# An Information Commission

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*The right to access government information is a foundational element of a democratic society, protected in the United States by the Freedom of Information Act, or FOIA. But agencies cannot be left to administer their transparency obligations unchecked; political motives and institutional protectionism will inevitably sway agencies to overwithhold information from the public. While FOIA delegates responsibility for oversight of transparency obligations to the Judiciary, courts have failed to provide meaningful recourse for violations, creating few incentives to fully comply with the law. Democratic accountability suffers from this massive and largely unchecked practice of excess government secrecy.*

*This Article calls for the creation of an independent administrative agency, styled as an information commission, to enforce transparency obligations. An independent information commission would be far superior to judicial review. A well-designed commission would increase the availability of review of agency decisions to withhold information from the public, the quality of that review, and the scope of enforcement activities needed to effectively tilt agencies toward open, transparent governance. Building on the literature on effective agency design, this Article suggests ways the commission could be structured to safeguard its independence and argues that such an institution is essential to protecting democracy.*

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## INTRODUCTION

Secrecy pervades government. It hides things we want hidden, like troop movements and confidential informants, but it also hides a mountain of information about which there is a clear public interest in disclosure and no legitimate need for secrecy. It hides corruption; it hides influence over government decision-making; it hides government policy. Secrecy is a pathology; natural and organizational incentives and bureaucratic structures promote it, even when it does us harm, including harm to democratic accountability. And secrecy goes largely unchecked.

Take, for example, Immigration and Customs Enforcement (ICE), which is responsible for apprehending individuals it believes have failed to comply with immigration laws. ICE detains many of those individuals in facilities indistinguishable from prisons.[1] But as a result of growing criticism of this vast civil-detention practice, ICE monitors many others who await the outcome of their immigration cases through alternatives to detention programs that use technological controls, such as ankle monitors.[2] ICE regularly posts data on the number of people monitored by these alternative approaches.[3] When a nonprofit organization detected

1. *See* Hanna Johnson, *The Questions You Probably THINK You Know the Answer to — but Likely Don't — About ICE Detention*, ACLU (Nov. 30, 2020), https://www.aclu.org/news/immigrants-rights/the-questions-you-probably-think-you-know-the-answer-to-but-likely-dont-about-ice-detention [https://perma.cc/S286-HBSV].

2. *See* AM. IMMIGR. COUNCIL, ALTERNATIVES TO IMMIGRATION DETENTION: AN OVERVIEW 1–3 (2023), https://www.americanimmigrationcouncil.org/research/alternatives-immigration-detention-overview [https://perma.cc/9B8S-3WBY].

3. *See Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management#stats [https://perma.cc/8QZQ-TXWW] (last visited Feb. 15, 2024).

data anomalies in 2022, and ICE itself confirmed that some of its published data was inaccurate,[4] the organization filed a Freedom of Information Act (FOIA) request seeking the anonymized individual-level data underlying those statistics.[5] More than three months later, ICE responded that it had conducted a search for such records and "no records responsive to [the] request were found."[6] Put differently, ICE publicly reports aggregate data on how many individuals are in this program but claims it has no records whatsoever listing the individual data underlying that aggregate statistic. How could ICE issue such an absurd response? Why does it take three months for ICE to respond to a basic information request? What can this nonprofit organization further do to obtain the underlying data?

Take another example. The top newsroom lawyer for the *New York Times* recounted an episode when a reporter received a denial of a 2019 FOIA request for records concerning the Trump Organization's business relationship with the federal government.[7] Upon a closer inspection, however, buried in the seemingly routine communication from the agency was a plain-typed, anonymous note of an unusual variety.[8] It read: "The processing of the request was highly irregular. The withholding was entirely unjustified . . . The document was probably withheld for political reasons."[9] That is, a rogue FOIA officer was so horrified by the agency's official response, they felt compelled to tip off the requester! How can this happen? Why are political forces at work in determining whether records must be released or are subject to a legitimate exemption from disclosure?

Secrecy starts with hundreds of thousands of individual decisions made by government officials to deny access to government records requested by a member of the public under FOIA. The government denies these requests by overclaiming exemptions to disclosure that are permitted under the law.[10] It denies these requests by delaying—sometimes by years—responding at all.[11] It denies these requests by refuting that any records exist, even when that plainly cannot be

4. *ICE Lacks Transparency: Asserts No Records Exist to Substantiate Its ATD Custody Claims*, TRAC (Dec. 23, 2022), https://trac.syr.edu/whatsnew/email.221223.html [https://perma.cc/5656-ZEJB].

5. *ICE Posts Wrong Numbers on Alternatives to Detention (ATD) Monitoring*, TRAC (Dec. 14, 2022), https://trac.syr.edu/whatsnew/email.221214.html [https://perma.cc/9UZT-3HAL]; TRAC, *supra* note 4; *see also* Austin Kocher, *ICE's Data on Alternatives to Detention Raises Ongoing Quality Concerns + Recap of New Immigration Data*, AUSTIN KOCHER (Jan. 5, 2023), https://austinkocher.substack.com/p/ices-data-on-alternatives-to-detention [https://perma.cc/ED7N-5C82].

6. Letter from Brian Hearn, Supervisory Paralegal Specialist, Off. of Info. Governance & Priv., to Susan Long, Transactional Recs. Access Clearinghouse (Dec. 22, 2022), https://trac.syr.edu/reports/files/2022-ICFO-29132_response-no_records_found.pdf [https://perma.cc/4F2K-8UPN]; *see also* Kocher, *supra* note 5.

7. *See* David McCraw, *How the Times Uses FOIA to Obtain Information the Public Has a Right to Know*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/02/reader-center/foia-freedom-of-information-public-records.html.

8. *See id.*

9. *Id.* (omission in original).

10. *See infra* Section I.B.

11. *See infra* Section I.C.

the case.[12] And, as this Article will detail, in the vast, vast majority of cases, it gets away with it.

The root of the problem lies in the methods used to enforce transparency obligations. Congress designed a system by which individuals or organizations who do not receive the records they request from an agency must go to federal court for recourse.[13] But court is expensive and slow, and generally not a layperson's endeavor. And it is all too obvious to agencies and requesters alike that the chances that an agency's failure to comply with transparency obligations will carry any consequence are nearly zero.[14] Partly as a result of the failure of meaningful compliance or enforcement mechanisms, the agency culture around FOIA promotes doing the bare minimum to stay out of trouble.[15]

Less concretely, but equally troubling, is that there is currently no locus in government championing the people's right to access government information. As a result, we lack a meaningful public discourse promoting the public value of transparency or facilitating democratic oversight, celebrating citizens' use of transparency laws, or framing the stakes of the debate around government transparency as a fight for the human right to information needed to hold government accountable. FOIA is too often perceived as drudgery, compliance work, or even a detraction from the real work of government.[16]

Grounded in the literature on administrative agency design, this Article is the first to make a full-throttled case for a transparency champion and enforcement arm in the United States: an independent oversight agency styled as an information commission. While such bodies are common in other corners of the globe,[17] the unique role of agencies in American governance and constitutional constraints on agency structures require a distinct justification for such a model in the United States. Moreover, FOIA's history is long. The judicial model of enforcement has been fully tried and tested, and, as explained below, it has failed.[18] An information commission presents design opportunities that can meet the challenges of FOIA enforcement as we are experiencing them here and now.

This Article makes the case for an information commission in four Parts. Part I documents the pressing need for enforcement of transparency laws, focusing on the background conditions and institutional forces that militate toward excessive government secrecy such that oversight of transparency obligations is critical. Part II explores the competitive advantages and disadvantages of using courts as a primary enforcement vehicle versus administrative agencies. Drawing on a rich

12. *See, e.g.*, *supra* notes 1–6 and accompanying text.

13. 5 U.S.C. § 552(a)(4)(B). A dissatisfied requester may also appeal to a higher authority within the same agency, but that review is not independent since it remains inside the agency that denied access at the outset. *See id.* § 552(a)(6)(A)(i)(III).

14. *See infra* Section II.C.

15. *See infra* notes 47–56 and accompanying text.

16. *See infra* Section I.C.

17. *See* Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 679 (2022).

18. *See infra* Section II.C.

literature on judicial review in FOIA cases, it argues that Congress's delegation of FOIA enforcement to the Judiciary was a mistake, the consequences of which are made clear by the failure of the courts to adequately police transparency obligations. Part III sets out the affirmative case for an information commission. It argues that a commission would be able to engage in a higher volume of review, reach substantively more pro-transparency default decisions, and complement its individual administrative adjudication with a range of compliance activities that would greatly enhance the efficacy of transparency oversight.

Part IV takes on the primary challenge of institutional design of a potential information commission: protecting its independence. It describes how, despite the current uncertainty regarding the future of certain protections for independent agencies, a carefully designed information commission could be adequately protected from influence to serve its mission. In today's information environment, the stakes of government transparency and faith in democracy could not be higher. What follows is the case for protecting our fundamental democratic right to information.

## I. THE IMPERATIVE TO OVERSEE INFORMATION OBLIGATIONS

Each federal agency cannot be left to police itself internally with respect to transparency obligations. The inherent conflict of interest is apparent. Transparency obligations are aimed primarily at information about the agencies themselves, namely their decisions, their actions, and their performance.[19] No one likes scrutiny or invites inspection, and disclosure can lead to disagreement, criticism, or other consequences. Agency officials will unavoidably have conscious and subconscious biases that will influence their disclosure decisions. The evidence in this Part demonstrates the dire need for oversight of agency administration of transparency laws. Because the judicial review mandated by FOIA has not resulted in effective oversight, the later Parts of this Article will suggest a new system of review. But, first, let us understand the nature and scope of the existing transparency failure.

### A. CATEGORIES OF TRANSPARENCY OBLIGATIONS

Agencies' central obligations under FOIA to provide information to the public break down into two broad categories. First, agencies must proactively, or affirmatively, disclose certain categories of records,[20] publishing them without waiting for a member of the public to make a request.[21] These categories include, in particular, most types of agency working law, such as binding rules and

19. *Cf.* 5 U.S.C. § 552(f)(2) (defining agency records subject to FOIA).

20. *See id.* § 552(a)(1) (listing categories of records that must be published in the Federal Register); *id.* § 552(a)(2) (listing categories of records that must be published on agency websites); *see also Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, U.S. DOJ: OFF. OF INFO. POL'Y (Oct. 26, 2022), https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information [https://perma.cc/U9YT-K9VP].

21. While "proactive" and "affirmative" disclosure have sometimes been used distinctly to refer to voluntary and mandatory publication, respectively, they are more often used interchangeably to refer to

regulations; agency guidance and interpretative documents; orders resolving agency adjudications; staff manuals and organizational records; and other policy-making records.[22]

The second category of information obligations under FOIA is the much more well-known "reactive" provision of FOIA: any person may submit a request for reasonably described records, and the government must respond within twenty business days providing the requested records unless they fall in one of nine enumerated exemptions.[23] Federal agencies typically receive more than 800,000 FOIA requests each year;[24] responding to those requests is the activity that occupies the great majority of FOIA resources.

Agencies may withhold records from the public under listed exemptions, which cover (1) properly classified records related to national defense or foreign policy; (2) internal documents related solely to agency personnel practices; (3) records exempted from disclosure by another statute; (4) trade secrets and confidential commercial information; (5) records that would be subject to privilege claims in litigation; (6) records that if disclosed would create an unwarranted invasion of personal privacy; (7) certain law enforcement records; (8) certain records about financial institution examinations; and (9) certain records about wells.[25] Moreover, when agencies invoke these exemptions, they are required to specify which exemption is being invoked, segregate any nonexempt material in the document, and release the nonexempt portions.[26] But even when an exemption *could* apply, agencies are required to determine whether they *should* apply, based on whether the agency can identify a foreseeable harm that would result from disclosure.[27]

Most complaints about agency FOIA performance arise from two fundamental breaches of obligation. The first is withholding requested information under an

all such disclosures without a predicate request from the public. *See* U.S. DOJ: OFF. OF INFO. POL'Y, *supra* note 20.

22. § 552(a)(1)–(2); *see* Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 586 (2009).

23. § 552(a)(3)(A) (providing the right to request reasonably described records); *id.* § 552(a)(6)(A)(i) (requiring an agency response within twenty business days after receipt of request); *id.* § 552(b) (listing the exemptions).

24. *See* OFF. OF INFO. POL'Y, U.S. DOJ, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2022, at 2 (2023), https://www.justice.gov/media/1289846/dl?inline [https://perma.cc/F6U2-BRVB].

25. § 552(b).

26. *Id.* ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.").

27. *See id.* § 552(a)(8)(A)(i)(II) (requiring that agencies only withhold information under an otherwise applicable exemption if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption"); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (holding, among other things, that exemptions to disclosure under FOIA are discretionary, not mandatory).

exemption to disclosure even though the exemption does not actually apply.[28] A subspecies of this kind of violation is overredaction of material not properly redacted pursuant to an exemption, or the failure to redact at all and instead to withhold records in their entirety. At any point an exemption is claimed, whether to withhold in full or in part, it raises the specter of whether such a claim is proper. The second fundamental breach of FOIA obligations is the failure to respond in a timely fashion, or not at all, to a request for records.[29] These two kinds of problems plague FOIA and are the subject of well-founded, vociferous, and constant grievance. Agencies are routinely overwithholding records on a variety of bases and are failing to meet their obligations to respond to requests in a timely fashion.

A third category of FOIA violations deserves mention. Proactive or affirmative disclosure obligations are routinely and sometimes flagrantly violated. Even though this has not previously generated many disputes either at the agency level or in federal court,[30] it increasingly has been the subject of critique, litigation, and proposed reforms.[31]

Congress designed FOIA's transparency obligations—those of maximum disclosure in response to requests, timely responses, and proactive disclosure—to be an effective tool for government oversight. The Act's legislative history demonstrates Congress's intent to ensure "an informed electorate."[32] The Supreme Court famously declared that the law ensures that "people are permitted to know *what their government is up to*,"[33] and has emphasized that "the Act is broadly conceived," but admitted that agencies had not been willingly transparent in the past.[34] And indeed, as explained below, agency reticence has persisted despite FOIA's statutory mandate.

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28. *See infra* Section I.B.

29. *See infra* Section I.B.

30. As evidence of the scarcity of these disputes, only relatively recently did circuit courts even consider whether FOIA provides a right to sue over these violations and/or whether complainants must first present such disputes to the agency and exhaust administrative remedies. *See, e.g.*, Citizens for Resp. & Ethics in Wash. v. U.S. DOJ, 846 F.3d 1235, 1239–41 (D.C. Cir. 2017); Animal Legal Def. Fund v. U.S. Dep't of Agric., 935 F.3d 858, 869 (9th Cir. 2019); N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 213, 215 (2d Cir. 2021).

31. For an example of recent litigation over affirmative disclosure obligations under FOIA that reached a favorable settlement for plaintiffs, see Complaint for Injunctive and Declaratory Relief at 1, Nat'l Bail Fund Network v. Immigr. & Customs Enf't, No. 22-cv-07772 (N.D. Cal. Dec. 8, 2022) (bringing claims over agency's alleged failure to affirmatively disclose various policies related to bail determinations in immigration detention in violation of 5 U.S.C. § 552(a)(2)) and Stipulation of Settlement, *Nat'l Bail Fund Network*, No. 22-cv-07772 (detailing agreed upon release of records and payment of attorneys fees by defendant). For an example of policy proposals in this arena, resulting in proposed legislative reforms transmitted to Congress, see generally ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2023-1: PROACTIVE DISCLOSURE OF AGENCY LEGAL MATERIALS (2023), https://www.acus.gov/document/proactive-disclosure-agency-legal-materials [https://perma.cc/7UEZ-4KVR].

32. *See* S. REP. NO. 89-813, at 3 (1965).

33. U.S. DOJ v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

34. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting *Mink*, 410 U.S. at 80).

### B. PROTECTIONISM

One central reason for noncompliance is agency self-protectionism. The courts have acknowledged this problem, ruling that agencies cannot invoke FOIA exemptions to protect against agency embarrassment or scrutiny, much less misconduct or malfeasance.[35] But agencies are routinely overwithholding records for this very reason, both consciously and subconsciously. Agency personnel's inherent conflict of interest drives this problem.

Two recent incidents demonstrate the threat of political interference to full disclosure. At the Department of the Interior (Interior), the Inspector General (IG) investigated a Trump-era policy implementing "awareness reviews," which required FOIA staff to flag responses to FOIA requests that would name certain officials and forward the records to those officials for their review prior to release.[36] The IG found that this review in some cases "contributed to delays in or changes to the records that were ultimately released as well as confusion on the part of some FOIA professionals."[37]

For example, a FOIA request was submitted for emails between a National Park Service congressional liaison and then-Secretary of the Interior Ryan Zinke's wife, who had asked the liaison to coordinate a national park tour for another federal official and their family.[38] The standard email search tool produced ninety-six pages of responsive records, but after an awareness review, the FOIA office was directed to use a different search tool that produced only sixteen pages of responsive records, which were the pages eventually released.[39] This example reveals a classic case of a FOIA request seeking out possible evidence of misuse of public resources, prompting apparent interference by the affected political actors using self-protectionism to limit disclosure.[40]

The IG even investigated Interior's egregious use of the awareness review process to delay release of records pertaining to then-Deputy Secretary, later-

35. *See, e.g.*, Jones v. FBI, 41 F.3d 238, 244 (6th Cir. 1994) ("FOIA's overall goal is 'to open agency action to the light of public scrutiny.'" (quoting *Reps. Comm. for Freedom of the Press*, 489 U.S. at 772)); *Dep't of the Air Force*, 425 U.S. at 361; Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011).

36. *See* Memorandum from Cindy Cafaro, Departmental FOIA Officer to Assistant Sec'ys, Heads of Bureaus & Offs., & Bureau/Off. FOIA Officers (Feb. 28, 2019), https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf [https://perma.cc/96D9-L7NJ].

