42

undertaken by General Antonio Taguba, which set forth both the “sadistic, blatant and wanton” prisoner abuse by guards and collusion by superiors. But information continued to make its way to the media from outraged insiders. With the broadcast of some of the Abu Ghraib photos by 60 Minutes and the subsequent waves of disclosures, the effort at suppression largely collapsed. In May and June 2004, internal whistleblowers began to disseminate to the media and the internet legal memoranda authorizing abusive interrogation, and the supporting documents of the Taguba report.

Leaks continued in 2005, setting the stage for FOIA requests by advocacy organizations seeking specific documents identified in the media, along with broader information on detainee abuse. By 2007, those inquiries had resulted in the release of over 100,000 pages of documents.

As with resistance to record destruction, the crucial institutional context of these disclosures was the federal civil service. Just as the longer time horizon of civil servants encourages resistance to the destruction of records, it is prone to generate the riskier step of affirmatively disclosing abuses to outsiders. As with record keeping, whistleblowing does not require broad participation by employees before it is effective. It takes only one individual willing to disseminate information to dispel the deep secrecy that hamstring FOIA requesters.

Civil servants are also more inclined than political appointees to resent violations of internal norms of departments where they have spent their careers. The Judge Advocates General who approached human rights advocates to spur them to investigate complained that the U.S. military’s 50-year history of observing the Geneva Conventions was being overturned. Mary McCarthy, a CIA deputy Inspector General who had filed reports decrying illegal interrogation techniques, was impelled to turn to the press when she “was startled to hear what

she considered an outright falsehood” in CIA presentations to Congress.<sup>20</sup>

To be sure, not all GWOT information was leaked by principled internal critics. But the resolution of Bush regime officials to centralize dubious initiatives in the Office of Vice President Dick Cheney attests to the perceived dangers that civil servants pose to deep secrecy.

#### **D) FOIA Production and the Rule of Law on the Supply Side**

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

The scope of exemptions gives wide range for administrative predictions of dire consequences from disclosure, and courts will often defer to these predictions. Satirist Tom Lehrer once observed, in the context of pornography, “when correctly viewed, everything is lewd.” When viewed through the prism of the possible assembly of a “mosaic” of information by a dangerous enemy of unknown capacities, everything is a dire threat to national security. Given the availability of “national security” concerns, why would an administration ever fail to classify damaging material?

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<sup>20</sup> R. Jeffrey Smith, “Fired Officer Believed CIA Lied to Congress; Friends Say McCarthy Learned of Denials About Detainees’ Treatment,” *Washington Post*, May 14, 2006.

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

The strengthened FOIA obligations of 1974 led to the establishment of the Office of Information and Privacy in the Department of Justice in 1981 (renamed the Office of Information Policy in 2008). That office, directed by the same attorneys for over a quarter-century, took as part of its institutional mission the quest to establish a culture of lawful response to FOIA requests. The strength of this culture forms part of an explanation for the success of FOIA litigation in the context of the GWOT.

The self-interest of career civil servants, moreover, sometimes supports disclosure. In a multivocal bureaucracy, a faction that can show itself to have opposed a problematic policy as a matter of principle or prudence may be eager to expose abuses by its rivals. The dynamic manifested itself in maneuvering over the ACLU "torture files" FOIA requests for documents regarding coercive interrogation policies. The FBI, under Robert Mueller, which had lodged objections to these tactics, affirmatively gathered a chronology of its objections, granted the ACLU's request for expedited processing, and released revelatory documents. As one account puts the matter:

[After the initial Abu Ghraib disclosures,] the FBI general counsel's office began a more systematic effort to document the abuses that had been recorded by its agents in Iraq, Afghanistan and Guantanamo. The result was a flood of alarming reports that have now

been turned over to the American Civil Liberties Union in its Freedom of Information lawsuit seeking the release of government documents on the treatment of prisoners.

The release of these documents has exacerbated tensions between the FBI and the Pentagon over the issue. Defense officials have privately complained that bureau officials affirmatively decided to turn over the documents in the lawsuit in order to protect itself from charges that it was complicit in the improper treatment of prisoners.<sup>21</sup>

The history of the “torture files” request highlights a final structural guarantee grounded in the career civil service. FOIA’s national security exemption requires that materials actually have been classified pursuant to valid executive order, and the classification process has its own career personnel and organizational dynamics. These can be resistant to efforts to over-classify in the interests of political gain, if for no other reason than the perception that political over-classification diffuses the resources necessary to protect against real threats to security. As I have described elsewhere,<sup>22</sup> the integrity and institutional clout of William Leonard, the Director of the Information Security Oversight office in the summer and fall of 2004, precluded the “national security” gambit and facilitated the release of over 100,000 pages of revealing documents.

Finally, the institutional structure of the federal judiciary proved crucial in GWOT requests. As noted earlier, confrontations between requesters and a recalcitrant administration often leave substantial room for the exercise of judicial discretion. Much of the action in FOIA requests occurs in the shadow of litigation, or out of the range of effective appellate review. The efficacy of FOIA, therefore, depends in substantial measure on the rigor and skepticism with which trial judges exercise their offices.