37. OFF. OF INSPECTOR GEN., U.S. DEP'T OF INTERIOR, NO. 2019-ER-057, LACK OF TRACKING AND UNCLEAR GUIDANCE IDENTIFIED IN THE U.S. DEPARTMENT OF THE INTERIOR'S AWARENESS REVIEW PROCESS FOR FREEDOM OF INFORMATION ACT REQUESTS 2 (2022), https://www.oversight.gov/sites/default/files/oig-reports/DOI/Final-Report-FOIAAwareness.pdf [https://perma.cc/NXU7-PJ38].

38. *Id.* at 10.

39. *Id.*

40. *See* Daniel McGrath, *Interior's Proposed FOIA Rule Threatens Transparency and Accountability*, AM. OVERSIGHT (Jan. 29, 2019), https://www.americanoversight.org/interiors-proposed-foia-rule-threatens-transparency-and-accountability [https://perma.cc/C8CM-6T26] (describing the legal and ethical problems the rule posed).

Secretary, David Bernhardt.[41] The investigation revealed that, as one member of Congress said, "[o]fficials at Interior are now on the record admitting what we suspected all along: they orchestrated a coverup to protect Secretary Bernhardt during his confirmation, and all but lied to Congress about it."[42]

Awareness reviews are not, however, limited to agencies with ethically dubious leaders or administrations of any particular political party. For example, in 2019, the Environmental Protection Agency (EPA) adopted a formal regulation that empowered political appointees to determine whether potential FOIA releases should be withheld on the basis of an exemption or responsiveness,[43] and at least as early as 2017, the Consumer Financial Protection Bureau (CFPB) also used an awareness review practice.[44] In a particularly early example, a 2009 policy at the Department of Homeland Security required career staff not only to notify political appointees of potential document releases, but to inform them of the identity of the requesters, where they lived, and the organizations for whom they worked.[45] This requirement even applied to requests from members of Congress, who were to be identified by political affiliation.[46]

Even when overtly political protectionist motivations are not at play, human behavior will inevitably cause officials to err on the side of caution.[47] Frequently there may be colorable, but weak, arguments for the application of exemptions, a type of ambiguity ripe for overwithholding. While FOIA technically permits sanctions of FOIA personnel who fail to release records in certain circumstances,[48] that

41. Rebecca Beitsch, *Watchdog Report Raises New Questions for Top Interior Lawyer*, HILL (Aug. 11, 2020, 9:00 AM), https://thehill.com/policy/energy-environment/511342-watchdog-report-raises-%20new-questions-for-top-interior-lawyer/ [https://perma.cc/A9NG-BGDU].

42. *Id.*

43. James Pollack, *Restricting Access to Public Records*, ENV'T & ENERGY L. PROGRAM (July 19, 2019), https://eelp.law.harvard.edu/2019/07/epa-restricts-access-to-public-records/ [https://perma.cc/J8D4-HVVD]; Freedom of Information Act Regulations Update, 84 Fed. Reg. 30028, 30033 (June 26, 2019) (to be codified at 40 C.F.R. pt. 2).

44. OFF. OF INSPECTOR GEN., *supra* note 37, at 5 n.12.

45. Ted Bridis, *Playing Politics with Public Records Requests*, NBC NEWS (July 21, 2010, 7:30 PM), https://www.nbcnews.com/id/wbna38350993#.UcNcVPlwpQQ [https://perma.cc/NZ6M-4ZTT].

46. *Id.*

47. *See* MAX WEBER, *The Power Position of Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 232, 233 (H. H. Gerth & C. Wright Mills eds. & trans., 1946) ("Bureaucratic administration always tends to be an administration of 'secret sessions': in so far as it can, it hides its knowledge and action from criticism.").

48. *See* 5 U.S.C. § 552(a)(4)(F)(i). The provision reads:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

*Id.*

provision is never invoked.[49] And as seasoned secrecy litigator Alan Morrison recently quipped, "Has anyone ever been awarded a medal or received a promotion for releasing any government records . . . ?"[50] To my knowledge, the answer is "no."

Further, FOIA personnel *do* risk repercussions at work if they wrongly release records and those releases cause some sort of harm, be it to agency or private interests. Oona Hathaway described her own experience working at the Pentagon with a Top Secret security clearance, where she "quickly learned that secrecy is the easiest course," in part because "if [she] got it wrong by classifying the document too highly, there would likely be no penalty," but "[c]lassifying a document or email too low . . . could bring serious professional consequences—not to mention potentially threaten U.S. national security."[51] Agency staff may still face repercussions if releases are embarrassing, even if proper, and so may have an incentive to find a way to apply an exemption even if the application is tenuous.[52] Combined with the reality that FOIA offices often lack meaningful institutional power within their agencies, rank-and-file FOIA processors are naturally incentivized to be extremely cautious about disclosure.

And transparency is inherently unpleasant. Responding to FOIA requests is "basically like having your taxes audited every day."[53] A former information commissioner in Australia, after the Office of the Australian Information Commissioner was the subject of political attacks,[54] was clear-eyed about

49. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-235R, FREEDOM OF INFORMATION ACT: FEDERAL COURT DECISIONS HAVE NOT REQUIRED THE OFFICE OF SPECIAL COUNSEL TO INITIATE DISCIPLINARY ACTIONS FOR THE IMPROPER WITHHOLDING OF RECORDS 4 (2018), https://www.gao.gov/assets/gao-18-235r.pdf [https://perma.cc/Y9SS-E3L7] ("According to the available information and [Department of] Justice and [Office of Special Counsel (OSC)] officials, since fiscal year 2008, no court orders have been issued that have required OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel."). Reports published by the Department of Justice confirm that zero notifications were made to the OSC from 2008, when the reports started to include OSC information, to the most recent 2022 report. *See Reports*, U.S. DOJ: OFF. OF INFO. POL'Y (Oct. 13, 2023), https://www.justice.gov/oip/reports-1 [https://perma.cc/Q6PJ-QDZ5] (scroll to "DOJ FOIA Litigation and Compliance Reports"); *see, e.g.*, DOJ, THE DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION ACT 2022 LITIGATION AND COMPLIANCE REPORT 22 (2023), https://www.justice.gov/oip/page/file/1570391/dl?inline [https://perma.cc/3ZAM-XZVA].

50. Alan B. Morrison, *The Real Classified Documents Problem: There Are Far Too Many*, HILL (Jan. 31, 2023, 2:00 PM), https://thehill.com/opinion/white-house/3837394-the-real-classified-documents-problem-there-are-far-too-many/ [https://perma.cc/AZ2L-6CRA].

51. Oona A. Hathaway, *Secrecy's End*, 106 MINN. L. REV. 691, 721–22 (2021).

52. *Cf.* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 148–51 (2006) (describing the internal check on secrecy as "minimal" and how there are "many incentives, on the other hand, to keep secrets").

53. Andrew McGill, *Why FOIA Is Broken, from a Government Worker's Perspective*, ATLANTIC (July 6, 2016), https://www.theatlantic.com/politics/archive/2016/07/why-the-freedom-of-information-act-is-broken-from-a-government-employees-perspective/623621/.

54. *See* Richard Mulgan, *The Slow Death of the Office of the Australian Information Commissioner*, SYDNEY MORNING HERALD (Aug. 26, 2015, 5:37 PM), https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html.

government officials' views on their freedom of information legislation: "[T]hey hate it . . . . I know they do."[55] One study of civil servants' attitudes about FOIA noted their "mixed motives": "The public must be served. One public wants access to agency records. Another public relates to the agency's functional mission. The agency must be protected. The law must be obeyed, but may be construed to serve other motives."[56] The combination of incentives, attitudes, and behavioral tendencies—both the pernicious and the benign, the marginal to the most consequential—amount to an enormous propensity for agencies to withhold records under FOIA.

Classified records provide perhaps the most egregious and well-studied example of excessive and unjustified government secrecy. An Executive Order sets the standards for classification decisions, detailing categories of records that can be classified, types of classification designations, and who may classify records.[57] While the list of classified categories of information is a relatively concise list of eight categories—including some narrower matters such as "military plans, weapons systems, or operations" and "intelligence activities (including covert action), intelligence sources or methods, or cryptology"[58]—some items can be sweeping in application. For example, "scientific, technological, or economic matters relating to the national security" seem to potentially cover vast swaths of information.[59] Still, the provisions are only to apply if "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security."[60]

Despite the seemingly restrained structure of the Executive Order, the resulting number of classification decisions is staggering. For example, in 2017, there were 58,501 original classification decisions, representing new, secret national security information, and 49 million derivative classification decisions, representing documents that incorporate or reproduce already classified secrets.[61] And 2017 was the last time the Information Security Oversight Office (ISOO), the agency that oversees the classification system, reported these kinds of statistics, when it declared that it needed to "reform and modernize our data collection methods,"[62]

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55. Paul Farrell, *Hypocritical Politicians 'Hate' Freedom of Information, Says Former Commissioner*, GUARDIAN (Sept. 29, 2015, 9:30 PM), https://www.theguardian.com/politics/2015/sep/30/politicians-hypocritical-on-freedom-of-information-says-former-commissioner [https://perma.cc/GMA3-UFSQ].

56. William H. Harader, *Need to Know: An Attitude on Public Access*, 10 GOV'T PUBL'NS REV. 441, 442–43 (1983).

57. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

58. *Id*. at 709.

59. *Id*.

60. *Id*.

61. *See* INFO. SEC. OVERSIGHT OFF., NAT'L ARCHIVES & RECS. ADMIN., 2017 REPORT TO THE PRESIDENT 8, 10 (2018), https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf [https://perma.cc/E6EN-2LVY]; *see also* Exec. Order No. 13,526, 75 Fed. Reg. at 707, 712 (defining original versus derivative classification authorities).

62. *See* Letter from Mark A. Bradley, Dir., Info. Sec. Oversight Off., to the President of the U.S. (Aug. 16, 2019), *in* INFO. SEC. OVERSIGHT OFF., NAT'L ARCHIVES & RECS. ADMIN., 2018 REPORT TO THE PRESIDENT (2019), https://www.archives.gov/files/isoo/images/2018-isoo-annual-report.pdf [https://perma.cc/3N58-D4EZ].

likely in reaction, at least in part, to revelations about past problems with vast undercounting.[63]

Oona Hathaway's recent work documents the pathologies of the classification system that result in massive overclassification, including many of the institutional and personal incentives described above with respect to releases under FOIA.[64] But unlike most FOIA decisions, overclassification occurs when the initial document is created, a point in time at which additional factors push government officials to overclassify, including time constraints, the non-interoperability of the systems that handle differently classified material, and the cumbersome process of declassification.[65]

Experts agree that overclassification is rampant. In 2016, the House Committee on Oversight and Government Reform held hearings on overclassification at which a former director of ISOO testified.[66] Applying his forty years of experience, he described the perverse incentives that lead to massive overclassification:

> Everyone with a [security] clearance knows that if he or she improperly discloses or otherwise mishandles information that should be classified, even inadvertently, he or she will be subject to sanction, perhaps even to criminal penalties. However, cleared individuals likewise know if they overclassify information, whether willfully or negligently, there will most likely be no personal consequences. Given this disparity, [it's] no wonder that the attitude "when in doubt, classify" prevails, not withstanding any admonition to the contrary.[67]

Legal scholars have also documented that overclassification is rampant.[68] Tom Blanton, director of the National Security Archive at George Washington University, which is a frequent FOIA requester in this area, estimates that seventy to eighty percent of classified records should not bear that label.[69]

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63. *See generally* OFF. OF INSPECTOR GEN., AUD-SI-16-43, U.S. DEP'T OF STATE, COMPLIANCE FOLLOW-UP REVIEW OF THE DEPARTMENT OF STATE'S IMPLEMENTATION OF EXECUTIVE ORDER 13526, CLASSIFIED NATIONAL SECURITY INFORMATION (2016) (finding that the State Department had not reported all classification decisions because it has failed to collect data from all units).

64. *See* Hathaway, *supra* note 51, at 722–23.

65. *Id.* at 722–23, 726.

66. *See Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 5, 8 (2016) (statement of J. William Leonard, Former Dir., Info. Sec. Oversight Off.).

67. *Id.* at 11; *see also* ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUST., REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 21–32 (2011), https://www.brennancenter.org/our-work/research-reports/reducing-overclassification-through-accountability [https://perma.cc/9453-YC75] (describing the same incentive structure).

68. *See* 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, 725–52 (2014) (examining the social and political trends around FOIA "Exemption One" and judicial deference to review these agency determinations); *see also* Hathaway, *supra* note 51, at 721–30 (describing how secrecy and overclassification is often the easiest course in the national security context, based on firsthand experience).

69. Zachary B. Wolf, *Yes, the Government Keeps Way Too Many Secrets*, CNN POL. (Sept. 3, 2022, 6:01 AM), https://edition.cnn.com/2022/09/03/politics/us-government-secrets-what-matters/index.html [https://perma.cc/9A58-C2L8].

Government agencies have long used the classification system to prevent scandal rather than protect national security. For example, in 1947, the Atomic Energy Commission ordered the classification of documents related to human experiments involving nuclear radiation, instructing that documents related to the experiments should be classified if they would have an "adverse effect on public opinion or result in legal suits."[70] The National Security Archive actually collects a series of what it calls "dubious secrets" on its website, which include "countless cases of a government agency or official refusing to declassify a document on national security grounds, only to find out it's already been safely released to the public by another [department]."[71]

Classification decisions are not the only area of abuse. Exemption 5, which is similarly subject to widespread criticism, protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency" and operates to incorporate the regular litigation privileges agencies can assert, such as attorney–client privilege, into FOIA.[72] One privilege is the deliberative process privilege, which protects records that are predecisional and deliberative because of what the Supreme Court has described as "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."[73] The privilege is designed to protect the frank exchange of predecisional ideas.[74]

But the privilege does not, of course, apply to everything agency officials say to one another in writing. It does not apply to final agency decisions and the reasons supporting them.[75] It does not apply to merely factual material, as opposed to opinions, suggestions, or ideas.[76] It does not apply to records that were not kept internal.[77] And it does not apply to anything produced after a decision was made.[78]

This exemption has often been used to improperly conceal information. It has been described as the "withhold it because you want to" exception,[79] the "most

70. GOITEIN & SHAPIRO, *supra* note 67, at 1 (quoting Memorandum from O. G. Haywood, Jr., Colonel, Corps of Engineers, to Dr. Fidler, U.S. Atomic Energy Comm'n (Apr. 17, 1947), https://www.osti.gov/opennet/servlets/purl/16294778.pdf [https://perma.cc/X2HZ-YU3F]).

71. *See Dubious Secrets*, NAT'L SEC. ARCHIVE, https://nsarchive.gwu.edu/special-exhibits/dubious-secrets [https://perma.cc/G6KY-8AGC] (last visited Feb. 15, 2024).

72. 5 U.S.C. § 552(b)(5).

73. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001).

74. *See* U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 267 (2021).

75. *Id.* at 267–68.

76. *See In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).

77. *See* Petroleum Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1437 (D.C. Cir. 1992).

78. Nat'l Sec. Archive v. CIA, 752 F.3d 460, 463 (D.C. Cir. 2014).

79. Nate Jones, *The Next FOIA Fight: The B(5) "Withhold It Because You Want to" Exemption*, UNREDACTED (Mar. 27, 2014), https://unredacted.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/ [https://perma.cc/X9CD-9ANG].

abused exemption,"[80] and a "get out of jail free" card[81] to avoid embarrassment or politically inconvenient disclosures. For example, the Central Intelligence Agency (CIA) used Exemption 5 to justify withholding its history of the 1961 Bay of Pigs Invasion, arguing that it would "confuse the public" with inaccurate historical information, and the Federal Elections Commission (FEC) argued its own guidance on when to apply Exemption 5 was itself exempt on that basis.[82]

Because of the abuse of this exemption, Congress narrowed it in 2016 when it amended FOIA to ban the use of the deliberative process privilege for records that are at least twenty-five years old.[83] Nonetheless, Exemption 5 is still the fifth-most cited exemption,[84] having been invoked a full 65,807 times in 2022, the last reported data year.[85] The 2016 amendment assists historians but does little to curb contemporary overwithholding. Moreover, the Supreme Court's recent decision in *United States Fish & Wildlife Service v. Sierra Club, Inc.* appears to expand the potential application of the exemption by construing the "predecisional" prong of the test very broadly.[86]

FOIA's exemptions based on classification and the deliberative process privilege provide just two examples where the evidence suggests vast overapplication of these bases for withholding. The same incentives and forces apply to decisions made to invoke other exemptions based on privacy, law enforcement interests, confidential commercial information, and more. The nature of the decision, the consequences, and the incentives involved all suggest that the FOIA decisionmaker will err toward secrecy.

### C. RESOURCE ALLOCATION

Beyond the bias of individual decisionmaking about the release of records, a structural bias tilts toward agency secrecy. Agencies have no incentive to prioritize transparency obligations either through budgetary measures or by promoting

80. *Administration of the Freedom of Information Act: Current Trends: Hearing Before the Subcomm. on Info. Pol'y, Census, & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 127 (2010) (statement of Tom Fitton, President, Jud. Watch).

81. Nick Schwellenbach & Sean Moulton, *The "Most Abused" Freedom of Information Act Exemption Still Needs to Be Reined In*, PROJECT ON GOV. OVERSIGHT (Feb. 6, 2020), https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in [https://perma.cc/8LE4-BMJN].

82. Jones, *supra* note 79; *CIA Bay of Pigs Secrecy Case Reaches Appeals Court*, NAT'L SEC. ARCHIVE (Dec. 13, 2013), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB450/ [https://perma.cc/T7SX-BKZE].

83. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 540 (codified at 5 U.S.C. § 552).

84. *See, e.g.*, OFF. OF INFO. POL'Y, *supra* note 24, at 8 (listing in descending order of frequency of invocation: Exemption 6, Exemption 7(C), Exemption 7(E), Exemption 3, and then Exemption 5).

85. *Create an Annual Report*, FOIA, https://www.foia.gov/data.html [https://perma.cc/2KDU-XY69] (last visited Feb. 15, 2024) (click "Select All Agencies"; choose "Exemptions" as Data Type; click "Filter Results"; choose "Ex. 5" "is greater than" "0" "Submit"; choose "2022" as Fiscal Year; click "View Report").

86. 592 U.S. 261, 271–72 (2021) (concluding that EPA's draft biological opinions were not final decisions even though they were EPA's final document and there were no subsequent actions because it constituted a proposal that "died on the vine").

FOIA work in the hierarchy of agency activities. The FOIA offices are often relatively powerless, and program offices view FOIA as a distraction from the success of the primary agency activities. As a result, FOIA administration is structured to guarantee that late, incomplete, or nonexistent responses are the norm, and compliance with FOIA's procedural obligations becomes another enforcement flashpoint.

Enabling statutes define agencies' missions; political appointees and high-level government officials are unlikely to view FOIA—a statute that applies across the Executive Branch—as a core part of their responsibilities. Agency administration seeks to serve the agency's primary social goal, such as ensuring national security, protecting the environment, or regulating the marketplace. By contrast, agencies relegate FOIA to compliance work—required but distracting, or, put bluntly, "an irritant."[87] A Department of Defense FOIA processor described that "FOIA requests are handled as additional duties and not given high priority."[88] But FOIA compliance requires cooperation from program offices to, at a minimum, search for responsive records. As a former state official explained, "These [program office] folks have no incentive to cooperate, and every minute they spend on tracking down documents is time taken from their actual jobs."[89]

The budgetary process is also structured to underfund FOIA offices. Congress does not typically appropriate a separate line item for FOIA operations; rather, agencies must fund their FOIA operations from their general administrative appropriations, ensuring that FOIA budgets compete with the general agency resources.[90] Accordingly, agencies routinely fail to designate adequate funding for FOIA operations.[91]

For example, in the 1990s, Congress investigated the Federal Bureau of Investigation's (FBI) large backlog of FOIA requests.[92] An FBI official testified that the FOIA office "would require a massive diversion of additional resources from the FBI's other programs" to keep up with an increasing number of FOIA requests.[93] Almost a decade later, a requester sued the FBI after it claimed it needed eight years to process a request for documents related to searches of two news media outlets.[94] The Ninth Circuit, in reviewing the agency's request to stay litigation until that eight year processing time could be reached, explained that the FBI's "queue is too long" and connected the backlog to the Executive Branch's failure to persuade Congress to "provide additional funds to achieve compliance."[95] The court made clear the consequences to requesters: "Telling the

87. Farrell, *supra* note 55.
88. McGill, *supra* note 53.
89. *Id.*
90. *See FOIA Update: FOIA Affected by Budget Constraints*, U.S. DOJ (Jan. 1, 1990), https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints [https://perma.cc/44HF-JNLL].
91. *See id.*
92. *Id.*
93. *Id.*
94. Fiduccia v. U.S. DOJ, 185 F.3d 1035, 1039–40 (9th Cir. 1999).
95. *Id.* at 1041.

requester 'You'll get the documents 15, or eight, years from now' amounts as a practical matter in most cases to saying 'regardless of whether you are entitled to the documents, we will not give them to you.'"[96]

The problem persists. U.S. Citizenship and Immigration Services (USCIS) was recently sued in a class action by noncitizens seeking their own immigration history files, known as A-Files, over the persistent, systematic, and extreme delays they faced in receiving their records.[97] In the district court's order granting class certification—a not unheard of but certainly not ordinary event in FOIA litigation—it described the extent of the problem: "USCIS' FOIA backlog—the number of requests that have gone unanswered past the statutory deadline—has more than doubled in the last few years," resulting in "41,329 pending requests in the USCIS backlog and at least 17,043 referrals unaccounted for by ICE in the most recent fiscal year."[98]

Budgetary issues were also a factor in these delays. The USCIS's FOIA operational budget comes out of its general operating funds, but USCIS is a fee-for-service agency, required by statute to set fees for its various immigration-related services at a level to ensure it recoups the cost of those services.[99] Thus, the agency officials averred that "due to a 50% drop in receipts and incoming fees caused by the COVID-19 pandemic, USCIS in FY 2020 undertook aggressive spending reduction measures . . . . As a result of these reductions, USCIS's FOIA office was unable to authorize overtime . . . and was not able to fill vacant positions."[100] That is, the structural way that FOIA operations are funded biases agencies against meeting their FOIA obligations.

But agencies are capable of moving the needle toward compliance. After the district court granted summary judgment for the plaintiffs in the case, USCIS authorized the use of emergency funds and contractor overtime; it deployed staff from other components to be trained to perform FOIA duties on top of their regular workloads.[101] As a result, within ninety days, the agency had reduced its backlog by ninety-seven percent.[102] But structural incentives bias agencies against achieving this kind of FOIA compliance, resulting in the need for outside institutions to enforce the law.

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96. *Id.*

97. *See* Complaint for Declaratory and Injunctive Relief Under the Freedom of Information Act at 1–2, Nightingale v. U.S. Citizenship & Immigr. Servs., 507 F. Supp. 3d 1193 (N.D. Cal. 2020) (No. 19-cv-03512).

98. Nightingale v. U.S. Citizenship & Immigr. Servs., 333 F.R.D. 449, 455 (N.D. Cal. 2019).

99. *See* 8 U.S.C. § 1356(m). The agency recoups a full 97% of its operating budget of more than $4 billion with the fees it charges. OFF. OF THE CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, THE CHALLENGES OF THE CURRENT USCIS FEE-SETTING STRUCTURE: RECOMMENDATION 63, at 1 (2022), https://www.dhs.gov/sites/default/files/2022-06/CIS%20OMBUDSMAN_2022_FEE_FOR_SERVICE_RECOMMENDATION_FINAL.pdf [https://perma.cc/TE7Z-XPS5].

100. Third Declaration of Tammy M. Meckley at 5, Nightingale v. U.S. Citizenship & Immigr. Servs., No. 19-cv-03512 (N.D. Cal. Mar. 17, 2021).

101. *See id.* at 3–7.

102. *Id.* at 3.

In fact, FOIA lawsuits initiated to challenge the failure of an agency to respond—rather than the invocation of an exemption in response to a request—are rising drastically.[103] As of 2019, most FOIA litigation—more than four out of every five cases—was prompted by agencies failing to respond at all.[104] Moreover, requesters' impatience is not the problem. That year, requesters waited an average of 177 days—well beyond the twenty-business-day deadline—to file suit.[105] Agency noncompliance with deadlines is a significant, and persistent, problem for the vindication of the public's right to government transparency.

Finally, agency resource constraints and undervaluing FOIA operations has created a serious agency deficit with respect to proactive disclosure efforts. The FOIA's extant requirements, slim as they may be, are rarely met. A National Security Archive audit of agency websites revealed that nearly twenty years after Congress enacted online proactive disclosure requirements, only forty percent of agencies were systematically posting the required categories of records at all, irrespective of whether the posted categories were in fact complete.[106]

But the people in the best position to see what is being routinely requested and what should be published as a systematic proactive disclosure initiative are FOIA personnel. The FOIA staff report they have little power.[107] One former high-level official charged with overseeing FOIA obligations at three separate agencies over her career described FOIA work as "the least respected profession you can have" and noted that "[e]ven if you had top notch people . . . it is a profession that only gets recognized when it screws up."[108]

Many FOIA offices are under-resourced, and the metrics on which they are judged focus on efforts to respond to requests more quickly. As a result, they are not able to suggest changes that require a large up-front investment on the part of the agency, even if over time it might save the agency money or be of great public service to the agency's constituents. Agencies are poorly positioned to police their proactive disclosure performance. Indeed, every incentive points in the opposite direction.

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103. *FOIA Suits Rise Because Agencies Don't Respond Even as Requesters Wait Longer to File Suit*, FOIA PROJECT (Dec. 15, 2019), https://foiaproject.org/2019/12/15/foia-suits-rise-because-agencies-dont-respond-even-as-requesters-wait-longer-to-file-suit/ [https://perma.cc/9T7Z-6CTE].

104. *Id.*

105. *Id.* When agencies did respond, requesters waited even longer, presumably either to negotiate or administratively appeal a denial, averaging 339 days to sue. *Id.*

106. *Most Agencies Falling Short on Mandate for Online Records*, NAT'L SEC. ARCHIVE (Mar. 13, 2015), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB505/ [https://perma.cc/JF66-KRSN]. Pre-digital era disclosure requirements were also poorly complied with. *See* U.S. GOV'T ACCOUNTABILITY OFF., GGD-86-68, FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS 1, 25 (1986), https://www.gao.gov/assets/ggd-86-68.pdf [https://perma.cc/73AS-LLXU] (auditing thirteen cabinet-level agencies, and finding rampant noncompliance).

107. *See* Harader, *supra* note 56, at 442 (noting that "employees find that the reward system does not encourage[] work on public access problems," and explaining how some have worked to create a more recognized career track of FOIA professionals).

108. Telephone Interview with Helen Foster, Former Chief Priv. & FOIA Officer & Chief Admin. Officer, U.S. Dep't of HUD (May 14, 2019) (omission in original) (on file with author).

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With respect to every one of the central transparency obligations agencies must perform, the agencies' incentives—behavioral, economic, and organizational—push the agencies toward unwarranted secrecy. Hence, an outside authority must enforce these obligations. Allowing agencies to be the final decisionmaker about transparency will inevitably lead to a wholesale undermining of the law's intended effect to promote accountability and democratic participation. As the next Part explains, the current law relies on the federal courts to act as the enforcement mechanism, a choice that has proven woefully inadequate.

## II. THE EXISTING DELEGATION TO THE COURTS

While transparency obligations administered by agencies require external enforcement, how that enforcement should take place and who should occupy the role of enforcer is anything but obvious. FOIA is currently enforced by the courts. A dissatisfied requester can file a federal lawsuit and is entitled to de novo judicial review of the government's claim of exemptions or failure to otherwise satisfactorily respond.[109] This Part documents how the Judiciary has been unable to protect FOIA's transparency aims. Part III will argue for an alternative model: a single independent agency that would be delegated responsibility to ensure FOIA compliance.

### A. THE CHOICE BETWEEN AGENCIES AND COURTS

Congress is often faced with the task of deciding which institution is best situated to operate as the primary enforcer of statutorily created rights: an agency or the courts? This choice implicates more than the differing formalities and processes of each respective institution. It is also a decision about which institution is best situated to make hard policy choices.

All statutes will have some ambiguities, and someone has to resolve those matters and fill in gaps.[110] Many attribute the inevitability of delegation to the inability of Congress to anticipate, understand, or regulate the details of various requirements in the most complex, technical areas.[111] Others point to the political expediency of stating broad popular principles while letting others (agencies and courts) be the unpopular interpreter making the consequences of those laws real.[112]

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109. 5 U.S.C. § 552(a)(4)(B).

110. *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135–36 (2000) (explaining the inevitability of policy delegations in any legislative effort); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) ("Just as agencies exercise a lawmaking function when they fill in the gaps left by broad delegations of power, so too do courts.").

111. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (articulating this rationale for broad delegations).

112. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478–79 (2015).

In the modern administrative state, the gap-filler is often an agency. Delegations of power to administrative agencies have provoked a debate about the legitimacy of this quasi-lawmaking function being situated in the unelected "fourth branch" of government.[113] The Court purported to constrain agency power with the advent of the modern nondelegation doctrine, which nominally requires Congress to make the underlying policy choice by prescribing an "intelligible principle" to guide agency discretion.[114] Though that doctrine has proved relatively toothless, a recent revival of nondelegation arguments in academic literature[115] and Supreme Court opinions[116] reflects some people's discomfort with agency policymaking. Yet, agency policymaking is pervasive, and its recognition as legitimate is reflected in the fact that judicial review has been crafted to ensure deference to the agency's decisions, including their interpretations of law.[117] While deference, too, is in an increasingly precarious position with looming doctrinal changes,[118] it nonetheless demonstrates the continuing force of Congress's choice to delegate to agencies.

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113. *See generally* Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359 (1947) (identifying concerns with legislative delegations rooted in democratic accountability).

114. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."). For the only two cases to have ever actually invalidated a statute on nondelegation grounds, see Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

115. *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1931 (2020) (suggesting that "Congress revive the practice of regular reauthorization of statutes that govern federal regulatory action . . . to mitigate the democratic deficits that accompany broad delegations of lawmaking authority to federal agencies"). *See generally, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the founders would not have had concerns about the delegation of legislative authority to the Executive Branch and that such delegation did in fact take place on significant policy questions during their time); Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17, https://illinoislawreview.org/online/the-irrelevance-of-the-northwest-ordinance-example-to-the-debate-about-originalism-and-the-nondelegation-doctrine/ [https://perma.cc/AW4Z-NX9V] (arguing that one of the examples of "delegation at the founding" from Mortenson and Bagley's article is irrelevant to the nondelegation debate); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (reviewing the history and concluding that there is in fact evidence that the Founders believed that Congress could not delegate its powers); Philip Hamburger, Foreword, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083 (2023) (arguing that the Constitution bars transfers of powers, but also explaining how Congress can authorize agencies and courts to do some of what Congress itself could do).

116. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing that a statute should be held unconstitutional as violating the nondelegation doctrine).

117. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (setting out the deference scheme); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (deferring to an agency's less formal decision); Auer v. Robbins, 519 U.S. 452 (1997) (deferring to an agency's own interpretations of their regulations).

118. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the constitutionality of *Chevron* deference). *See generally, e.g.*, Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); James Romoser, *In an Opinion that Shuns* Chevron*, the Court Rejects a Medicare Cut for Hospital Drugs*, SCOTUSBLOG (June 15, 2022,

When Congress does not delegate the authority to administer a statute to an agency, however, the result is that the Judiciary serves as the ultimate gap-filler, interpreter, or policy-choice-maker. As Margaret Lemos's work foundationally demonstrates, "The inevitability of lawmaking has nothing to do with Congress's choice of delegate; it has to do with the nature of the delegated task."[119] Her work documents how Congress has vested policymaking authority in the federal courts in countless areas.[120]

Indeed, Congress has sometimes practically invited the courts to prescribe primary rules of conduct. Quite early in the rise of the administrative state, Congress chose what Alexander Bickel described as a "regulation by lawsuit" approach in the Sherman Act.[121] That statute prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade,"[122] and leaves enforcement to the courts.[123] Because Congress provided no elaboration, and because read literally this would forbid essentially all contracting, the courts were left to determine what conduct constituted legitimate competition rather than illegal collusion. Some have argued that this punt to the Judiciary was by design.[124] In other cases, Congress has granted the federal courts common law making power, despite the famous abolition of "general" federal common law in *Erie Railroad Co. v. Tompkins*.[125] For example, the federal courts are expressly empowered to craft the law on evidentiary privileges.[126]

Many other statutes are not so broad, but still leave the hard work of making many important policy choices to the courts. As Lemos said, "One need not subscribe to an extreme version of legal realism to recognize that judges make policy when they interpret vague, ambiguous, or gap-filled statutes, just as agencies do."[127] She points, as examples, not only to antitrust, but also to countless statutes

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8:50 PM), https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/ [https://perma.cc/65RJ-Y6A9].

The Supreme Court heard oral arguments in two cases in January 2024 that presented the issue of whether *Chevron* should be overruled: *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. *See* Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSBLOG (Jan. 17, 2024, 6:58 PM), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [https://perma.cc/B4BK-W5WK].

119. Lemos, *supra* note 110, at 422.

120. *See id.* at 409 ("Congress regularly enacts statutes that explicitly or implicitly cede to courts the authority to fill in gaps or supply meaning to vague statutory terms.").

121. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21, at 130 (1984).

122. 15 U.S.C. § 1.

123. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 51–52 (1993) ("Rather than provide more specific guidelines, . . . Sherman and other senators insisted that such a task 'must be left open for the courts to determine in each particular case.'" (quoting 21 CONG. REC. 2456, 2460 (1890))).

124. *See id.* at 51.

125. 304 U.S. 64, 78 (1938) (requiring a federal court sitting in diversity jurisdiction to apply state substantive law and declaring that "[t]here is no federal general common law").

126. FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege . . . .").

127. Lemos, *supra* note 110, at 428.

that are silent or ambiguous as to a controversial matter, requiring the Judiciary to engage in policymaking. She describes the Court's gap-filling as to the Copyright Act,[128] about which the Supreme Court admitted that "Congress has not plainly marked our course" to be followed by the Judiciary.[129] She also describes the Court's decision about the availability of relief under securities laws,[130] where the Court admitted it could not "divine . . . the express 'intent of Congress'" and therefore it was appropriate to consider "what may be described as policy considerations" in choosing among the options.[131]

Lemos's work documents the fluidity of policymaking between Congress, agencies, and the courts. Indeed, the courts and agencies may even engage in policymaking using the same methods, as many agencies use adjudication as the primary means of interpreting the laws they administer.[132] As a result, in any statutory scheme, Congress has made a choice about the delegation of policymaking that it can also choose to revise.

### B. FOIA'S DELEGATION TO COURTS

Congress chose to delegate FOIA policymaking and enforcement to the courts.[133] In a departure from review of most agency actions, Congress provided a cause of action under FOIA that requires courts to review secrecy decisions de novo, with no deference to either the agency's fact-finding or its legal interpretation.[134] The record is not closed at the administrative level; rather, parties can introduce additional evidence, arguments, and rationales for decisionmaking during the judicial proceeding.[135] Giving courts plenary review powers makes sense precisely because, in the context of FOIA, agencies themselves are the regulated entities, not acting in their typical capacity as regulators of private parties where their actions are reviewed as a secondary matter by courts.