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<sup>21</sup> Michael Isikoff and Mark Hosenball, “Has the Government Come Clean?,” *Newsweek.com*, January 5, 2005, <http://www.msnbc.msn.com/id/6790916/site/newsweek/>.

<sup>22</sup> Kreimer, “Strategy of Transparency,” 1204-1205.

All federal judges are, of course, life tenured; any particular FOIA request therefore has a chance of coming before a judge appointed not by the current administration, but by predecessors of different ideology. Moreover, under FOIA, venue for requesters' lawsuits lies both in the location of the requested records, which is usually the District of Columbia, and in the district in which the claimant resides. For matters of national interest, an administration must potentially contend with a nationwide portfolio of litigation. That portfolio is likely to contain legal precedents and judicial opinions more diverse than the consensus in Washington, D.C., or the balance of power on the DC Circuit.

Strategic GWOT litigants sought judges likely to be skeptical of administration claims. Efforts to withhold documents on prisoner abuse and the details of Guantanamo detention practices were challenged by requesters in New York, outside the precedential authority of the 2-1 majority in the D.C. Circuit that gave almost unqualified deference to the administration's national security claims.<sup>23</sup> The challenges succeeded before Clinton appointees Alvin Hellerstein, who had served in the Judge Advocate Corps of the U.S. Army from 1959-1960, and Jed Rakoff, who had spent seven years in the U.S. Attorney's Office for the Southern District of New York.

In California, Judge Charles Breyer, who had served as a Watergate special prosecutor, upbraided the government for tendering "frivolous claims of exemption" regarding documents relating to the "no-fly list." Even within the District of Columbia, Clinton appointees Gladys Kessler and Ellen Segal Huvelle effected the release of documents debunking the administration positions concerning deployment of the Patriot Act by forcing the administration to accelerate its

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<sup>23</sup> *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

processing of the relevant FOIA requests.

To be sure, many judges across the country also acquiesced to flimsy arguments resisting disclosures of information. But an administration seeking to maintain secrecy must contend with the prospect that FOIA cases will come before a bench that contains a number of reasonably skeptical judges. And, as with the prospect of leaks, it requires only one success on a given subject to release information into public dialogue.

### **III. The Force of FOIA: The Question of Efficacy**

In contrast to the FOIA critics who regard the statute as unnecessary, a second group of commentators casts FOIA as a wholly ineffective check on executive overreaching in the GWOT.

The answers to these challenges come in two stages. First, as already indicated, it is important to assay successful requests and appreciate the ways in which FOIA can trigger other disclosures and discussion. FOIA's role in the ecology of transparency has been both to authenticate some prior disclosures, easing their way into public discourse, and to potentiate other subsequent disclosures in ways that the critical literature has failed to appreciate. Second, analysis requires a clear-eyed assessment of the ways in which FOIA disclosures have functioned to leverage the checking functions of other institutions, and the cumulative impact of disclosures over time.

#### **A) FOIA and the Half-Full Glass: Assessing Contributions to Public Information**

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

But FOIA requesters also met with success. Critical commentary often fails to account for cases--predominantly in the period following the Supreme Court's rebuff of uncontrolled executive authority in prosecuting the GWOT in June 2004<sup>24</sup>--which rejected efforts to resist FOIA inquiries. In this period, the successful substantive challenges in the Supreme Court were part of a change in the nation's approach to the GWOT that helped FOIA requesters obtain important judgments regarding Guantanamo detainees, prisoner abuse, and surveillance. Critics often fail, moreover, to acknowledge the instances where information has been revealed in the shadow of FOIA but without authoritative judicial mandate. As I discuss at greater length in Strategy of Transparency, revelations emerged from FOIA requests regarding the post-September 11 dragnet, the MATRIX (Multistate Anti-Terrorism Information eXchange) surveillance network, the Combatant Status Review Tribunals in Guantanamo, the implementation of the Patriot Act, and the physical abuse of prisoners detained overseas.<sup>25</sup>

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

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<sup>24</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>25</sup> Kreimer, "Strategy of Transparency," 1168-1185.

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

As the revelations of Watergate led Congress to strengthen FOIA, they also generated a network of other institutions within the government to audit the exercise of executive authority. FOIA disclosures regarding GWOT abuses in turn triggered inquiries by these watchdogs within the executive branch.

The disclosure of FBI reports regarding detainee abuse in the ACLU's FOIA litigation in late 2004, for example, brought about internal investigations both by the Department of Justice Inspector General and a specially commissioned Army investigation team. The revelation of internal reports of abuses of Patriot Act authority in FBI documents disclosed in the EPIC FOIA litigation in late 2005 precipitated an investigation by the Department of Justice Office of the Inspector General.

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

The FOIA disclosures of FBI documentation of torture in late 2004 galvanized hearings,

even in a Congress dominated by presidential allies. The weight of documents released in the Torture FOIA litigation provided leverage for further inquiry by skeptical members of Congress in confirmation hearings. Synergistically, congressional inquiry triggered by leaks and FOIA documents extracted materials which had been redacted from the initial Torture FOIA disclosures.<sup>26</sup>

Most important, FOIA disclosures provided a means of authenticating--and allowing mainstream media to take cognizance of--information that had emerged in bits and pieces from internal critics and targets of GWOT initiatives. Before the disclosures that began with Abu Ghraib, administration apologists shaped public discourse by touting disavowals of “torture,” portraying particular leaks as “rumor, innuendo, and assertions,” and denigrating critics as “either uninformed, misinformed or poorly informed.” Reporters, well aware that leakers can be self-interested players of varying levels of reliability, and dependent on administration sources for their flow of information on other matters, proved reluctant to openly accuse the administration of mendacity.