Indeed, no one agency is currently tasked with administering the statute. There are agencies that are tasked with providing guidance and best practices across the federal government, including the Office of Information Policy (OIP) at the Department of Justice (DOJ) and the Office of Government Information Services (OGIS) at the National Archives and Records Administration, which have confusingly overlapping responsibilities.[136] But FOIA is not a statute delegated for administration to any one agency; rather it applies equally to all, and thus neither

128. *See id*. at 433.

129. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

130. Lemos, *supra* note 110, at 433–34.

131. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

132. *See* Lemos, *supra* note 110, at 438.

133. *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1039 n.11 (2006) ("On a few occasions, Congress has also effected more specific transfers of interpretive authority from agencies to courts. Examples include the Freedom of Information Act . . . .").

134. *See* 5 U.S.C. § 552(a)(4)(B).

135. *See* Margaret B. Kwoka, *Deference,* Chenery*, and FOIA*, 73 MD. L. REV. 1060, 1079–80 (2014).

136. *See* Karanicolas & Kwoka, *supra* note 17, at 675–78.

those offices' interpretations nor any other agency's interpretation is entitled to any of the judicially crafted deference doctrines, including (so long as it remains in force) *Chevron* deference.[137] As such, courts are the delegated authority to make FOIA policy.

Moreover, that delegation of enforcement to the courts has resulted in vast development of what John Brinkerhoff described as "FOIA's common law."[138] Indeed, the judicial development of FOIA doctrine spans both substantive areas (such as the scope of exemptions) and procedural domains (such as the availability of discovery).

Substantively, FOIA contains only nine enumerated exemptions to disclosure requirements, each one consisting basically of a brief sentence,[139] designed to answer the question of whether any record about any subject across the entire federal government must be disclosed to a requester. Congress drafted these exemptions in generalities, exempting from mandatory disclosure, for example, "trade secrets and commercial or financial information obtained from a person and privileged or confidential,"[140] and "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"[141] among others.

The statute does not address many issues. Brinkerhoff catalogues a variety of judicially created doctrines concerning exemptions.[142] In one example, under the

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137. *See* Tax Analysts v. IRS, 117 F.3d 607, 613 (D.C. Cir. 1997) ("No one federal agency administers FOIA. The meaning of FOIA should be the same no matter which agency is asked to produce its records. One agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency."). The same is true for the Administrative Procedure Act (APA) more generally, inside of which FOIA is codified. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1243 (2015) (explaining that, because "Congress did not vest any single agency with the power to interpret" the APA, there was no "congressional delegation of interpretive authority" in the agencies; rather "agencies are not at the center of the deliberative universe; courts are").

138. John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REGUL. 575, 575 (2019). As Brinkerhoff points out, FOIA's common law is in keeping with a tradition of semi-acknowledged administrative common law. *See, e.g.*, Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (describing how "[m]uch of administrative law falls into th[e] common law category" despite an "ostensibl[e] link[] to statutory provisions"); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2 (2011) (noting that courts are "reluctant to be open about their use of common law in the administrative law arena"); Kovacs, *supra* note 137, at 1217 (stating that "the courts are not open about their development of administrative common law").

139. *See* 5 U.S.C. § 552(b)(1)–(9). The exemptions to FOIA cover (1) properly classified records; (2) records related solely to internal personnel rules; (3) records exempted by another statute; (4) trade secrets and confidential commercial information; (5) information that is subject to evidentiary privileges; (6) information that if released would cause unwarranted invasion into personal privacy; (7) certain law enforcement records; (8) certain financial institution examination records; and (9) certain geological information about wells. *Id.*

140. *Id.* § 552(b)(4).

141. *Id.* § 552(b)(6).

142. Brinkerhoff Jr., *supra* note 138, at 582–89. In addition to the examples I summarize, Brinkerhoff focuses attention on judicially created standards to implement Exemption 4's protection of confidential commercial and financial information. *Id.* at 584–87. The standard in that regard has materially changed as a result of *Food Marketing Institute v. Argus Leader Media*. 139 S. Ct. 2356

consultants corollary, courts have allowed agencies to claim the deliberative process privilege even as to some external documents produced by consultants, despite not qualifying as intra- or inter-agency memoranda as Exemption 5 requires.[143] In another, courts devised a complex two-part framework for determining if records are "compiled for law enforcement purposes" as required by Exemption 7, using a more lenient standard for those agencies whose primary function is law enforcement despite no differentiation between types of agencies in the statutory text.[144]

The courts have also crafted doctrines concerning classified information. For example, under the so-called *Glomar* doctrine, courts have permitted agencies not just to withhold records pursuant to exemptions, but to issue "neither confirm nor deny" responses under which the agency does not acknowledge the existence (or lack thereof) of records.[145] Elaborating on the *Glomar* doctrine, the D.C. Circuit has explained that "[b]ecause *Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information, they are permitted only when confirming or denying the existence of records would itself 'cause harm cognizable under a[] FOIA exemption.'"[146] Such a standard appears nowhere in the statute; indeed the D.C. Circuit—the provenance of the *Glomar* doctrine—has said "[t]he *Glomar* doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language."[147]

The D.C. Circuit has also crafted the so-called official acknowledgement doctrine in the context of classified records, which mandates that if "information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim."[148] The court created three criteria to apply the doctrine, focused on matching the specificity, content, and source of the information already disclosed and that was sought under FOIA.[149] No such exemption override or criteria appears anywhere in the statutory text of FOIA.

Quite apart from the scope of substantive disclosure requirements, courts have also made policy decisions through development of quasi-common law as to the

(2019); *see Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus Leader Media, U.S. DOJ: OFF. OF INFO. POL'Y (Oct. 4, 2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media [https://perma.cc/C26Z-WUH6].

143. *See* Brinkerhoff Jr., *supra* note 138, at 582–84.

144. *Id*. at 587–89.

145. The *Glomar* response originated in the case of *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in which the D.C. Circuit permitted the CIA to "neither confirm nor deny" the existence of records in response to a requester seeking records concerning a covert CIA mission to recover intelligence from a sunken Russian submarine using a privately owned ship, the Hughes Glomar Explorer. *Id*. at 1010, 1013. The term *Glomar* response comes from the name of the ship.

146. Roth v. U.S. DOJ, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (citation omitted) (quoting Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007)).

147. ACLU v. CIA, 710 F.3d 422, 431 (D.C. Cir. 2013).

148. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).

149. *See id*.

procedural aspects of FOIA litigation, which depart from the default transsubstantive procedural rules that govern civil litigation.[150] In one prominent example, courts have replaced traditional discovery in FOIA cases with a specialized procedural requirement known as a *Vaughn* index, named for the case, *Vaughn v. Rosen*, which established the requirement.[151] Based on the notion that discovery would be impractical in a case that centers on the disclosure of records, courts have declared that discovery is not typically available in FOIA cases, that plaintiffs have to specially move for the right to conduct discovery, and that grants of such permission are extraordinary.[152] Instead of discovery, courts require the government to produce a *Vaughn* index, which is a detailed affidavit listing withheld records with information thought sufficient to allow the parties to argue about the applicability of exemptions.[153] The ordinary civil discovery rules, by contrast, require no judicial permission and do not provide for a *Vaughn* index alternative.[154]

Thus, courts broadly used policymaking authority to implement FOIA's statutory mandates. They have invented exceptions to exceptions, created special procedures, crafted presumptions, and generally interpreted the scant words of the statute in conformity with the Judiciary's best guess about the preferable policy alternative. The next Section will argue that judicial policymaking has failed FOIA's transparency aims.

### C. THE FAILURES OF JUDICIAL DELEGATION

Although Congress thought that the de novo standard would prevent judicial review "from becoming meaningless judicial sanctioning of agency discretion,"[155] courts in practice still regularly defer—sometimes almost conclusively—to agency claims in FOIA cases. As described below, courts have consistently made policy choices favoring government interests in secrecy and discounting the transparency aims and democratic benefits that FOIA was intended to confer. The

150. Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1495–96 (2015) (arguing "that courts have employed a sort of common law approach to FOIA litigation processes, departing in significant aspects from the transsubstantive Federal Rules of Civil Procedure").

151. 484 F.2d 820, 827 (D.C. Cir. 1973).

152. *See, e.g.*, *In re* Clinton, 973 F.3d 106, 113 (D.C. Cir. 2020) ("[A]s a general rule, discovery in a FOIA case is 'rare' . . . ." (quoting Baker & Hostetler LLP v. U.S. Dep't of Com., 473 F.3d 312, 318 (D.C. Cir. 2006))); Thomas v. Dep't of Health & Hum. Servs., 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008) (noting that "discovery is an extraordinary procedure in a FOIA action"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 301 (D. Conn. 2008) ("When the courts have permitted discovery in FOIA cases, it is generally limited to the scope of the agency's search."); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 308 (D.D.C. 2007) ("FOIA actions typically do not involve discovery."); Cole v. Rochford, 285 F. Supp. 3d 73, 76 (D.D.C. 2018) ("[D]iscovery is rare in FOIA cases.").

153. *See Vaughn*, 484 F.2d at 827.

154. *See* FED. R. CIV. P. 26 (defining the scope of discovery).

155. 111 CONG. REC. 26820, 26823 (1965).

failures of judicial delegation can be traced to the courts' lack of institutional capacity and expertise necessary to oversee FOIA implementation.

Congress believed judicial review would ensure maximum possible transparency. One member of Congress explained that judicial review would mean that "for the first time in the Government's history, a citizen will no longer be at the end of the road when his request for a Government document arbitrarily has been turned down by some bureaucrat."[156] Moreover, when an early Supreme Court decision on FOIA in the realm of national security negated courts' ability to look behind classification decisions to examine their justifications,[157] Congress quickly amended the statute to overrule the Court, even overriding a presidential veto in the process.[158] One member of Congress explained: "The courts, in my view, have a duty to look behind any claim of exemption, which all too often in the past has been used to cover up inefficiency or embarrassment even in foreign policy matters . . . ."[159] Therefore, Congress clearly believed that independent enforcement of transparency obligations was essential to the law's success.

What Congress missed, however, were the structural and institutional limitations of judicial review in Article III courts. First, the overwhelming majority of FOIA requesters—even those whose requests were denied in whole or in part or who received responses that no records exist—will never actually be able to avail themselves of such recourse. As a result, agencies do not fear any threat of judicial reversal of their decisions to withhold records from the public.

The data demonstrate the rarity of judicial review. For example, in FY 2022 the federal government processed 878,420 FOIA requests, and of those, only 17.44% were granted in full.[160] The others were granted only in part and denied in part (39.11%), received a response that no records were located (21.49%), deemed an improper request (7.57%), denied in full based on exemptions (4.37%), deemed duplicative (3.39%), or otherwise received responses that did not produce records.[161] Other than those granted in full, nearly all other kinds of

156. 112 CONG. REC. 13636, 13659 (1966) (statement of Rep. Gallagher). He also noted judicial review's overall importance to the bill: "One of the most important provisions of the bill is subsection C, which grants authority to the Federal district courts to order production of records improperly withheld." *Id.*

157. *See* EPA v. Mink, 410 U.S. 73, 81–84 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552), *as recognized in* CIA v. Sims, 471 U.S. 159 (1985). In *Mink*, the Court held that FOIA did not confer the power for a court to examine the justification for a classification decision, but rather had to accept a facially valid classification as conclusive and unreviewable proof that the records are exempt from disclosure. *See id.*

158. *See Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SEC. ARCHIVE (Nov. 23, 2004), www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm [https://perma.cc/Z9AZ-BBJM].

159. 120 CONG. REC. 36613, 36626 (1974) (statement of Rep. Ogden R. Reid). The amendments authorized courts to review disputed records *in camera* and qualified that Exemption 1 based on classification could only be invoked if the records "are in fact properly classified pursuant to [an] Executive order." 5 U.S.C. § 552(b)(1)(B).

160. OFF. OF INFO. POL'Y, *supra* note 24, at 4, 6.

161. *Id.* at 6. The other remaining categories of responses were that the request was withdrawn (1.98%), the requested records were not reasonably described (1.27%), the requested record was not an agency record (1.16%), all records were referred to another agency for processing (1.06%), there was a fee-related response that ended the process (0.33%), and "other" (0.83%). *Id.*

responses can be challenged.[162] As to the kinds of responses that are most frequent, for those records withheld, the claim of exemption can be challenged;[163] for "no records" responses, the adequacy of the search can be challenged;[164] and other issues like fee issues or the description of records can also be challenged.[165] That means that 82.56%, or 725,223 requesters, received a response that did not give them everything they wanted, and which, if they chose, could have been challenged.[166]

But that same year, the government received only 15,495 administrative appeals,[167] representing only 2.1% of those requesters who potentially could have challenged a response. And lawsuits are far rarer. In a similar period, only 727 FOIA lawsuits were filed, representing approximately 0.1% of requesters eligible to challenge the response they received who ultimately made it to court.[168]

The reasons why requesters do not take advantage of the opportunity for judicial review are of course varied, but litigation's structural problems are a central hurdle. First, most people cannot independently navigate the judicial process,

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162. While two categories representing a tiny fraction of responses appear, perhaps, significantly less likely to be challenged, challenges are not impossible. First, as to those requests deemed to be "duplicate" requests (3.39%), it is possible an agency has miscategorized them as duplicative and a requester could challenge that determination as a constructive denial. Second, as to "Request Withdrawn," which represent 1.98% of responses, *id.*, agencies at times deem requests to be withdrawn when, typically after a long delay, they send letters asking if the requester is still interested in a response and the requester does not answer the letter. *See, e.g.*, *OIP Releases New Guidance for Agency Still-Interested Inquiries*, U.S. DOJ: OFF. OF INFO. POL'Y (July 2, 2015), https://www.justice.gov/oip/blog/oip-releases-new-guidance-agency-still-interested-inquiries [https://perma.cc/F63V-3QN6]. To be sure, some of these infrequent agency responses are less likely to be challenged, but they could be and, in any event, represent tiny fractions of the overall group of requesters who did not receive a full grant of their request.

163. § 552(a)(4)(B) ("On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").

164. *See, e.g.*, Liberation Newspaper v. U.S. Dep't of State, 80 F. Supp. 3d 137, 144–45 (D.D.C. 2015); Bigwood v. U.S. Dep't of Def., 132 F. Supp. 3d 124, 135–36 (D.D.C. 2015).

165. *See, e.g.*, Brayton v. Off. of the U.S. Trade Representative, 641 F.3d 521, 524–25 (D.C. Cir. 2011) (seeking attorney's fees); Nat'l Sec. Couns. v. CIA, 898 F. Supp. 2d 233, 273–78 (D.D.C. 2012) (unsuccessfully challenging the CIA's regular refusal to process FOIA requests that the CIA deems not to "reasonably describe" the records sought), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020); Am. Ctr. for L. & Just. v. U.S. DHS, 573 F. Supp. 3d 78, 88 (D.D.C. 2021) (finding that "agencies are entitled to demand" that applicants "reasonably describe the records they seek").

166. *See* OFF. OF INFO. POL'Y, *supra* note 24, at 6.

167. *See id.* at 15. Of course, the numbers are averaged a bit over time because some requests answered at the end of the year would trigger an appeal the following fiscal year, and some appeals at the beginning of the year would be from responses received the previous year. Still, these numbers are relatively stable over time, indicating that any variation is negligible. *See id.* (showing appellate numbers around 15,000 for the past eight fiscal years).

168. *July 2022 FOIA Litigation with Five-Year Monthly Trends*, FOIA PROJECT (Aug. 14, 2022), https://foiaproject.org/2022/08/14/july-2022-foia-litigation-with-five-year-monthly-trends/ [https://perma.cc/NP5S-K3ZQ] (representing the number of filings for a twelve-month period ending in July 2022, a year that largely overlaps with FY 2022). The same timeframe mismatch exists in litigation, as well. But again, the litigation numbers over time have been relatively stable, indicating that on average, these proportions are correct. *See id.* (showing data over the last five years reflecting only marginal changes in the average number of lawsuits filed).

hiring a lawyer is expensive, and pro bono FOIA attorneys are few and far between.[169] Even news outlets increasingly hire outside counsel for litigation, rather than using in-house counsel, but are reticent to pay market hourly rates for FOIA litigation.[170] Freelance journalists face even bigger barriers, as they have no institutional litigation capacity at all.[171] Most requesters—individuals, community groups, news media, and beyond—simply do not have the capacity to litigate when the response to their request is unsatisfactory.

Second, courts have institutional limitations in enforcing FOIA. They are reluctant to check agency secrecy even when the cases make it into their purview. In one study, agencies prevailed in FOIA cases at a rate that far exceeded their success in other types of agency review, even though agencies are supposed to receive less deference in FOIA cases, not more.[172] As the author explained, "FOIA cases are hard if not impossible to explain . . . if de novo is to be a meaningful standard of review,"[173] and "[i]t is hard to overcome the impression that in [FOIA cases] the district courts have failed to grasp the nettle."[174] In another study focused on national security cases, plaintiffs in FOIA disputes won only five percent of the time.[175] There, the authors noted that "[d]espite clear directives from Congress, . . . trial courts have in fact exhibited extreme reluctance to actually make any determinations in these cases that are contrary to government assertions of national security."[176]

The FOIA common law doctrines—the very decisions that demonstrate courts engaging in policymaking described above—often operate to the advantage of the agency and to the disadvantage of the requester, creating a sort of common law deference despite a formal de novo review standard.[177] Elsewhere I have

169. *See, e.g.*, *Litigating FOIA*, CTR. FOR CONST. RTS.: FOIA BASICS FOR ACTIVISTS, https://www.foiabasics.org/litigating-foia [https://perma.cc/Z8WP-8CC7] (last visited Feb. 15, 2024) (explaining that "[l]itigating your request in federal court means that if you aren't an attorney, you will need to find one to represent you," but also noting that "it can often be hard to find an attorney willing to litigate a FOIA request 'pro bono,' which means for free").

170. Telephone Interview with David McCraw, Deputy Gen. Couns., N.Y. Times, and Al-Amyn Sumar, First Amend. Fellow, N.Y. Times (May 3, 2019) (on file with author).

171. *See, e.g.*, GUMSHOE GRP., https://gumshoegroup.squarespace.com/ [https://perma.cc/H38U-YF9R] (last visited Feb. 15, 2024) (noting that freelance reporters have "diminished structural and financial support," and providing services connecting such reporters to legal resources in an attempt to fill that void).

172. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713, app. at 734 (2002) (comparing Social Security Disability cases, in which the agency is reversed 50% of the time, to FOIA cases, in which the agency is reversed only 10% of the time).

173. *Id.* at 730.

174. *Id.* at 723.

175. Mart & Ginsburg, *supra* note 68, at 728 ("[P]laintiffs rarely win FOIA cases when the government invokes the national security and foreign affairs exemption. . . . [O]nly 5% of such cases will result in an outright win for a plaintiff, and fewer than one in five cases lead to even partial disclosure.").

176. *Id.* at 747.

177. *See generally* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) (arguing that despite the de novo standard, courts have deferred to agencies in FOIA cases in a variety of ways). I am certainly not the only scholar to have noted a deferential approach developed through case law to the detriment of FOIA plaintiffs. *See generally, e.g.*, Fuchs, *supra* note 52 (discussing the need for greater

argued that these common law departures divide into two categories. The first, "spoken deference," encompasses instances where courts have created overtly deferential standards for particular aspects of FOIA cases.[178] For example, in national security cases, courts have articulated a "substantial weight" standard of review rather than de novo,[179] or openly ascribed a deferential standard toward the agency official's affidavit.[180] Similarly, courts have allowed agencies deemed to be primarily law enforcement agencies to presumptively meet the threshold requirement for the law enforcement records exemptions, namely, that the records were compiled for law enforcement purposes.[181]

The second category, "unspoken deference," refers to the procedural deviations courts have invented specific to FOIA cases which also work to the advantage of the government and the disadvantage of the requester.[182] This includes those mentioned above, such as a near total ban on discovery, but others as well. For example, courts have devised a unique application of summary judgment procedures, formally governed by Federal Rule of Civil Procedure 56. But instead of applying the rule to determine when summary judgment is appropriate (namely, when there is no genuine dispute of material fact), courts have consistently explained that summary judgment is presumptively the appropriate method for resolving FOIA cases, seemingly turning on an underlying assumption that FOIA cases involve purely legal questions, not disputed facts.[183] But in reality, FOIA

judicial scrutiny of government secrecy claims); Aram A. Gavoor & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U. L. REV. 525 (2017) (discussing the inefficiency of FOIA judicial review and the discrepancy between de novo review and agency interpretation).

178. Kwoka, *supra* note 177, at 211.

179. *See* Fuchs, *supra* note 52, at 165 (citing Halperin v. CIA, 629 F.2d 144, 147–48 (D.C. Cir. 1980)).

180. *See* CIA v. Sims, 471 U.S. 159, 179 (1985) ("The decisions of the [CIA] Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

181. Some circuits merely defer to those agencies with primarily law enforcement functions on this requirement. *See, e.g.*, Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (explaining to meet the Exemption 7 requirement, "[a]n agency which has a clear law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed"); Pratt v. Webster, 673 F.2d 408, 418, 420 (D.C. Cir. 1982) (laying out a two-part test to satisfy the "rational nexus" requirement, and explaining that in considering the threshold requirement for Exemption 7, the D.C. Circuit presumes that an agency acts within its legislated purpose, and thus criminal law enforcement agencies may provide "less exacting proof" that the records were compiled for those purposes); Abdelfattah v. U.S. DHS, 488 F.3d 178, 184–86 (3d Cir. 2007) (using an adaptation of the D.C. Circuit *Pratt* test). Other courts, however, have a per se approach that the requirement is met. *See, e.g.*, Irons v. Bell, 596 F.2d 468, 473–76 (1st Cir. 1979) ("[W]e hold that under the per se rule, all records and information compiled by an agency . . . whose primary function is law enforcement, are 'compiled for law enforcement purposes' for purposes of Exemption 7."); Kuehnert v. FBI, 620 F.2d 662, 666–67 (8th Cir. 1980) (adopting the per se rule); Williams v. FBI, 730 F.2d 882, 883–86 (2d Cir. 1984) (same); Jones v. FBI, 41 F.3d 238, 245–46 (6th Cir. 1994) (same); Jordan v. U.S. DOJ, 668 F.3d 1188, 1195, 1197 (10th Cir. 2011) (same).

182. Kwoka, *supra* note 177, at 211.

183. *See* Roseberry-Andrews v. DHS, 299 F. Supp. 3d 9, 18 (D.D.C. 2018) ("[T]he vast majority of FOIA cases can be resolved on summary judgment." (alteration in original) (quoting Brayton v. Off. of U.S. Trade Representative, 641 F.3d 521, 527 (D.C. Cir. 2011))).

cases routinely involve disputes of fact not susceptible to summary judgment, such as whether certain records were in fact maintained confidentially or if a record was used in an agency deliberation or created after a decision was made.[184] As a result of this faulty assumption, courts find themselves weighing evidence and resolving factual questions at the summary judgment stage, resulting in far fewer contested trial resolutions than other civil litigation.[185]

Importantly, the unavailability of discovery combined with summary judgment resolutions deprives requesters of the ability to cross-examine or otherwise challenge the government officials who handled the disputed records and who are in a position to justify (or not) the application of exemptions to them. Requesters litigate with their hands tied behind their backs, without the procedural opportunities typically afforded in federal court and without the true de novo standard of review promised by Congress.[186]

Why, then, are courts so unwilling or unable to fully enforce FOIA when they do get requesters who can litigate their disputes? Circumstantial evidence suggests that judges feel uniquely ill-positioned to decide FOIA cases as well as unusually burdened by them. The combination results in a series of procedural shortcuts, small-c conservative approaches, and ultimately government-secrecy-friendly positions. The institutional constraints of courts in this context have resulted in the inefficacy of judicial review.

Judges sometimes express their feelings of being burdened, as displayed in the following opening in a judicial opinion in a routine FOIA case: "Court dockets in this district overflow with Freedom of Information Act (FOIA) matters. Many of those cases seek reams of records, requiring massive efforts from defendant agencies. Despite the at times Sisyphean effort to respond, agencies rarely object to the breadth of a request."[187] The judge then recounted how with the proliferation of electronic records, and in particular email, agencies are now burdened with "search[ing] through more records than ever to find responsive ones" and yet "must respond to a deadline enacted 25 years ago, well before email's proliferation in the American workplace."[188] The judge also noted the impact of FOIA cases on the court system. "As outstanding requests pile up at agencies, so do FOIA cases on court dockets. Judges in this district currently have 991 active FOIA cases, which represent almost a quarter of the district's entire civil docket. And many of those take years to resolve."[189]

But the judge did not stop there. He then blamed nonprofit "frequent flyers" for the rise in FOIA litigation and asserted that FOIA's structure of allowing fee waivers for processing, combined with attorneys' fees for successful lawsuits,

184. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 234–44 (2011) (providing examples of questions of fact in FOIA cases).

185. *See id*. at 256–61.

186. *See* 5 U.S.C. § 552(a)(4)(B).

187. Am. Ctr. for L. & Just. v. U.S. DHS, 573 F. Supp. 3d 78, 79–80 (D.D.C. 2021).

188. *Id*. at 83.

189. *Id*. (footnote omitted).

incentivize nonprofits to make overly broad requests, burdening the system even further.[190] The judge was almost openly angry at requesters and disdainful of the law. As Bernard Bell explained, the logic behind the incentives argument is flawed, as it hardly seems strategic to make overly broad requests as a ploy to secure a deficient agency response at great delay only so the requester can maintain expensive litigation in the hopes of obtaining an attorney's fee award that is far from guaranteed.[191] Moreover, as my previous work has demonstrated, nonprofit organizations are responsible for a tiny fraction of overall FOIA requests.[192] Regardless, the sentiment about FOIA cases—and FOIA requesters themselves—remains.

This judge is not alone in his frustrations. In trying to explain why agency affirmance rates were so high in FOIA cases despite a de novo standard of review, Paul Verkuil noted that the Supreme Court became seemingly more skeptical about FOIA cases over time, "fed by factors such as the unsympathetic nature of the typical FOIA plaintiff . . . and the runaway costs of agency compliance."[193] Moreover, over the past five years, district courts have not resolved cases at the rate they have been filed, even though filing rates have not increased at the same pace as the backlog of cases.[194] At the end of 2020, eighty-three cases had been waiting for more than five years in district court for resolution.[195]

Beyond mere annoyance, however, there is evidence courts feel ill-equipped to decide FOIA cases.[196] Particularly in the realm of national security, courts have repeatedly asserted that it is not the Judiciary's "role to second-guess the reasonable judgment of executive branch officials when national security interests are plausibly at stake."[197] Courts are particularly deferential to government assertions of the so-called mosaic theory—a claim that although individual pieces of information may possess limited utility, they may reveal national security secrets in

190. *Id*. at 83–84.

191. *See* Bernard Bell, *Are Non-Profit Organizations' Records Requests Ruining FOIA?*, YALE J. ON REGUL.: NOTICE & COMMENT (June 19, 2022), https://www.yalejreg.com/nc/are-non-profit-organizations-records-requests-ruining-foia/ [https://perma.cc/D6P9-T7J6].

192. *See* Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2204 (2018) (documenting how, at many agencies, individuals seeking their own files dominate FOIA requests); Margaret B. Kwoka, *FOIA, Inc*., 65 DUKE L.J. 1361, 1380 (2016) (documenting how, at other agencies, businesses make the vast majority of FOIA requests).

193. Verkuil, *supra* note 172, at 716.

194. *Justice Delayed Is Justice Denied: Judges Fail to Rule in a Timely Manner on FOIA Cases*, FOIA PROJECT (Feb. 3, 2021), https://foiaproject.org/2021/02/03/justice-delayed-is-justice-denied/ [https://perma.cc/5YUA-28K2].

195. *Id.*

196. *See* Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* 48 (N.Y.U. Sch. of L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 10-53, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964 [https://perma.cc/SN3K-C23M] ("The reasons for judicial resistance to *de novo* review, despite the statutory mandate for it, are not mysterious. . . . [Judges] do not believe they are competent to disagree with national security experts . . . [and are anxious] about the magnitude of the harm if they should err . . . .").

197. Gov't Accountability Project v. CIA, 548 F. Supp. 3d 140, 152 (D.D.C. 2021); *accord* Ullah v. CIA, 435 F. Supp. 3d 177, 184–85 (D.D.C. 2020); Ctr. for Nat'l Sec. Stud. v. U.S. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003); *see also* Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

combination with other information.[198] David Pozen found that "judges treat mosaic claims with an augmented form of deference, which amounts to an effective *delegation* of mosaic theory oversight to the agencies themselves."[199] In an early non-FOIA case that became the basis for incorporating mosaic theory into FOIA disputes, the Fourth Circuit declared that "courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area."[200]

Courts' reluctance to review national security matters is also reflected in the manner in which they exercise their statutory *in camera* authority to review disputed classified records,[201] a provision added by Congress after the Supreme Court initially held that FOIA did not allow courts to consider the propriety of classification labels.[202] Courts rarely invoke their *in camera* authority,[203] oftentimes opining that they should only do so in extraordinary circumstances,[204] even though the statute has no such requirement.

Susan Nevelow Mart and Tom Ginsburg have identified some of the key cognitive blocks that may contribute to judicial unwillingness to second-guess agency secrecy claims.[205] One cognitive block is the "availability heuristic," a type of bias individuals experience in decisionmaking that favors prominent—or available—information over that which is less easy to ascertain.[206] Accordingly, decisionmakers are predisposed to overcount high-risk consequences (which are easy to imagine or describe) despite their low probability of occurrence (which is difficult to quantify or measure). When it comes to security decisions, the availability heuristic will mean, for example, that concerns about the worst-case scenario of ordering release of information that becomes key information used by terrorists will almost always outweigh the unknowable (but often tiny) probability of such

198. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005).

199. *Id.* at 652.

200. United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972); *see also* Pozen, *supra* note 198, at 639 (describing the role of *Marchetti* in the development of the mosaic theory in FOIA litigation).

201. *See* 5 U.S.C. § 552(a)(4)(B).

202. *See* EPA v. Mink, 410 U.S. 73, 81 (1973); Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2, 88 Stat. 1561, 1561.

203. *See* Mart & Ginsburg, *supra* note 68, at 765–72.

204. *See, e.g.*, Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) ("[A]n *in camera* review should not be resorted to as a matter of course, simply on the theory that 'it can't hurt.'" (quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978))); Loc. 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) ("*In camera* review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court's discretion." (citing Donovan v. FBI, 806 F.2d 55, 59 (2d Cir. 1986))).

205. *See* Mart & Ginsburg, *supra* note 68, at 745–46.

206. *Id.* at 746; *see also* Nobert Schwarz, Herbert Bless, Fritz Strack, Gisela Klumpp, Helga Rittenauer-Schatka & Annette Simons, *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCH. 195, 195 (1991) (describing the availability heuristic); Amos Tversky & Daniel Kahneman, *Introduction* to JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 18 (Daniel Kahneman et al. eds., 1982) (exploring the effect of cognitive biases on decisionmaking).

a terrible outcome.[207] As a result, courts are unwilling to closely scrutinize claims of exemption when the government frames the possible consequences—however unlikely—as dire.

The nonenforcement of FOIA's proactive disclosure requirements also demonstrates judicial reticence. Until relatively recently, the proactive disclosure provisions of FOIA, which require agencies to publish certain predetermined categories of records without the need for a predicate request,[208] have not been the subject of litigation. When a member of the public wanted government records, they used FOIA's request provision, and if litigation ensued, it was to challenge a denial. But FOIA's proactive disclosure obligations, as described above, are routinely violated. Yet, the courts have been uneven in their willingness to enforce these violations at all, even when cases are brought.

In a telling case, Citizens for Responsibility and Ethics in Washington challenged the DOJ's failure to proactively disclose formal written opinions issued by the Office of Legal Counsel.[209] The D.C. Circuit affirmed the district court's dismissal of the case while never reaching the question of whether these opinions fell within the affirmative disclosure mandate; rather, it concluded that FOIA's judicial review provision did not authorize courts to enforce the affirmative disclosure requirements at all.[210] After a strained statutory construction analysis leading to the conclusion that FOIA provided authority to the district courts only to order release of records to a particular plaintiff, and not publication to the world at large, it concluded with several "parting thoughts," one of which was this: "[W]e expect that only a rare instance of agency delinquency in meeting its duties under the reading-room provision will warrant a prospective injunction with an affirmative duty to disclose subject records to a plaintiff."[211] The court gave no reason why such a remedy, limited as it is, would be "rare," except the implication that courts are ill-positioned to mandate broad legal compliance requiring agency policy changes.[212]

Subsequently, two other circuit courts have disagreed with the D.C. Circuit, holding that FOIA does provide such authority to district courts.[213] But these types of cases are infrequently brought, and courts remain reluctant to wade into proactive disclosure claims encompassing voluminous records. As such, courts are not operating as an effective oversight mechanism for those proactive disclosure obligations.

Because effective judicial review is so rare, agencies have little incentive to critically examine the potential application of FOIA exemptions[214] or to devote

207. Mart & Ginsburg, *supra* note 68, at 746–47.

208. *See supra* notes 20–22 and accompanying text.

209. Citizens for Resp. & Ethics in Wash. v. U.S. DOJ, 846 F.3d 1235, 1239–40 (D.C. Cir. 2017).

210. *Id.* at 1243.

211. *Id.* at 1246.

212. *See id.* at 1243–44.

213. *See* Animal Legal Def. Fund v. U.S. Dep't of Agric., 935 F.3d 858, 869 (9th Cir. 2019); N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 224 (2d Cir. 2021).

214. *See* Mart & Ginsburg, *supra* note 68, at 747 (making this point expressly in the national security context).

resources to meeting either their reactive or their affirmative disclosure obligations. Without rigorous oversight, agencies have little reason to not err on the side of overwithholding. Any "observer effect"[215] that agencies would feel from the possibility of an unfavorable court ruling is essentially negated by the deferential posture with which a court is likely to review the vanishingly small number of cases that come before it.

## III. THE CASE FOR AN INDEPENDENT AGENCY

The previous Part showed how courts have failed to adequately enforce FOIA obligations. This Part demonstrates why an independent agency is the right institution for primary enforcement activities. At bottom, an information commission would have the power to review the responses to FOIA requests made by other agencies in the federal government upon complaint by the requester and to issue binding orders to release records wrongfully withheld. As demonstrated below, this model has the potential to increase the amount of enforcement of FOIA obligations, improve the accuracy of enforcement determinations, and broaden the methods of enforcement available.

To be sure, an information commission would be an unusual body in the federal government in at least a couple of respects. First, it would be empowered to adjudicate the obligations of other federal entities. However, agencies already sometimes review the resolution of a member of the public's rights initially made by another agency. Perhaps most analogously, the Equal Employment Opportunity Commission reviews the human resources decisions of other federal agencies regarding claims of discrimination.[216] An information commission's review function would be similarly transsubstantive. Second, to the extent that an information commission's orders would be subject to some further review by the Judiciary, it would potentially involve inter-agency litigation. While a vigorous academic debate has surrounded intra-branch litigation,[217] such cases do

215. "The phrase 'observer effect' describes the impact on executive policy setting of pending or probable court consideration of a specific national security policy." Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 833 (2013).