After the torture files FOIA releases, these ploys became less effective. FOIA provided details and substantiation for the fragmentary reports by critics that had disclosed the existence of deep secrets. FOIA disclosures provided official documents; those documents allowed the media to adopt the stance of a neutral observer reporting on the administrations’ own memoranda. The patterns of abusive interrogation began to move from the realm of allegation to the realm of fact in public debate. And with internal substantiation, it became less risky to report

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<sup>26</sup> In addition to the discussion in Kreimer, “Ecology and Strategy,” see Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (New York: W.W. Norton & Co., 2012), 112-121.

further corroborating accounts from administration critics.

## **B) The Substantive Impact of Disclosure on Abuses: FOIA and Institutional Leverage**

Federal courts were not eager to confront GWOT overreaching. But the materials revealed by FOIA litigation provided building blocks for substantive litigation to challenge abuses. Most striking, advocates deployed FOIA documents before the Supreme Court in challenging the Bush regime's claim of unreviewable power over detainees. Again, it is important to appreciate the cumulative effect of transparency.

The leaks of the Abu Ghraib abuses, the Taguba report, and the legal memoranda authorizing "enhanced" interrogation set the stage for the initial rebuff of the administration's claims of unreviewable authority over detainees in 2004.<sup>27</sup> As documentary evidence of abuses continued to emerge from Judge Hellerstein's FOIA orders in late 2005 and 2006, the Supreme Court considered the petition for certiorari and the merits of *Hamdan v. Rumsfeld*.<sup>28</sup> Advocates for the detainees adduced both the Torture FOIA documents themselves and the resulting public commentary and investigation to argue that restraints on treatment of detainees were necessary to assure adherence to minimal requirements of human rights. In June 2006, the majority opinion in *Hamdan* not only granted relief to Mr. Hamdan and his compatriots in Guantanamo, but was crafted to impose legal restraints on abuse by American operatives overseas.

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<sup>27</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). Cf. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). It appears that the Justices were cognizant of the mounting tide of disclosures regarding the administration's abuses as they deliberated in 2004. See, e.g., Jack Goldsmith, *The Terror Presidency* (New York: W.W. Norton, 2007), 134.

<sup>28</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (argued March 2006, decided June 30, 2006); *Hamdan v. Rumsfeld*, 546 U.S. 1002 (Nov. 7, 2005) (granting certiorari).

The administration, in turn, obtained legislation to substitute “Combatant Status Review Tribunals” (CSRTs) for the habeas corpus remedy made available by *Hamdan*. The Court initially denied certiorari in a case upholding the substitution against constitutional challenge. But it reversed that denial after being confronted with the disclosure by a whistleblower of the arbitrary and cursory nature of the CSRT process, against the background of CSRT transcripts disclosed by FOIA requests and the disclosure of previously secret OLC opinions effectively authorizing the executive to ignore statutory limits on torture.<sup>29</sup> The ultimate resolution in *Boumediene v. United States*<sup>30</sup> invalidated the Congressional substitution of the CSRT for habeas corpus rights.<sup>31</sup>

Since *Boumediene*, another development has made FOIA even more important as a foundation of litigation seeking to call government abuses to account. In *Ashcroft v. Iqbal*,<sup>32</sup> the Supreme Court limited the ability of plaintiffs to seek redress for government misconduct in federal court. In contrast to the prior interpretation of federal notice pleading, the *Iqbal* standard requires plaintiffs to provide details in a complaint sufficient to persuade a potentially skeptical trial judge not simply that they were injured by the government but that their account of the specific way they were injured and those responsible is “plausible.” Information about the scope of and responsibility for wrongdoing is often in the hands of government malefactors, and under

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<sup>29</sup> For details of the maneuvering around certiorari and the material submitted to the Court in *Boumediene* see Kreimer, “Ecology of Transparency” 1065-67.

<sup>30</sup> 128 S. Ct. 2229 (2008).

<sup>31</sup> In addition to the discussion in Ecology 1065-67 see, David Cole, *Engines of Liberty* (New York: Basic Books, 2016), 202-208

<sup>32</sup> 556 U.S. 662 (2009). See, e.g., Jonah Gelbach, “Material Facts in the Debate Over Twombly and Iqbal,” *Stanford Law Review* 68, no. 2 (2016): 360; Jonah Gelbach, “Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery,” *Yale Law Journal* 121, no. 8 (2012): 2270.

the prior dispensation, plaintiffs could seek it in discovery after filing suit. But under *Iqbal* this embargoed information has itself become the ticket of admission to the courthouse. FOIA requests can dislodge information in government files, and make litigation possible. Thus, it has become increasingly common for civil rights attorneys to use FOIA requests to lay the groundwork for litigation campaigns.<sup>33</sup>

The pattern of relief triggered by FOIA disclosures extends beyond the courts. Congress was generally timid in confronting GWOT overreaching, and internal executive watchdogs were often lax. But the occasions where political pressure effectively goaded these institutions built on the ecology of transparency. Some programs regarding domestic surveillance were withdrawn after disclosure of their excesses; others, which relied on cooperation of state governments outside the current administration's coalition, withered because of local opposition. FOIA disclosures impeached the credibility of administration spokesmen who campaigned for expansion of the PATRIOT Act, and a series of disclosures of GWOT abuses immediately preceded the December 16, 2005 decision in the Senate to block its renewal. Evidence of abuse of National Security Letters triggered an internal FBI audit, which in turn revealed widespread abuses and generated programmatic changes to bring the agency into line.

In April 2004, the disclosure of Office of Legal Counsel (OLC) opinions authorizing abusive interrogation techniques focused the attention of, and gave leverage to, internal critics of the memoranda; the official withdrawal of the OLC torture opinion followed a week later. The

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<sup>33</sup>For one recent example, see *Hernandez v. Lynch* EDCV 16-00620-JGB (KKx) (N.D. Calif., 2016), 7 at nn. 9,10, [https://www.aclu.org/sites/default/files/field\\_document/order\\_granting\\_pi\\_class\\_cert\\_and\\_denying\\_motion\\_to\\_dismiss.pdf](https://www.aclu.org/sites/default/files/field_document/order_granting_pi_class_cert_and_denying_motion_to_dismiss.pdf) (Evaluating the range of bonds imposed on indigent immigrants challenging deportations based on responses to a FOIA request).

prospect of cross-examination of Alberto Gonzales on the basis of the ACLU's Torture FOIA materials contributed to the incentives to issue a public replacement for the earlier torture memo on December 30, 2004. At the end of 2005, material obtained by the Torture FOIA litigation figured prominently in the debates leading to the adoption of the McCain anti-torture amendment, as did leaks by internal critics repelled by mendacity in administration efforts to counter the initial disclosures.

Over time, all of these mutually reinforcing leaks, FOIA disclosures, and investigations altered the patterns of secrecy, and the cycle of political and civil-society acquiescence, that enabled the Bush administration's most extreme GWOT initiatives. On one front, public confirmation of dubious tactics allowed critics both inside and outside of government to mobilize and coordinate. Within the executive branch, public disclosures pierced the mutually reinforcing groupthink that had discounted costs of extralegal tactics and had presumed their necessity and effectiveness. In Congress, revelations allowed critics to draw on the insights of skeptics within the government, and to gather expertise sufficient to dispute claims of legality and efficacy. In the media, disclosures of internal evidence allowed reports of abuses without stepping outside of the frame of respectful discourse.

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

Disclosures impeaching the administration's credibility and claims of lawfulness in one area generated more general skepticism. Judges, lawmakers, journalists, and the public react

negatively to being deceived, and once hard evidence of deception and abuse emerged in some areas of the GWOT, these groups became less inclined to extend comity in others. As Abraham Lincoln, who made his extraconstitutional assertions of authority in public, is said to have put the matter, “If you once forfeit the confidence of your fellow-citizens, . . . you can never regain their respect and esteem. It is true that you may fool all of the people some of the time; you can even fool some of the people all the time; but you can’t fool all of the people all the time.”<sup>34</sup>

#### **IV. FOIA and the Question of Proportionality**

A final set of critics acknowledge the possibility that the disclosures mandated by FOIA and facilitated by the ecology of transparency can contribute to public accountability. These commentators express skepticism, however, that the current regime is actually well shaped to accomplish that task. Some critics maintain that FOIA far more often contributes to private rent-seeking than to public oversight, and suggest that resources devoted to private requests are misdirected. Others accuse the system of an inability to match public benefits with public costs, and advocate a more targeted set of institutions to provide “optimal” levels of disclosure. While these concerns have some substance, the experience of GWOT FOIAs suggests that virtues of the current system reside precisely in the characteristics that generate critique. The breadth of the FOIA regime gives it robustness, and its situation in a resilient ecology of transparency provides a fault tolerant mechanism adapted both to the task of bringing the popular conscience to bear against tyranny and barbarism and to the goal of limiting egregious betrayals of the

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<sup>34</sup> Col. Alexander K. McClure, “*Abe*” *Lincoln’s Yarns and Stories* 184 (Chicago: Educational Company, 1904).

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### **A) The Robustness of a Broad FOIA Regime**

Skeptics correctly observe that self-interested businesses and inquisitive private parties rather than investigative reporters or civil society organizations file most FOIA requests. A FOIA regime that responded only to requests from representatives of the “public interest” on matters of public governance could conceivably be considerably less expensive and less intrusive.

There are considerable hurdles to identifying who represents the “public interest”; one person’s crank or “special interest” is another’s virtuous crusader. But even properly specified, such a system would sacrifice considerable protection for transparency on politically contested issues like the GWOT.