216. *See EEOC Coordination of Federal Government Equal Employment Opportunity*, U.S. EEOC, https://www.eeoc.gov/federal-sector/eeoc-coordination-federal-government-equal-employment-opportunity [https://perma.cc/3A8X-NZRQ] (last visited Feb. 16, 2024). Other agencies engage in review of a single other agency's decision. For example, ICE first makes determinations as to whether someone is subject to mandatory detention or if they are eligible for a bond, which are reviewed de novo in immigration court. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (2023); AM. IMMIGR. COUNCIL, SEEKING RELEASE FROM IMMIGRATION DETENTION (2019), https://www.americanimmigrationcouncil.org/research/release-immigration-detention [https://perma.cc/F6W2-SUAH]. Likewise, USCIS makes credible fear determinations as to asylum applicants, later reviewed by an immigration judge. *See Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 17, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule [https://perma.cc/L37M-Y94P].

217. *See generally, e.g.*, Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (positing that in circumstances involving independent agency adjudications, among others, intra-agency litigation should be permitted); Joseph

have a long history, particularly in instances where one agency wants to dispute an independent agency's binding adjudication of its obligations.[218] Without wading into these larger debates, it is enough to note for now that an information commission could fit comfortably within these traditions.[219]

The current agency oversight structures for FOIA bear little resemblance to the information commission proposed here. OIP is tasked with issuing guidance to agencies on FOIA administration and maintaining annual FOIA reports.[220] OGIS is empowered to offer mediation services between requesters and agencies, with the potential (though scantly used) to issue advisory opinions.[221] These agencies lack critical features; they are not authorized to issue binding orders resolving disputes over access to records, nor are they protected from political interference.[222] Proposals to strengthen OGIS could nudge it forward,[223] but an information commission as described here would be far more than an incremental move from where that institution stands today.

Without doubt, the devil is in the details. As Jerry Mashaw said, "[I]f the 'basics' of benefits adjudication are captured in goals such as 'accuracy, fairness and timeliness,' the difficult managerial problem lies in mediating the tension amongst those goals in the concrete operation of the program."[224] This Part will detail the benefits of agency adjudication, acknowledge some potential drawbacks, and flag important aspects of procedural design. It will not seek, however, to detail all aspects of agency adjudication that an eventual information commission should contemplate. Despite this necessarily incomplete account, the highlights of agency adjudication over current judicial processes demonstrate the wisdom of an information commission model.

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W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217 (2013) (taking a skeptical view of most inter-agency litigation based on separation of powers principles).

218. *See* Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 661 (2020) ("Particularly from the 1990s onward, these cases have often involved appealing independent agency decisions concerning conflicts over labor rights or promotions impacting employees of executive agencies.").

219. Existing institutions within the Executive Branch, such as the OIP in the DOJ and the OGIS in the National Archives and Records Administration, lack both independence and the power to issue binding orders regarding agency compliance, the hallmarks of an independent enforcement authority as described here. I explore in more detail the failures of OGIS and OIP to fulfill a meaningful oversight role elsewhere. *See* Karanicolas & Kwoka, *supra* note 17, at 675–78.

220. *About the Office of Information Policy*, U.S. DOJ: OFF. OF INFO. POL'Y (Dec. 22, 2022), https://www.justice.gov/oip/about-office [https://perma.cc/U8SK-CQ9E].

221. 5 U.S.C. § 552(h)(3). The reasons these advisory opinions are not used more often is not known, but OGIS's lack of enforcement powers may lead it to pull its punches, insofar as issuing advisory opinions that an agency does not have to follow may ultimately undermine OGIS's power of persuasion.

222. Karanicolas & Kwoka, *supra* note 17, at 675–78 (describing the evolution of OGIS and OIP and their shortcomings).

223. *See* FREEDOM OF INFO. ACT FED. ADVISORY COMM., 2020-2022 COMMITTEE TERM FINAL REPORT AND RECOMMENDATIONS 25–33 (2022), https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2022-07-05.pdf [https://perma.cc/B9ZN-RWBK] (recommending increasing OGIS's authority and resources).

224. Jerry L. Mashaw, Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law, Panel: The Structure of Government Accountability at University of Pittsburgh School of Law (Sept. 21–22, 1995), *in* 57 U. PITT. L. REV. 405, 410 (1996).

### A. MORE ENFORCEMENT

The first set of agency advantages in enforcing FOIA is practical: an independent agency would be likely to engage in a significantly higher volume of oversight than the courts. Agencies can set up flexible adjudication models with somewhat less procedural formality, designed to process complaints quickly and inexpensively without requiring legal representation. Accordingly, the proposed adjudication model could and should be much more accessible to members of the public, who would be able to avail themselves of it much more often. Agency decisions would be subject to a meaningful threat of review, creating an incentive to engage in better front-line decisionmaking.

Agencies are already not bound by the same formalities as federal courts. Indeed, even the most formal of adjudicatory procedures, those governed by all the Administrative Procedure Act (APA) procedural requirements, lack many of the hallmarks of federal court proceedings.[225] Most agency adjudications, though, are informal, and agencies largely craft the rules and procedures.[226] The APA offers some minimal protections for informal adjudications, such as the right to be represented by counsel retained at the individual's own expense,[227] the right to a decision in a reasonable time,[228] the right to utilize agency subpoenas to the same extent the agency can do so,[229] and the right to a statement of the agency's reasons for decisions made against a private party's interests.[230]

These minimal APA requirements leave more than adequate flexibility for an agency, including a future information commission, to design an adjudicatory scheme that suits the interests at stake (subject, of course, to any statutory requirements Congress might additionally impose). For example, informal agency adjudications can be fully paper proceedings or can involve an in-person hearing and typically permit both parties to present their arguments in lay terms and allow the adjudicator to request further information as necessary.[231] Written-only hearings

225. *See* Matthew Lee Wiener, *General Rules for Agency Adjudications?*, REGUL. REV. (Oct. 29, 2018), https://www.theregreview.org/2018/10/29/wiener-general-rules-agency-adjudications/ [https://perma.cc/TL47-8UTH] ("[T]he APA establishes nothing approaching a set of rules on the model of, say, the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure.").

226. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143–44 (2019).

227. 5 U.S.C. § 555(b).

228. *Id.*

229. *See id.* § 555(d).

230. *Id.* § 555(e).

231. The Administrative Conference of the United States and the ABA's Section on Administrative Law and Regulatory Practice have advocated for three categories of adjudication: Type A adjudications are formal adjudications governed by APA procedures and presided over by an administrative law judge; Type B adjudications are legally required evidentiary hearings that are not subject to the APA procedures and are presided over by adjudicators typically called administrative judges; and Type C adjudications are not subject to a legally required evidentiary hearing. *See* Adoption of Recommendations, 81 Fed. Reg. 94312, 94314 (Dec. 23, 2016); MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 5–6 (2019), https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf [https://perma.cc/DK5J-VXHH] (describing the factors

may be particularly appropriate in the vast majority of cases where credibility is not at stake.[232] Many agencies use written-only proceedings in at least some of their adjudications, including, for example, the Social Security Administration, the Equal Employment Opportunity Commission, and the U.S. Department of Agriculture.[233]

Importantly, an information commission could design a system with the procedures tailored to the kinds of disputes it would face. For example, a default paper-hearing system for disputes over records requests could include an option for an in-person hearing, perhaps for those with disagreement among the commissioners. Paper-only hearings could be particularly effective in this context given that *in camera* review of disputed records would be one critical component of the decisionmaking process, as discussed in further depth below.[234]

Current agency adjudication systems demonstrate the feasibility of handling voluminous contested matters efficiently. Indeed, agency adjudication vastly outpaces federal court litigation, with the largest volume agencies adjudicating hundreds of thousands of cases per year.[235] Information commissions in other jurisdictions have been able to handle impressive volumes of complaints concerning information denials. For example, in Mexico, widely celebrated as having one of the strongest freedom of information regimes in the world,[236] at the federal level alone, the commission resolved 16,894 appeals in FY 2022,[237] which Mexico's Federal Institute for Access to Public Information and Data Protection

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that help distinguish between the categories, and identifying Type A as what is typically considered "formal adjudication," Type C as "informal adjudication," and Type B as its own distinct category in the middle). As described here, the type of adjudication imagined by an information commission acting as an independent agency adjudicator of FOIA disputes falls squarely within the Type B adjudicatory framework.

232. *See* ASIMOW, *supra* note 231, at 80 (noting that such written hearings are "appropriate in cases that do not involve resolution of credibility conflicts").

233. *See* Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1775 tbl.2 (2020) (comparing procedures used across six agencies used as case studies in informal adjudication).

234. *See infra* notes 254–57 and accompanying text.

235. The most comprehensive data is now a decade old but puts the Social Security Administration administrative law judges at nearly 800,000 cases closed per year, immigration judges within the DOJ at just over 250,000 cases per year, Office of Medicare Hearings and Appeals at nearly 80,000 per year, IRS Office of Appeals at almost 50,000 per year, and the Board of Veterans' Appeals at a bit more than 40,000 per year. *Caseload Statistics*, STAN. UNIV.: ADJUDICATION RSCH, https://acus.law.stanford.edu/reports/caseload-statistics [https://perma.cc/FRV4-KTQT] (last visited Feb. 16, 2024). Although dated, evidence suggests that the volume of adjudication is only increasing over time. *See* ASIMOW, *supra* note 231, at 21 (summarizing studies showing that "the workload of Type B adjudicating agencies is growing steadily"). To compare to federal court caseloads, where district courts in 2022 received only around 300,000 civil filings and just over 70,000 criminal cases per year, see *Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/Y3KJ-NDU9] (last visited Feb. 16, 2024).

236. *See* Toby, *Congratulations Mexico for the World's Best Right to Information Law*, CTR. FOR L. & DEMOCRACY (Sept. 28, 2016), https://www.law-democracy.org/live/congratulations-mexico-for-the-worlds-best-right-to-information-law/ [https://perma.cc/63EP-E9ST].

237. INSTITUTO NACIONAL DE TRANSPARENCIA, ACCESO A LA INFORMACIÓN Y PROTECCIÓN DE DATOS PERSONALES, INFORME DE LABORES 2022, at 58 (2022), https://micrositios.inai.org.mx/informesinai/#dearflip-df_120/1/ [https://perma.cc/3EA5-FWEY].

(INAI) reports represents six percent of all requests.[238] While six percent of all requests being reviewed by INAI is already an impressive amount of review, the quantity of review is almost astounding when taking account of the initial dispositions of requests. In FY 2022, federal entities responded to 281,251 requests for information, of which only 30,565 requests were denied,[239] meaning that more than half of denials are reviewed by INAI,[240] a level of review that is exponentially more than judicial review of FOIA denials in the United States.[241]

While it may seem counterintuitive that agencies are able to handle voluminous adjudication when courts cannot, agencies, with greater procedural flexibility, also have more tools at their disposal. Recent work has documented that, in the context of mass adjudication, agencies have used "new rules, policy guidance, flexible staffing, and even artificial intelligence" as "programmatic solutions to address persistent delays."[242] For example, even agencies that lack rulemaking authority can spot patterns of problems in implementing statutory authority and can lobby Congress for new rules that permit more efficient and accurate decisionmaking.[243] In one innovative example, the Social Security Administration implemented an artificial intelligence (AI) program to review draft decisions and flag possible errors and inconsistencies for the adjudicator to review.[244] These kinds of innovations are possible for an agency in a way that a federal court, constrained by formalities, could never have.

Importantly, we should expect an independent agency to receive far more review requests than an analogous court would because an administrative process will provide increased access to requesters. First, hiring a lawyer is often unnecessary in agency proceedings, where procedures are designed to be accessible and comprehensible by lay people,[245] including to journalists who also struggle to find representation in FOIA litigation. For an information commission, the procedures should be specifically designed to be primarily used by unrepresented

238. *Id.* at 62.

239. *Id.* at 28–29 (4,163 yielded no records, 3,850 were exempt, and 22,552 belonged elsewhere or were otherwise improper).

240. It is possible some requests agencies report as "granted" could be appealed if the requester does not believe the grant encompassed everything they wanted, and therefore that some of the 16,894 appeals reviewed by the commission were not denials. Still, it is safe to assume such instances are comparatively less common than instances of appeals of denials.

241. *Cf. supra* note 168 and accompanying text.

242. Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335, 1341 (2019).

243. *See id.* at 1348.

244. *Id.* at 1351. For a more detailed description of the Social Security Administration's use of AI in adjudication, as well as agency AI use in other contexts, see generally DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUÉLLAR, ADMIN. CONF. OF THE U.S., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020) (report commissioned by the Administrative Conference of the United States).

245. *See* Adoption of Recommendations, 81 Fed. Reg. 94312, 94316 (Dec. 23, 2016) ("Agencies should make hearings as accessible as possible to self-represented parties by providing plain language resources, legal information, and other assistance, as allowed by statute and regulations.").

parties. Second, an information commission should not have filing fees and other costs associated with litigation, such as to avoid erecting any barrier to citizens availing themselves of the process. And third, the time frame for decisionmaking should be much faster because the procedures are less formal and the agency possesses specialized expertise, ensuring that information has a chance of being actually useful to the recipient. As a play on the old adage goes, "access delayed is access denied."[246]

### B. BETTER ENFORCEMENT

More oversight, or more enforcement, is only helpful if it is "better." What, then, does "better" enforcement mean? Jerry Mashaw once observed that there is "no objective, external referent for determining" whether a decision is "accurate."[247] That is, the quality of decisions is, to some extent, in the eye of the beholder. Despite inherent limitations on measuring accuracy, this Section will argue that a new independent agency would be likely to make "better" decisions because it would be better positioned than the Judiciary to make policy choices consistent with FOIA's purpose. The principal advantages of such an agency would be its expertise, its mission-driven orientation, and its greater democratic accountability.

Information law is an area in which expertise is critical to decisionmaking. One clear signal that expertise is important in this area is courts' constant deference to agency expertise on the question of whether release of documents in a given instance will produce a particular harm, be it to an ongoing investigation,[248] or the privacy interests of an individual,[249] or the decisionmaking process of government officials.[250] As the previous Part demonstrated, courts feel ill-equipped to second-guess agency expertise in these critical areas, leading to great deference

246. *E.g.*, Bryan Short, *Right to Know Week & Canada's Broken Access to Information System*, OPEN MEDIA (Oct. 5, 2022), https://openmedia.org/article/item/right-to-know-week [https://perma.cc/E7WZ-KF4F].

247. Mashaw, *supra* note 224, at 411–12.

248. *See, e.g.*, Ctr. for Nat'l Sec. Stud. v. U.S. DOJ, 331 F.3d 918, 927–28 (D.C. Cir. 2003) ("Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one."); Jud. Watch, Inc. v. CIA, No. 17-cv-397, 2019 WL 4750245, at *4 (D.D.C. Sept. 29, 2019) ("When an agency 'specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.' However, the 'deferential' standard of review is not 'vacuous.'" (citation omitted) (quoting Campbell v. U.S. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998))).

249. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004) ("We hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure."); Pinson v. U.S. DOJ, 202 F. Supp. 3d 86, 102 n.3 (D.D.C. 2016) ("Because Exemption 7(C) covers information that 'could reasonably be expected' to cause an unwarranted invasion of privacy, 5 U.S.C. § 552(b)(7)(C), the balancing test in Exemption 7(C) is more deferential to the government agency than the test in Exemption 6." (citing Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984))).

250. Nat'l Ass'n of Crim. Def. Laws. v. DOJ Exec. Off. for U.S. Att'ys, 844 F.3d 246, 249 (D.C. Cir. 2016) ("[Exemption 5] allows the government to withhold records from FOIA disclosure under at least three privileges: the deliberative-process privilege, the attorney-client privilege, and the attorney work-

to those with a vested interest in secrecy. An information commission could develop the necessary expertise to critically examine these agency claims.

The specialized nature of information expertise in the broader economy also counsels toward having an expert information body within government. Information is now the basis for large swaths of economic production with data playing a central role in a wide variety of industries.[251] As others have explored in depth, the era of industrial capitalism has given way to information capitalism,[252] and as I have argued elsewhere, an information commission could serve as the locus of government expertise in the effects of releasing government information in the increasingly complex information environment.[253]

An agency's tools could augment their expertise. As David Spence and Frank Cross said in a defense of the administrative state using a public choice theoretical frame, "[C]ourts are the poorest of all government institutions when it comes to independent information-gathering capabilities."[254] Similarly, Justice Stephen Breyer has noted that "courts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand."[255] By contrast, agencies can create procedures tailored to gathering information necessary to augment their expertise in the matter, using the full range of knowledge necessary to decide important policy matters.

In one particularly salient example, an information commission should be permitted or required to review the disputed records *in camera* in every case and should have individuals with the security clearance needed to review classified records (with some possible extra precautions for the most highly classified of records). Currently, courts have the power to review records *in camera* but use that power exceedingly infrequently, despite congressional intent that review of the decision to withhold records be de novo.[256] Moreover, giving the agency the power to review the disputed records is consistent with recommendations submitted by consultants to the Administrative Conference of the United States that all Type B adjudications have subpoena power.[257]

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product privilege." (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980))).

251. *See generally, e.g.*, DAN SCHILLER, HOW TO THINK ABOUT INFORMATION (2007) (documenting the commodification of information and the democratic deficit it has produced); KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION (2017) (describing fundamental economic shifts in which value is extracted through new digital technologies and information); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (arguing that we have shifted to a networked information economy).

252. *See generally, e.g.*, JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019).

253. *See generally* Margaret B. Kwoka, *The Anti-Managerial Information Commission*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 197.

254. Spence & Cross, *supra* note 110, at 140.

255. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389 (1986).

256. *See supra* notes 201–04.

257. *See* ASIMOW, *supra* note 231, at 184, 187.