An infrastructure of career civil servants processing FOIA requests is the sine qua non of an effectively functioning FOIA system. At a mundane level, the capital cost of establishing the bureaucracy to process “private” FOIA requests finances the same bureaucracy that processes “public” ones. More subtly, the broad availability of FOIA sets transparency as a standard operating procedure. Requests are not by definition politically charged and confrontational; they are part of the way in which civil servants normally do business. And crucially, the breadth of “self-interested” requests generates the case law of judicial enforcement of FOIA. A continued flow of FOIA requests into the courts, undertaken by self-interested litigants, establishes the judicial infrastructure available to “public interest” requesters.

A FOIA system that provides broad benefits to an array of “special interests,” moreover,

provides robustness against political attack. Commentators have noted that transparency regimes are often established in the wake of particular scandals, but prove stable only where a sufficient constituency benefits from the regime to sustain it in the face of predictable claims of overreaching or costliness.<sup>35</sup> 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 link arms with the Business Roundtable, information arbitrageurs, and right-wing enthusiasts, they are more likely to resist predictable pressures to curtail FOIA and more likely to expand it. Plausible models of political economy suggest that Congress is most likely to establish or expand FOIA entitlements where its interests diverge from those of the executive.<sup>36</sup> The broader the scope of FOIA, the more such divergences are likely to appear. If one goal is to provide a hedge against egregious abuses by regimes weakly constrained by the political forces of the moment, a broad inclusion of “private” requesters is not a FOIA bug but a feature.

## **B) FOIA and Optimality**

As critics allege, the structures of transparency examined here are not precisely tailored to generating optimal decisions. Some requests are denied or delayed past the time that they could allow the public to provide input into decisionmaking. Others are granted in a fashion that

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<sup>35</sup> E.g., Archon Fung, Mary Graham, and David Weil, “The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?,” *Transparency Policy* (2002), 4-5, <http://www.transparencypolicy.net/assets/FGWTransparency1.pdf>; Archon Fung, Mary Graham & David Weil, *Full Disclosure: The Perils and Promise of Transparency* (New York: Cambridge University Press, 2007), 110-115.

<sup>36</sup>See also Michener discussion in this volume of “leverage”.

could allow small public benefit, but impose costs on decisionmakers. But optimizing decisions is not the only--or the most important--goal for a system of transparency. Just as the “checking value” in First Amendment theory focuses on keeping public opinion ready to check the worst excesses of government,<sup>37</sup> transparency structures can serve not to achieve the best of which government is capable, but to avoid the worst.

In this account, the question should not be whether decisionmakers balance each tradeoff between “transparency” and “efficiency” optimally at the margin, but whether at a reasonable cost, the system provides both checks against tyrannical or barbaric decisions and guardrails against catastrophic government failures.

Where a sense of shame grounded on the actor’s own ideals (or those the actor attributes to the electorate) would be triggered by disclosure, the possibility of disclosure itself is particularly important. Kant’s publicity condition is mirrored in the Washington folk wisdom that every action must be evaluated in part by how it would eventually look on the front page of the New York Times.

The pathologies of the GWOT were not rooted primarily in a secret effort to maximize the interests of one private pressure group. Rather, secrecy sought to further electoral chances of the incumbent administration by hiding the moral costs of the policies adopted for public benefit as they conceived it. Secrecy aggrandized the unrestricted authority of the national executive. In responding to such initiatives, a static account of marginal cost benefit optimization is likely to prove inadequate. A judge asked to balance the costs and benefits of disclosing allegedly

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<sup>37</sup> E.g., Vincent Blasi, “The Pathological Perspective and the First Amendment,” *Columbia Law Review* 85, no. 3 (1985), 449, 455; Vincent Blasi, “The Checking Value in First Amendment Theory,” *American Bar Foundation Research Journal* 2, no. 3 (1977), 521, 523, 527.

problematic GWOT initiatives would be all too likely to succumb to the facially legitimate goals of the initiatives themselves, along with the siren song of deference to “representative institutions” endowed with both legitimacy and the mystique of knowledge of hidden threats. The messier ecology of transparency, which relies on a blanket rule of freedom of information for all, loosely joined with a chain of leakers, investigators, and advocates, is likely to be more robust in crises of fear and outrage.

The virtues of a resilient ecology of transparency extend beyond crises of national security to other egregious abuses. The linked institutions of transparency established in the 1970s--Inspectors General, disclosure of political contributions, the State Department’s “Dissent Channel,” the National Archives Information Security Oversight Office, the upgraded FOIA, the publication rights guaranteed by New York Times v. United States-- responded to President Nixon’s domestic overreaching in the pursuit of political aggrandizement and incipient tyranny. We are regularly reminded today that the threat of creeping authoritarianism may be only weakly constrained by a federal legislature with both houses dominated by members of the President’s party.<sup>38</sup> A minority party in Congress has neither subpoena power nor the authority to convene