One important agency advantage is its ability to craft rules, like *in camera* review, that blend the inquisitorial model with a traditional adversarial model of adjudication. The long-acknowledged inherent information imbalance in FOIA judicial disputes[258] demonstrates the advantages of a blended model. Indeed, agencies can intervene by developing a more inquisitorial approach to dispute resolution.

The expertise of an agency, along with its ability to gather all the necessary information to utilize that expertise, is one of the bases justifying judicial deference to an agency's interpretation of the law it administers (*Chevron*) or discretionary policymaking choices (arbitrary and capricious review).[259] While deference to the agencies whose records are at issue is not warranted,[260] deference to an information commission would not only be warranted under existing black-letter law, but salutary. An information commission's interpretation of the statute, discretionary policymaking choices, and body of administrative opinions susceptible to common law precedential application should receive the judicial deference commensurate with its expertise and Congress's choice to delegate to such a commission.[261] In fact, judicial deference to the commission would augment the commission's many public benefits.

In addition to expertise-based advantages, an independent agency would offer institutional advantages, namely having a mission-driven perspective. Agencies are not designed to be neutral arbiters when implementing a statute, but rather are designed to fulfill a social mission, in this instance, maximum government transparency as envisioned by FOIA. Margaret Lemos described the different approaches to policymaking between institutions as asking different questions: while agencies would ask, "How would I like to resolve this issue?, a court instead asks, How would Congress like to resolve this issue?"[262] Indeed, this mission-driven perspective serves as a counterweight to other government interests in secrecy and prevents the commission from being allied with national security agencies.

The democratic accountability of agencies also bolsters this social-mission-oriented perspective because agencies are closer to the electorate than are federal judges.[263] For example, the give-and-take between agencies and Congress is often faster and clearer; Congress can easily correct agencies when they veer off

258. *See* Vaughn v. Rosen, 484 F.2d 820, 823–24 (D.C. Cir. 1973).

259. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864–65 (1984); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2374 (2001); *see also* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1215–24 (2021) (detailing the expertise-based justification for *Chevron* deference).

260. *See supra* notes 172–207 and accompanying text.

261. To be sure, *Chevron* and other deference doctrines are under considerable critique in academia and the courts. *See supra* note 118 and accompanying text. I do not wade into the debate here.

262. Lemos, *supra* note 110, at 430.

263. *See generally* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (critiquing the courts' ability to make policy); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (documenting the various ways in which agencies are politically accountable).

course, and ongoing dialogues between the institutions prevent such errors.[264] Such a process seems potentially even more fruitful in the context of FOIA, a statute Congress has had a uniquely strong appetite for revisiting through iterative rounds of amendments nearly all moving toward strengthening the right of the public to access government information.[265]

Finally, while much has been made of agency capture, an information commission is still likely to be less biased in favor of special interests than courts may be. An information commission will not have a single outside special interest that is likely to repeatedly come into play; the risk of capture is by the other executive branch agencies themselves, not by private interests. Executive branch agencies are less likely to make a concerted effort to influence decisionmaking as private industry has done, and the mechanisms to protect the commission's independence, explored below,[266] go a long way to mitigating that concern.

Further, private interests demonstrably influence the courts. As early as 1974, Marc Galantar's pioneering work, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, documented how the design of the legal system advantages already-advantaged parties and limits how much courts can play a redistributive role in society.[267] Many other scholars have noted the success of repeat players in the judicial system, representing a type of influence that individual litigants can have.[268] And more broadly, the Judiciary is limited to the cases brought before it; its agenda is set by others and its remedies limited by judicially crafted doctrines, like standing, that keep more broadly recognized public interests from pursuing legal remedies.[269] Interestingly, David Spence and Frank Cross described the creation of the first bureaucratic agency, the Interstate Commerce Commission, as Congress's response to a perceived need for railroad regulation and aversion to turning to the courts, which Congress feared would unfairly advantage the railroad companies.[270] Thus, Congress has long recognized the problem of judicial bias.

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264. *See* Spence & Cross, *supra* note 110, at 140 ("The courts lack democratic accountability and are far more difficult for Congress and the President to check and correct than are agencies."); *see also* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1301–06 (1999) (describing the fallacy of the argument that the Judiciary is the right check on agencies as compared with Congress).

265. FOIA, enacted in 1966, was amended in 1974, 1976, 1986, 1996, 2002, and 2007. *FOIA Legislative History*, NAT'L SEC. ARCHIVE, https://nsarchive2.gwu.edu/nsa/foialeghistory/legistfoia.htm [https://perma.cc/WA9R-YLDK] (last visited Feb. 16, 2024).

266. *See infra* Part IV.

267. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

268. *See* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 366, 379–81 (1999) (noting that repeat players have greater success in court); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 212 (1982) (demonstrating a repeat player effect); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 78–79 (1991) (noting the behavior of repeat players in settlements).

269. Spence & Cross, *supra* note 110, at 140–41.

270. *Id*. at 139.

But "better" decisionmaking in this context is not just decisionmaking that is freer from influence, less self-interested, or more informed. It is also decisionmaking that results in greater transparency. As described in Part II, the Judiciary's approach has led to rubberstamping government secrecy, to the detriment of the purpose of FOIA to promote maximum government transparency. Better decisionmaking must entail more orders of release of information than our current baseline. Put differently, even if there is no "right" amount of transparency, we know we currently have the "wrong" amount.

Evidence from other jurisdictions with information commissions demonstrate that a well-designed commission will produce a much higher reversal rate than currently exists in the federal courts. In Mexico, for appeals of denials of access to information that the information commission decided on the merits, in the last reporting year only 20% of agency decisions to deny access were affirmed, while 26% were reversed, 45% were modified, and the remaining 9% resulted in an order for compliance to the agency.[271] Similarly, in Connecticut, the only state in the United States with a similarly empowered information commission, over a six-year period, the commission ruled in favor of the citizen complainant 36% of the time and for the responding agency only 30% of the time (with the remainder ending without a clear merits judgment).[272] These strikingly similar statistics offer a glimpse into the power of information commission review.

The information commission can be the champion for transparency. It would house the necessary expertise to avoid deferring on questions it feels are outside its competency. It would acquire the information necessary to make better decisions. It would approach policy matters as questions of societal import. It would avoid the biases that come with limited judicial review and influence of private parties. And it would be an institution with a primary mission of enforcing FOIA. This combination of attributes would lead to decisionmaking that would shift back toward a presumption of transparency.

### C. MORE KINDS OF ENFORCEMENT

Agencies' enforcement activities are not limited to administrative adjudications deciding the matters that parties bring before them. Rather they can be given the power to perform a wide variety of tasks. This breadth of potential delegations of power gives an information commission the possibility of significantly more

271. INSTITUTO NACIONAL DE TRANSPARENCIA, ACCESO A LA INFORMACIÓN Y PROTECCIÓN DE DATOS PERSONALES, *supra* note 237, at 58–59. Of the 16,894 appeals of denials reviewed, 12,253 were decided on the merits (the remaining 4,641 were dismissed). *Id.* at 58. Of these 12,253 decided on the merits, 9,831 were reversed in whole or in part and 2,422 were affirmed. *Id.*

272. Deborah Mohammed-Spigner, The Connecticut Freedom of Information Commission (FOIC); Facilitating Access to Public Records 87–88 (Jan. 2009) (Ph.D. dissertation, Rutgers University) (on file with author). The data reported here are admittedly much older, encompassing the years of 2000–2005. *Id.* at 83.

effective enforcement because it can engage in a wide variety of enforcement activities.[273]

With respect to enforcement activities that wield meaningful power over regulated entities, agencies are regularly tasked with some sort of inspection or auditing authority. An early example is the Office of Comptroller of the Currency, which Congress empowered to engage in bank inspections to ensure banks did not fail and cause devastating economic harms.[274] Today, regulators use inspection and auditing as enforcement techniques throughout the economy, including for pharmaceutical inspections, food production facilities, mines, nuclear power plants, and airlines.[275]

Inspection and auditing are tools that should also be available to an information commission. An information commission could, for example, be tasked with auditing agency compliance with FOIA obligations. This could entail a random sampling of un-appealed FOIA responses each year to determine if agencies are complying with the law. It could also entail auditing agency websites to see if they are compliant with proactive disclosure requirements. Finally, it could empower an agency to inspect systems of records to ensure agencies perform adequate searches in response to requests.

This suite of inspection and auditing functions could vastly improve the enforcement capabilities of an information commission, ensuring that some amount of surveying or randomized monitoring takes place. In a complaint-driven process, the agency's agenda is set by the dissatisfied requester, rather than the enforcing agency. A broader set of compliance tools allows the agency to set an enforcement agenda of its own.

Auditing and inspections not only allow an information commission to identify problems and order rectification but also permit an information commission to gather a broad set of data. This ability to collect information will reveal patterns of persistent noncompliance, which counsels toward giving an information commission another set of common agency enforcement tools used by agencies like the EPA and Federal Trade Commission (FTC): the ability to levy fines, sanctions, or other penalties.[276] An information commission could levy fines or other

273. It is worth noting that one set of enforcement tools that has been particularly powerful in some instances are pre-approval authorities, or ex ante enforcement. These tools allow agencies to block certain actions absent their approval, such as marketing of a drug or certain potentially anticompetitive mergers. *See* Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1277 (1999) (exploring the power of pre-approval and its appropriate uses). Pre-approval tools are less obviously applicable for an information commission, unless it were to take on other information regulation tasks, something I suggest may be possible in other work. *See* Kwoka, *supra* note 253.

274. Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 384–86 (2019).

275. *See id.* at 387–96; *see also* Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 IND. L.J. 421, 435 (2022) (noting that "many agencies can inspect property or enter premises, sometimes for the purpose of inspecting records").

276. *See, e.g.*, *Basic Information on Enforcement*, U.S. EPA (Feb. 7, 2024), https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/C85D-GWDG]; *Notices of Penalty*

penalties on persistently noncompliant or repeatedly violative agencies or specific agency officials, and could use both its data from complaints filed from citizens and its broader investigating and auditing functions to identify patterns ripe for harsher consequences.

A more cooperative or incentives-based set of enforcement tools should also be part of an information commission's arsenal. To the extent an information commission is gathering data about agency performance—and it should—the data collected will affect the behavior of the agencies insofar as they will attempt to match their performance to the metrics being measured.[277] Carefully calibrated metrics can be an important tool in this regard.[278] For example, management scholarship describes how "managers 'manage what [they] measure'; that is, managers will pay attention to things they are forced to keep track of."[279] In this context, the mere act of monitoring and investigation itself can have a salutary effect, decreasing the risk of noncompliance and providing an incentive to disclosure.

Another set of soft or noncoercive enforcement tools that could be deployed include providing guidance to other agencies, training agency FOIA personnel, capacity building in developing best practices or technological solutions, and even providing awards to agencies for particularly good performance. These kinds of activities are within agency bailiwicks and can have meaningful effects on meeting transparency obligations.

A final set of activities could include public education and marketing of transparency-related values. An information commission should be tasked with educating the public about their rights, promoting the value of transparency work, and inculcating transparency as a norm of governance. This sort of work could transform transparency into a collective value that the citizenry demands of its government and over which it is outraged if it does not receive. A mission-driven agency can harness the pathologies of bureaucracy for the aims of transparency; if transparency is this agency's aim, all activities should further its primary goal.

An information commission can engage in a vastly wider set of activities than a court, activities which together could shift the government culture around FOIA, transforming FOIA from a compliance function to part of our civil duties and democracy enhancing activities. Indeed, when framed as helping enforce the

*Offenses*, FTC, https://www.ftc.gov/enforcement/penalty-offenses [https://perma.cc/3DF2-22ZG] (last visited Feb. 16, 2024).

277. *See* Rachel E. Barkow, Foreword, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1170–71 (2016) (noting that "[c]ivil agencies are . . . judged based on particular metrics," and as a result, will attempt to conform their performance to those metrics).

278. *See id.* at 1173 ("Thus when Congress thinks about designing agencies, it should spend more time thinking about the kind of metrics it wants to receive from the agency and how those metrics will, in turn, influence the political environment and ultimately the enforcement decisions of the agency.").

279. Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1111 (2007) (alteration in original) (footnote omitted) (quoting Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 295 (2001)).

rights of the public, transparency can be rebranded by an information commission as part of every agency's core mission.

## IV. PRESERVING INDEPENDENCE

Independence is critical to a new information commission. Without independence, an information commission will be subject to the same kinds of political pressures that have affected FOIA operations inside agencies, as described above.[280] Without independence, an information commission may even start to identify with the institutional interests of the Executive Branch rather than its role as safeguarding the rights of the public to access government information.[281] And without independence, the legitimacy of the review may be lacking, leading the public to view the institution with skepticism and avoid invoking its authority.[282]

Yet, independent agencies are at the crosshairs of important ongoing debates as a matter of both law and policy. First, open questions exist about the constitutionality of certain mechanisms of independence, including restrictions on removal of agency heads. Second, an independent agency might struggle to maintain its independence or fulfill its mission without being paralyzed by its various mechanisms of control. This Part considers these issues, concluding that while they do present challenges for a potential information commission, they are not barriers so much as cautions for careful institutional design. It further suggests a suite of protections—reaching beyond mere removal restrictions and into budgeting, appointments qualifications, litigation authority, and more—that would effectuate the kind of independence necessary for a successful information commission.

### A. CONSTITUTIONAL CONCERNS

Independent agencies are a topic of much debate. While there is no set definition of an independent agency,[283] and the term does not appear anywhere in the Administrative Procedure Act,[284] the most commonly understood feature of independent agencies is that the heads of those agencies are protected from at-will removal from their positions by a set term in office accompanied by a "for-cause" removal provision. In *Humphrey's Executor*, the Supreme Court justified Congress's power to create such a scheme by noting that Congress has the power to create mixed-function agencies that perform quasi-legislative and quasi-judicial functions, and that it can protect the independence of the principal officers in charge of those agencies to perform that function.[285]

280. *See supra* Section I.B.

281. *See supra* notes 35–46 and accompanying text.

282. *See* Karanicolas & Kwoka, *supra* note 17, at 675–78.

283. *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (examining the typical factors that are used in distinguishing between "independent" and "executive" agencies and ultimately rejecting the distinction).

284. *See* 5 U.S.C. § 551(1) (defining "agency"). There is, however, a purported list of such agencies in the Paperwork Reduction Act. *See* 44 U.S.C. § 3502(5).

285. Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935); *see also* Morrison v. Olson, 487 U.S. 654, 685–93 (1988) (upholding restrictions on the power of a principal officer of an agency to remove an inferior officer).

Recently, however, the Supreme Court has signaled increasing discomfort with these removal protections. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court struck down a two-level scheme of for-cause removal protections, under which the President could only remove the agency heads for cause, and those individuals could only remove certain inferior officers for cause.[286] "[M]ultilevel protection from removal," the Court held, "is contrary to Article II's vesting of the executive power in the President" because it interferes with the President's duty to "take Care that the Laws be faithfully executed."[287]

The creation of the Consumer Financial Protection Bureau (CFPB) brought the issue of removal restrictions to the fore. The CFPB was created with a somewhat unusual (though not unprecedented) structure under which a single Director oversaw the agency designed to be independent, rather than a multimember commission or a board.[288] In *Seila Law*, the Supreme Court held this structure to be unconstitutional.[289] Importantly, the Court's discussion called into some question the continuing validity of *Humphrey's Executor*, though it did not overrule it, by explaining that "the contours . . . depend upon the characteristics of the agency . . . [and r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"[290] *Free Enterprise Fund* and *Seila Law* together clearly demonstrate an unwillingness by the Court to entertain removal restrictions in new circumstances and even put in some peril the removal restrictions in the historically approved structures.[291]

This judicial trend is rooted in a belief in strong executive power. For example, Steven Calabresi and Christopher Yoo have argued that the historical record supports ultimate presidential control over the Executive Branch and that the President may remove and control all policymaking subordinates.[292] Recently, scholars have debated the meaning of specific passages from records of the Constitutional Convention and contemporary jurist William Blackstone as they

286. 561 U.S. 477, 484 (2010).

287. *Id.*

288. *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

289. *Id.* at 2192.

290. *Id.* at 2198 (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

291. *See* Collins v. Yellen, 141 S. Ct. 1761, 1770 (2020) (holding the Housing and Economic Recovery Act's for-cause removal restriction for single Director of the Federal Housing Finance Agency violated constitutional separation of powers); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (holding the unreviewable authority wielded by Administrative Patent Judges during *inter partes* review is incompatible under the Appointments Clause with their appointment by the Secretary of Commerce to an inferior office); *see also* Jarkesy v. SEC, 34 F.4th 446, 449 (5th Cir. 2022) (declaring unconstitutional the structure of Administrative Law Judges' removal restrictions at the SEC); Robert Stebbins, Abigail Edwards & Ariel Blask, *The* Jarkesy *Decision and Ramifications for Administrative Proceedings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 29, 2022), https://corpgov.law.harvard.edu/2022/06/29/the-jarkesy-decision-and-ramifications-for-administrative-proceedings/ [https://perma.cc/KQ96-D7HS].

292. *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 17 (2008).

pertain to the President's ultimate control over executive officials, including to remove them from office.[293]

Legal scholars and public intellectuals have begun to forecast the death of the independent agency altogether, predicting the Supreme Court will eventually hold removal restrictions to be unconstitutional entirely. For example, Lisa Heinzerling traces this trend to a broad attack on the administrative state, including calls for overruling *Chevron*, the advent of the major questions doctrine, and the demise of independence protections.[294] Her account, entitled *How Government Ends*, declares that "nothing less than the future of the effective governance is at stake."[295]

This debate has obvious implications for the design of an information commission. Future legal developments may limit the protections that Congress can erect to maintain the commission's independence, starting with removal protections for the commissioners themselves. But as the rest of this Section explains, these fears may be overstated. First, there are many strong arguments, including historical arguments, against unbridled removal power. Second, and relatedly, there are reasons to believe the Court may not be ready to go that far. Finally, even if these removal restrictions fall as unconstitutional, other methods of designing an institution can protect an agency's independent decisionmaking role.