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<sup>38</sup> E.g., David Frum, “How to Build an Autocracy,” *The Atlantic*, March 2017, <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>; Masha Gessen, “Autocracy: Rules for Survival,” *The New York Review of Books*, November 10, 2016, <http://www.nybooks.com/daily/2016/11/10/trump-election-autocracy-rules-for-survival/>; Daniel W. Drezner, “The Politics of Discomfort in the Age of Trump,” *Washington Post*, March 6, 2017, [https://www.washingtonpost.com/posteverything/wp/2017/03/06/the-politics-of-discomfort-in-the-age-of-trump/?utm\\_term=.97a470b8e207](https://www.washingtonpost.com/posteverything/wp/2017/03/06/the-politics-of-discomfort-in-the-age-of-trump/?utm_term=.97a470b8e207); Ruth Ben-Ghiat, “Trump is following the Authoritarian Playbook,” CNN, January 17, 2017, <http://www.cnn.com/2017/01/16/opinions/trump-following-authoritarian-playbook-ben-ghiat/?iid=EL>; Jacob Levy, “Authoritarianism and Post Truth Politics,” *Niskanen Center* November 30, 2016,

hearings. Minority legislators, however, like the state and local officials the Framers envisaged as “sentinels” to “communicate the same knowledge to the people,” can still turn to FOIA to obtain information to begin the process of checking tyranny.<sup>39</sup> And civil society can do the same. So, too, in the spirit of Sunstein’s invocation in this volume of Amartya Sen’s observations on famines and free press, FOIA stands sentinel against disastrous environmental mismanagement foisted quietly upon a federal bureaucracy and hidden from the public.<sup>40</sup>

Although most of the GWOT examples canvassed in the articles on which this chapter is based

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<https://niskanencenter.org/blog/authoritarianism-post-truth-politics/>; Jeet Heer, “Donald Trump Is Becoming an Authoritarian Leader Before Our Very Eyes,” *New Republic*, January 23, 2017, <https://newrepublic.com/article/140040/donald-trump-becoming-authoritarian-leader-eyes>; Ezra Klein, “How to Stop an Autocracy,” *Vox*, February 7, 2017,

<http://www.vox.com/policy-and-politics/2017/2/7/14454370/trump-autocracy-congress-frum>

<sup>39</sup> E.g., Nick Cahill, “California Pushes for Immigration Raid Information,” *Courthouse News Service*, February 28, 2017, <https://www.courthousenews.com/california-demands-information-immigration-raids/>; Edward-Isaac Dove, “Seattle Mayor wants to sue Trump,” *Politico*, February 21, 2017,

<http://www.politico.com/story/2017/02/seattle-mayor-trump-235218>;

Juliet Bennett Rylah, “L.A. City Attorney Files FOIA Request Over LAX Detainees,” *LAist*, February 15, 2017, [http://laist.com/2017/02/15/feuer\\_foia.php](http://laist.com/2017/02/15/feuer_foia.php);

“Democratic Senators Ask Labor Department to Fulfill FOIA Request of Trump Nominee Labor Violations,” *Elizabeth Warren*, January 13, 2017,

[https://www.warren.senate.gov/?p=press\\_release&id=1355](https://www.warren.senate.gov/?p=press_release&id=1355);

Phil McCausland, “Scott Pruitt, President Trump’s EPA Nominee, Ordered to Release Thousands of Emails,” NBC News, February 16, 2017, <http://www.nbcnews.com/news/us-news/scott-pruitt-president-trump-s-epa-nominee-ordered-release-thousands-n722161>

(Rather than respond to written questions, Pruitt told senators to file an open records request 18 times - or as Sen. Ed Markey of Massachusetts said, to “go FOIA yourself.”)

<sup>40</sup> Cf. “Reports of Information Removed from Government Websites,” *Open the Government*, <http://www.openthegovernment.org/node/5435>;

Matt Novak, “The EPA Just Posted a Mirror Website of the One Trump Plans to Censor,” *Gizmodo*, February 16, 2017, <http://gizmodo.com/the-epa-just-posted-a-mirror-website-of-the-one-trump-p-1792430343>

(“Under federal law, agencies are required to publicly post any documents that get three or more requests. “The genius of this approach is that, because they were required by federal law to post the mirror site (because it’s a frequently requested record), it’s harder now to force it down,)

involve national security, it seems eminently sensible to support a broadly tailored and resilient FOIA regime as insurance against other disastrous and unchecked abuses.

### **C) Neoliberalism, Paleoliberalism and Self-Government**

Professor Pozen has recently argued that FOIA fosters “regressive antiregulatory ecologies” and that the cost of FOIA’s disruption of governance is borne by the beneficiaries of the administrative state. In Pozen’s words, “generally reasonable and well-intentioned public servants see FOIA as a serious hindrance to their statutorily assigned work.”<sup>41</sup>

In general, public servants will tend to release information that furthers their goals. They will no doubt experience rules requiring them to disclose information they would prefer to retain in confidence as a “hindrance to their statutorily assigned work.” Some of that hindrance will effectively increase the cost of regulation, though the magnitude of the costs imposed by that hindrance seems less clear.

Not all hindered regulation, however, involves paleoliberal or progressive efforts to control exploitive business interests. Consider, for example,<sup>42</sup> the role of FOIA in “hindering”

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<sup>41</sup>Pozen, “Freedom,” at 1131. Professor Pozen’s thoughtful and gracious account is far longer and more nuanced than I have room to address fully in this update. I sketch a response to his concerns about the “neoliberal” tilt of FOIA.

<sup>42</sup>FOIA has been a useful tool in the kit of immigrant rights advocates in a series of areas which I lack space to address here. It seems destined to remain so as the Trump/ Bannon/ Sessions/ Miller regime becomes more draconian. See, e.g., n. x supra, Mary Tuma, “Did the White House and ICE Collude? Inquiring Civil Rights Groups want to Know,” *Austin Chronicle*, February 24, 2017, <http://www.austinchronicle.com/news/2017-02-24/did-the-white-house-and-ice-collude/>;

“ACLU Files Demands for Documents on Implementation of Trump’s Muslim Ban,” *ACLU*, February 2, 2017, <https://www.aclu.org/news/aclu-files-demands-documents-implementation-trumps-muslim-ban>;

the efforts of the Department of Homeland Security under the Obama administration to induce local officials to collaborate in immigration enforcement efforts. Despite potential constitutional objections, federal “public servants” tried to convince local officials that participation in “Secure Communities” and detainer programs was mandatory, while simultaneously attempting to mute public opposition by maintaining to other audiences that collusion was optional.<sup>43</sup> As part of an ultimately successful organizing campaign to encourage local communities to assert their constitutional opposition to draconian and disruptive enforcement, a coalition of immigrant rights activists spearheaded by the National Day Laborer Organizing Network (NDLON) filed and litigated a series of FOIA requests, posted the resulting disclosures online, and used them to galvanize opposition at both state and federal levels.<sup>44</sup> At the same time, the results of the NDLON FOIA formed a building block for federal civil rights actions imposing limits on

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Shirin Sinnar, “More Misleading Claims on Immigrants and Terrorism,” *Just Security*, March 4, 2017,

<https://www.justsecurity.org/38341/misleading-claims-immigrants-terrorism/>.

<sup>43</sup> See, e.g., *Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 742-43 (S.D.N.Y. 2011) (“There is ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities”).

<sup>44</sup> See, e.g. Erica Lynn Tokar, “Unlocking Secure Communities: The Role of the Freedom of Information Act in the Department of Homeland Security's Secure Communities,” *Legislation and Policy Brief* 5, no. 1 (2013): 103; Hannah Weinstein, “S-Comm: Shattering Communities,” *Cardozo Public Law, Policy and Ethics Journal* 10, no. 2 (2012): 395; Rachel R. Ray, “Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement’s ‘Secure Communities’ Program,” *Seattle Journal for Social Justice* 10, no. 1 (2011): 23; “National Day Laborer Organizing Network (NDLON) v. US Immigration and Customs Enforcement Agency (ICE),” *Center for Constitutional Rights*, February 3, 2010, <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs>; “About,” *Uncover the Truth*, <http://uncoverthetruth.org/campaign>.

constitutional violations by local collaborators.<sup>45</sup>

In adjudicating the tenacious efforts by the administration to prevent FOIA disclosures “hindering” the activities of DHS “public servants,” the trial judge observed

This litigation, filed more than two years ago, has already engendered four judicial opinions — now five. I once again urge the Government to heed the now famous words of Justice Louis Brandeis : "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>46</sup>

Whatever epithets apply here, “regressive” is not an obvious choice. In the ND LON FOIA, an ecology of transparency led to democratic contestation and more humane self-government.

Equally important, with due respect to the many conscientious public servants in the federal government, not all public servants are assiduous, reasonable, or well intentioned.

FOIA can impose a tax on public spirited regulation. But FOIA also imposes a tax on refusals to so regulate. Temptations to shirk are subject to exposure, regulation that is slipshod or counterproductive is subject to examination, and efforts by the subjects of regulations to buy relief from public duties are subject to discovery.<sup>47</sup> Recurring to the Sen paradigm, with FOIA

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<sup>45</sup> E.g., *Galarza v. Szalczyk*, 745 F.3d 634, 642 n.7 (3d Cir. 2014) (citing “ICE FOIA 2674.020612, <http://altopolimigra.com/wpcontent/uploads/2011/12/ICE-FOIA-2674.020612.pdf>).

<sup>46</sup> *Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 113 (S.D.N.Y. 2012).

<sup>47</sup> Mr. Frum’s meditation on the prospects for authoritarianism observes: “The benefit of controlling a modern state is less the power to persecute the innocent, more the power to protect the guilty.” FOIA is suited to at least detect such protection. Cf. David Fahrenthold and Rosalind Helderman, “Trump Camp says \$25,000 Charity Contribution to Florida AG was a Mistake,” *Washington Post*, March 22, 2016, [https://www.washingtonpost.com/politics/trump-camp-issues-rare-admission-of-error-charity-donation-to-florida-ag-was-a-mistake/2016/03/22/349c8f8c-efb4-11e5-a61f-e9c95c06edca\\_story.html?tid=a\\_inl&utm\\_term=.2cd41a9857f0](https://www.washingtonpost.com/politics/trump-camp-issues-rare-admission-of-error-charity-donation-to-florida-ag-was-a-mistake/2016/03/22/349c8f8c-efb4-11e5-a61f-e9c95c06edca_story.html?tid=a_inl&utm_term=.2cd41a9857f0); “CREW Files Open Records Request with Florida AG’s Office Regarding Trump University,” *CREW’s Most Corrupt*, March 17, 2006, <http://www.crewsmostcorrupt.org/legal-filings/entry/crew-files-open-records-request-with-florida-ag-office>.

available, those who suffer from public nonfeasance or misfeasance can detect it more easily and if there is political will, the threat of political discipline makes sins of deregulation less likely to occur. It is not obvious that these deterrent effects are outweighed by the hindrance imposed when regulatory targets deploy FOIA for tactical advantage.