To begin, scholars working within the originalist frame have forcefully argued that the first Congress in 1789, the record of which is key in this debate, rejected a strict unitary executive model, which was advanced at the time by James Madison.[296] Peter Strauss has argued that the historical role for the President in the ordinary administrative context has been that of "overseer," not "decider," suggesting limits on removal are entirely appropriate.[297]

Many scholars predict the Court will not go so far as to render unconstitutional independent agencies. For example, Cass Sunstein and Adrian Vermeule have suggested a possible middle ground between minimalist and maximalist

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293. *See, e.g.*, Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 93 (2020) (reviewing Blackstone and records of the Constitutional Convention in concluding that "the executive power" is more than just a residual power and plausibly includes the powers to appoint, remove, and promulgate regulations); Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125, 150–51 (2022) (critiquing Wurman's analysis); Ilan Wurman, *Some Thoughts on My Seila Law Brief*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 1, 2021) (responding to Shugerman's critique), https://www.yalejreg.com/nc/some-thoughts-on-my-seila-law-brief-by-ilan-wurman/ [https://perma.cc/EL3P-G7DU].

294. *See* Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), https://www.bostonreview.net/articles/how-government-ends/ [https://perma.cc/DXX3-RKZA]; *see also* Michigan v. EPA, 576 U.S. 743, 760–61 (2015) (Thomas, J., concurring) (criticizing *Chevron*); West Virginia v. EPA, 597 U.S. 697, 723–24 (2022) (addressing the "major questions doctrine"); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 657–68 (2021) (examining the historical record to show a sharp pivot after President Obama's reelection toward conservative opposition to *Chevron* deference).

295. Heinzerling, *supra* note 294.

296. *See, e.g.*, Jed Handelsman Shugerman, *The Imaginary Unitary Executive*, LAWFARE (July 6, 2020, 8:54 AM), https://www.lawfareblog.com/imaginary-unitary-executive [https://perma.cc/SC76-H2NA].

297. *See generally* Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

approaches to presidential authority over independent agencies by calling for a "neglect of duty" approach to removal restrictions.[298] And Aaron Nielson and Christopher Walker have suggested that the Presidents' removal powers can be constrained by means other than statutory removal restrictions, such as exacting political costs for exercising removal power, enacting reason-giving requirements for removal, and raising cloture thresholds.[299]

Beyond the general possibility that the Court does not invalidate removal restrictions across the board, the Court might find removal restrictions to be constitutional (or not) on a case-by-case basis depending on the unique nature of the agency and its need for independence. For example, inspectors general may be an area where special considerations and need for independence particularly justify removal restrictions.[300] Similarly, one could imagine an information commission —expressly designed to police other agencies—meeting some requirement of heightened justification for independence.

Still, Congress should be considering the use of other ways to preserve an information commission's independence apart from removal restrictions. Indeed, even if removal restrictions remain constitutional in some cases, they are not the only tools for preserving independence that are available to Congress.[301] Scholars have identified key features of institutional design that promote independence, including requirements for bipartisan composition of multimember bodies, appointment qualifications, the ability to bypass White House review before appearing in Congress, and independent funding.[302] Congress should use all of these tools to increase the strength of the independence of an information commission.

Appointments of the commissioners should be constrained by qualifications. Political balance is a common tool (for example, no more than three members of

298. *See* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 643 (2021).

299. *See* Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 51–61 (2023).

300. *See generally* Andrew C. Brunsden, *Inspectors General and the Law of Oversight Independence*, 30 WM. & MARY BILL RTS. J. 1, 44 (2021) (arguing that a constitutional basis exists for Congress to enact removal protection for inspectors general).

301. *See, e.g.*, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013) (arguing that "[a]gencies that lack for-cause tenure yet enjoy operative independence are protected by unwritten conventions" that protect the agencies from political influence); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1487 (2015) (examining "the statutory features of 321 agencies and bureaus in the federal executive establishment," and concluding that "there is substantial and underappreciated variation in the structural characteristics that influence the accountability of federal agencies to the President and Congress").

302. *See, e.g.*, Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1744–45 (2013) (listing many such factors); MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 163–92 (2015) (same); Datla & Revesz, *supra* note 283, at 784–812 (same); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 976 (2015) (same).

a five-member board or commission can be from a single political party),[303] but other qualifications can also be imposed. For example, no more than one member of the Federal Reserve Board can be from a single Federal Reserve District,[304] two of the three members of the National Indian Gaming Commission must be an enrolled member in a Native American tribe,[305] and at least two of five members of the Surface Transportation Board must have professional or business experience in the private sector.[306] Information commissioners could, for example, be required to have a certain balance of skills: at least one with a computer science background, one with an agency FOIA administration background, one from civil society, and one from journalism, or other similar categories of important stakeholders or skill sets.

Second, an information commission should be statutorily exempt from White House clearance for submissions to Congress. The White House has long exercised control over submissions to Congress by agencies, including budgetary submissions, testimony, and proposed legislation.[307] But some independent agencies have been given formal bypass of the Office of Management and Budget (OMB) clearance procedures by statute, and others bypass OMB by custom or even refuse to recognize OMB's authority.[308] An information commission should be given clear statutory bypass authority. Indeed, one of the early public failures of independence for OGIS was that it was required to get OMB clearance for its congressional submissions.[309]

Third, an information commission should have independent litigation authority. Some existing agencies have such authority,[310] which has been linked with more agency autonomy.[311] This design feature is important because the commission appears in court on varying sides of disputes between requesters and the government. For example, it may appear in defense of agencies' positions when a requester sues for a failure to order release of requested records. But it also may appear in court when an agency challenges a release determination. In the latter instance, the commission's interests are aligned with the member of the public, not the agency. Having lawyers from the DOJ represent the commission would

303. *See* Datla & Revesz, *supra* note 283, at 797–99, 797 tbl.4 (citing, for example, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, and the FTC, among others).

304. 12 U.S.C. § 241.

305. 25 U.S.C. § 2704(b)(3).

306. 49 U.S.C. § 1301(b)(2).

307. *See* Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 642–50 (1954).

308. *See* BREGER & EDLES, *supra* note 302, at 165–66.

309. *See* Karanicolas & Kwoka, *supra* note 17, at 676–77.

310. *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 204, § 16, 88 Stat. 2183, 2199 (1975) (codified as amended at 15 U.S.C. § 56) (granting the FTC independent litigating authority); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 506, 86 Stat. 816, 889 (codified as amended at 33 U.S.C. § 1366) (granting EPA independent litigating authority in certain circumstances); Safe Drinking Water Act, Pub. L. No. 93-523, § 1450(f), 88 Stat. 1660, 1691 (1974) (codified as amended at 42 U.S.C. § 300j-9(f)) (same).

311. *See* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1348 (2000).

represent a potential conflict of institutional interests undermining the independence of the commission.[312] The commission should therefore have its own lawyers represent its positions in court.

Finally, Congress must protect the information commission's budget. Commentators have noted that agencies with budgetary independence enjoy a great degree of functional independence.[313] Most agencies gain budgetary independence by self-funding their activities by charging fees to regulated entities.[314] Recently, one independent budgetary mechanism has come under attack, again related to the innovative design of the CFPB. There, Congress mandated that the CFPB be funded from the Federal Reserve's money, which led to the Fifth Circuit declaring the structure an unconstitutional violation of the Appropriations Clause because the Federal Reserve also has budgetary independence, and this represents a "double-insulated" end-run around the appropriations process.[315]

Review of this decision is pending in the Supreme Court,[316] but even if the Fifth Circuit's position is eventually affirmed, an information commission could be designed with budgetary independence that potentially avoids the thorny problems presented by the CFPB. One possible model would be to consider the agencies as essentially regulatory "clients" of the commission and require each agency to pay a fee for every dispute brought to it by an individual dissatisfied with the response to their FOIA request. Or each agency the commission reviews could be required to give a (tiny) annual percentage of its budget to the commission, essentially the fee for its oversight services. While obviously the commission's budget would then be contingent on the agencies' budgets, it would not be subject to overtly political control. Budgetary independence is key and should be a central part of an information commission design.

Taken together, a full set of independence tools can ensure an information commission maintains the needed independence to effectuate its oversight role. Hopefully, removal restrictions remain one piece of the available toolkit. But even without those restrictions, the commission can be protected from political interference in various important ways.

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312. *But see* Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, 16 Op. O.L.C. 121, 128–31 (1992) (opining that "litigation between two executive agencies would not appear to involve the requisite adversity of interests to constitute a 'Case[]' or 'Controvers[y]' within the meaning of Article III" because the Executive Branch has one unitary interest (alterations in original)).

313. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 589 (2000) ("Funding is key to independence.").

314. *See, e.g.*, 12 U.S.C. § 243 (Federal Reserve Board); 12 U.S.C. §§ 2245(d), 2250 (Farm Credit Administration); *Budget, Planning and Performance*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 27, 2023), https://www.uscis.gov/about-us/budget-planning-and-performance [https://perma.cc/P9UX-XSQB] (USCIS).

315. Cmty. Fin. Servs. Ass'n of Am., Ltd., v. CFPB, 51 F.4th 616, 641–42 (5th Cir. 2022).

316. *See No. 22-448*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-448.html [https://perma.cc/N964-ATSX] (last visited Mar. 8, 2024).

### B. PRACTICAL CONCERNS

A final set of concerns arises from the experiences of independent agencies, some of which have been widely viewed as extremely successful, and others of which have been roundly criticized as failing to maintain independence or falling victim to paralysis in the face of political divides or vacant positions. These critiques demonstrate the importance of carefully considering design at the outset, and even more so of naming strong founding commissioners who can set a culture that demands respect within and outside of the agency.

The Federal Election Commission (FEC) presents one of the starkest cautionary tales. Worse, its mission is most closely related to a potential information commission; both institutions are charged with protecting the public's right to access information fundamental to their ability to participate in the democratic process.[317] Indeed, the FEC should, ideally, serve as a model for an information commission. Yet, the consensus is that the FEC has largely failed to meet its mission, and the influence of money in elections remains ever more problematic over time.[318]

The critiques center on political deadlock.[319] The FEC is led by six commissioners, no more than three from any one party.[320] Yet, a vote of four commissioners is needed to take any legal action.[321] When campaign finance laws, which had been a bipartisan issue, became starkly partisan, anti-campaign finance commissioners were appointed to the FEC, blocking nearly all effective action.[322] That is, three of the commissioners have been essentially against the core mission of the agency they run for all of recent history.[323]

Another concern about independent agencies is that appointments languish, and vacant seats abound. When seats remain vacant, agencies may be deadlocked or are at risk of, or sometimes actually fall into, a state of incapacity, without the legal authority to act in a binding manner. This has happened at the Federal

317. *See Mission and History*, FEC, https://www.fec.gov/about/mission-and-history/ [https://perma.cc/ULP5-8DMJ] (last visited Mar. 8, 2024).

318. *See* Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1421 (2018) (summarizing the criticism and noting that "[s]ome of the agency's most vocal detractors have been FEC Commissioners themselves"). *See generally* Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503 (2020) (documenting the range of political interference that rendered the FEC "feckless"); Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447 (2017) (same).

319. *See* Gabrielle Gesek, *A House Divided: The Fall of the Federal Election Commission*, DREXEL L. REV.: BLOG (Oct. 24, 2019), https://drexel.edu/law/lawreview/blog/overview/2019/October/federal-election-commission/ [https://perma.cc/D9JD-2HFX].

320. 52 U.S.C. § 30106(a)(1); Gesek, *supra* note 319.

321. § 30106(c).

322. Adav Noti, Erin Chlopak, Catherine Hinckley Kelley, Kevin P. Hancock & Saurav Ghosh, *Why the FEC Is Ineffective*, CAMPAIGN LEGAL CTR. (Aug. 8, 2022), https://campaignlegal.org/update/why-fec-ineffective [https://perma.cc/S2DX-E2WX].

323. *Id.*

Communications Commission,[324] National Labor Relations Board,[325] and others, and was notably at risk of happening at the FTC for a time recently.[326]

In this regard, an information commission may be inherently better situated. FOIA is a perennially bipartisan interest, and FOIA reforms are historically bipartisan as well, despite always advancing in a steady march toward improving transparency.[327] Some of the biggest champions of FOIA in the past decades have included politicians as radically different in perspective as Chuck Grassley and Patrick Leahy.[328] At least for the moment, transparency may be a value that can be promoted by both parties, such that appointments are less subject to political influence. Such influence could be further reduced by adopting systems that have been proposed with regard to the FEC itself, such as an independent nominating committee that identifies qualified candidates to funnel to the Senate.[329]

Moreover, bipartisan political respect is not a pipe dream. The Federal Reserve offers a counterpoint; it is an institution that does not even have statutorily mandated removal restrictions but has maintained independence despite immense political pressure.[330] One account describes how this accomplishment is largely due to establishing institutional respect through a documented history of important work, and how even President Trump did not cross the line into removing the

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324. *See* Casey Egan, *Policy Experts Warn of Partisan 'Deadlock' at FCC in 2021*, S&P GLOB.: MKT. INTEL. (Dec. 8, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/policy-experts-warn-of-partisan-deadlock-at-fcc-in-2021-61621324 [https://perma.cc/D5UP-DB2R]; Drew FitzGerald, *FCC Deadlock Shields Wireless Companies from Privacy Penalties*, WALL ST. J. (Dec. 19, 2022, 4:30 PM), https://www.wsj.com/articles/fcc-deadlock-shields-wireless-companies-from-privacy-penalties-11671485450; Margaret Harding McGill, *Deadlocked FCC Could Derail Biden's Digital Equity Plans*, AXIOS (May 19, 2022), https://www.axios.com/2022/05/19/deadlocked-fcc-derail-bidens-digital-equity-plans [https://perma.cc/4WLQ-M6MJ].

325. *See* Sam Hananel, *Empty Seats Stall Work of Federal Labor Agency*, SEATTLE TIMES (Sept. 11, 2009, 4:44 PM), https://www.seattletimes.com/seattle-news/politics/empty-seats-stall-work-of-federal-labor-agency/; *Politics Stymie National Labor Relations Board*, NBC NEWS (Sept. 6, 2009, 3:06 PM), https://www.nbcnews.com/id/wbna32715894 [https://perma.cc/MK6N-TMFQ].

326. *See* Eleanor Tyler, *Analysis: FTC May Be Headed into Deadlock, Delaying Big Deals*, BLOOMBERG L. (Oct. 7, 2021, 5:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ftc-may-be-headed-into-deadlock-delaying-big-deals; *U.S. Chamber of Commerce Stands Up to FTC Going Rogue*, U.S. CHAMBER COM. (Nov. 19, 2021), https://www.uschamber.com/regulations/u-s-chamber-of-commerce-stands-up-to-ftc-going-rogue [https://perma.cc/6HYR-7DB6]; Robert King, *FTC Deadlocked on Whether to Study PBM Contracting Practices Such as DIR Fees*, FIERCE HEALTHCARE (Feb. 17, 2022, 5:05 PM), https://www.fiercehealthcare.com/payers/ftc-deadlocked-whether-study-pbm-contracting-practices-such-dir-fees.

327. *See, e.g.*, Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552).

328. *See generally, e.g.*, S. 742, 117th Cong. § 2 (2021) (proposed bill limiting the extent to which federal agencies may exempt information under FOIA); S. 2220, 116th Cong. § 2 (2019) (bill to restore traditional legal interpretation of FOIA exemption regarding confidential commercial information after Supreme Court decision in *Food Marketing Institute v. Argus Leader Media*).

329. *See* Tracy King, *Three Big Ways the For the People Act Would Fix the FEC*, CAMPAIGN LEGAL CTR. (Feb. 23, 2021), https://campaignlegal.org/update/three-big-ways-people-act-would-fix-fec [https://perma.cc/W4MC-LA9U]; H.R. 1, § 6301, 117th Cong. (2021).

330. *See generally* Caroline W. Tan, Note, *What the Federal Reserve Board Tells Us About Agency Independence*, 95 N.Y.U. L. REV. 326 (2020) (utilizing the Federal Reserve Board as an example of the ability of administrative agencies to establish themselves as important, independent entities).

board chair when he disagreed with his decisions.[331] In some sense, then, the initial choice of commissioners, their leadership by example, and the early proof of concept will be critical to establishing the respect that the commission needs to maintain its stature.

No magic bullet exists to avoiding the problem of political tampering with the appointments process. It is now a feature of our democratic process and one that is unlikely to abate soon. Still, an information commission has better bipartisan footing at the outset, and a strong first commission could set the stage for future success. These design features are concerns, but not debilitating ones.

## CONCLUSION

Incrementalist approaches to curbing excess government secrecy have been like trying to "empty a tub [of secrets] with a thimble while the faucet is still on full blast."[332] FOIA is not a compliance technicality or a mere regulatory requirement. It is a structural requirement in a democracy; it protects a fundamental right to access information. Secrecy, the late Senator Daniel Patrick Moynihan once said, "is a mode of regulation. In truth, it is the *ultimate* mode for the citizen does not even know that he or she is being regulated."[333]

As FOIA's obligations languish under a default of perverse incentives and underenforced promises, transparency faces death by a thousand cuts. Thoughtful institutional design supports the creation of an independent information commission empowered to enforce agency transparency obligations with a full panoply of administrative powers and a remedial process accessible to anyone denied information rights. This Article offers the blueprint for designing such an institution to protect democratic accountability.

331. *Id*. at 327–31.

332. Hathaway, *supra* note 51, at 727.

333. *Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 2 (2016) (statement of Rep. Chaffetz) (emphasis added).