In the current environment, neither congressional majorities nor the President’s advisers are likely to check deregulatory shirking and rent-seeking without a goad. While neoliberal forces have deployed FOIA to smear regulators in the past decade, today the posse of paleoliberalism is preparing to saddle up FOIA to confront the efforts to “deconstruct the administrative state.”<sup>48</sup> And FOIA is well suited to help discipline the official dissemination of evidence-free “alternative facts.”<sup>49</sup>

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<sup>48</sup> E.g., Edward Isaac Dove, “Obama Lawyers form 'Worst-case Scenario' Group to Tackle Trump,” *Politico*, February 23, 2017, <http://www.politico.com/story/2017/02/obama-trump-lawyers-worst-case-235280> (“They started by submitting 50 Freedom of Information Act requests ...[t]he plan is to bring what they find to reporters, build it into pressure for congressional oversight... and, as necessary, to file lawsuits.”); Josh Gerstein, “Liberals Cribbing from Conservatives’ Playbook to Attack Trump,” *Politico*, December, 16, 2016, <http://www.politico.com/story/2016/12/democrats-trump-resistance-conservative-playbook-232687> (“The post-election scramble to build a liberal version of Judicial Watch is underway. ....Others say there's no shortage of left-leaning groups that regularly file Freedom of Information Act suits and are sure to keep it up under Trump: the American Civil Liberties Union, Electronic Frontier Foundation, the Electronic Privacy Information Center, Public Citizen and more.” ); Ben Norton “ ‘FOIA Superhero’ Launches Campaign to Make Donald Trump’s Administration Transparent,” *Salon*, November 27, 2016, <http://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent/>; Michael Morisy, “Join our Project to FOIA the Trump Administration,” *Muckrock*, January 17, 2017, <https://www.muckrock.com/news/archives/2017/jan/17/help-us-foia-trump-administration>.

<sup>49</sup> E.g., “Request Under the Freedom of Information Act,” *The Campaign Legal Center*, February 15, 2017, <http://www.campaignlegalcenter.org/sites/default/files/02-15-17%20FOIA%20Request%20-%20Voter%20Fraud.pdf> (“The Campaign Legal Center submits this... request

for records pertaining to the Department of Justice and Office of Management and Budget’s writings and communications regarding President Trump’s allegations of

Finally, as Professor Pozen reminds his readers, the issue is always “as compared to what?” If neoliberal forces can hijack FOIA for their purposes, it is not clear why at least two of the alternatives that Pozen suggests, Congress and leakers, are not equally subject to capture and manipulation. And if neoliberal interests cannot deploy FOIA, they have other tools of hindrance at their disposal. By contrast, less well organized beneficiaries of regulation may not be equally effective in stimulating congressional oversight or internal leakers or in obtaining other leverage. Professor Pozen has identified the direction of the effects that concern him, but their net magnitude provides an uncertain basis to condemn FOIA.

## **Conclusion**

The ecology of transparency will not always prevent abuse. Advocates for humanity, civil liberties, or the public interest will often be in no position to challenge abusive policies before they take effect. Leaks may be strategic or premature, and FOIA requests may be ineffective. Information may be drowned out by chaff. News media, Congress, or the courts may be coopted or intimidated. Executive actors may not worry about the future or may game the system by embedding violations in areas resistant to disclosure. The public may prove indifferent to malfeasance or inhumanity.

Still, there have been and in my view there will be important occasions on which FOIA as part of the ecology of transparency proves crucial for the public weal and for public decency.

Donald Rumsfeld, one of the architects of the GWOT abuses, was a sponsor of the original

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widespread voter fraud,”); Jason Leopold, “Here Are The Official Photos Showing Trump’s Inauguration Crowds Were Smaller Than Obama’s,” *Buzzfeed*, March 6, 2017, [https://www.buzzfeed.com/jasonaleopold/the-national-park-service-has-released-official-photos-of-tr?utm\\_term=.unRLj6wNm#.gddYqArGB](https://www.buzzfeed.com/jasonaleopold/the-national-park-service-has-released-official-photos-of-tr?utm_term=.unRLj6wNm#.gddYqArGB) (released in response to FOIA request).

Freedom of Information Act. In 2004, as he and his colleagues struggled to shield their excesses from public scrutiny, Rumsfeld proclaimed with unwitting irony “Our great political system needs information to be self-correcting. While excesses and imbalances will inevitably exist for a time, fortunately they tend not to last. Ultimately truth prevails.”<sup>50</sup>

Rumsfeld was wrong about many things, but he was right in observing that self-correction like self-government requires information. FOIA does not make it inevitable that truth prevail. But the absence of FOIA would make the triumph of truth less likely.

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<sup>50</sup> Donald H. Rumsfeld, U.S. Sec’y of Def., “Remarks to the Newspaper Association of America/American Society of Newspaper Editors,” *Federation of American Scientists*, April 22, 2004, <https://fas.org/sgp/news/2004/04/dod042204.html>.