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# Executive Secrecy: Congress, the People, and the Courts

Barry Sullivan

# EXECUTIVE SECRECY: CONGRESS, THE PEOPLE, AND THE COURTS

*Barry Sullivan*•

ABSTRACT

*Congress enacted the Freedom of Information Act ("FOIA") to ensure that "any person" could gain access to all the executive branch information that could safely be disclosed, without any special showing of need, thereby enhancing the ability of citizens to know what their government is doing. Writing in 1982, then-Professor Antonin Scalia ridiculed the concept of active citizenship which FOIA embodied, asserting that the statute was the product of "an obsession [with the idea] that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and . . . the press."[**] That was a "romantic notion," he thought, because significant disclosures of executive branch information do not ordinarily result from the work of the press or the public, but from the operation of institutionalized checks and balances, that is, through the tug-and-pull between Congress and the President.[***] Four decades later, it seems clear that the choice implicit in Professor Scalia's account is a false one: the health of our representative democracy depends on the vitality of both avenues of access to executive information, and both avenues require shoring up. On the one hand, FOIA has not fully satisfied its proponents' expectations with respect to its "informing function," meaning its capacity for enhancing the public's knowledge of government and for promoting active citizenship. On the other hand, lessons from the recent past suggest that Professor Scalia's faith in Congress's superior ability to secure information*

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** Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGUL., Mar.–Apr. 1982, at 14, 19.

*** *Id.*

*from an uncooperative executive may itself be something of a "romantic notion." This Article will explore both avenues, the ways in which they have not fulfilled their promise, and how they might be made more effective.*

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## INTRODUCTION

In 1948, Alexander Meiklejohn challenged us to think about a constitutional right to receive—as well as transmit—information and opinions. The argument was straightforward. "What . . . would be the use," he asked, "of giving to American citizens freedom to speak if they had nothing worth saying to say?"[1] Meiklejohn recognized that citizens acquire something "worth saying" not only through individual reflection, but also through "the free exchange of information and of ideas."[2] Meiklejohn's choice of words—"free exchange"—was intentional; the freedom to speak implies a freedom to hear.[3] But the incumbent Attorney General apparently thought otherwise, having forbidden certain classes of foreign visitors, "except by special permission, to engage in public discussion of public policy while they are among us."[4] Meiklejohn thought that the Attorney General's action was prohibited by the First Amendment, which he also took to mean that, notwithstanding the views of any government official, "such books as Hitler's *Mein Kampf*, or Lenin's *The State and Revolution*, or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States."[5] For Meiklejohn, the point was not to protect the authors' interests in self-expression or self-realization,[6] but to ensure that citizens have access to the information needed for democratic self-government. "We are saying that . . . citizens . . . will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them."[7] And, as Justice Felix Frankfurter said, "Our

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[1] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 102 (1948); *see also* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 1, 24–28 (2012) (detailing the evolution of thought and law concerning citizen access to government information in the years following the Second World War).

[2] MEIKLEJOHN, *supra* note 1, at xii.

[3] *See id.* at xiii–xiv.

[4] *Id.* at xiii; *see, e.g.*, STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR, at xii (1982) ("The Cold War of the late 1940s and 1950s evoked official repression on an unprecedented scale."). It was also a time of conspiracy theories and mass hysteria. *See id.* at 37 ("[P]olitical rhetoric revolved around the charge that Washington had been infected with 'twenty years of treason.'").

[5] MEIKLEJOHN, *supra* note 1, at 91.

[6] *Id. But see* ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 33 (1941).

[7] MEIKLEJOHN, *supra* note 1, at 91. *But see* Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 517 (1971) (arguing that there is no First Amendment right to engage in "well-informed" speech). Although the Constitution does not expressly mention an affirmative right to receive information, Meiklejohn and others thought that such a right was implicit in the First Amendment, and it was expressly recognized in later national and international instruments. *See* Sullivan,

scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale."[8]

Meiklejohn viewed active citizenship as essential to democracy, and the availability of information as essential to active citizenship. Legislators need information to promote the common good, and citizens need information to evaluate the performance of their representatives. Those needs are no less compelling today than they were in Meiklejohn's time, but our immediate problem may appear somewhat different. We sometimes seem not to lack information, but to be awash in it,[9] and much of it is false or unreliable.[10] Even our leaders sometimes refer to facts as "fake news," and to "fake news" as facts.[11] Meiklejohn, like John Stuart Mill and Justice Oliver Wendell Holmes before him, had faith that truth would eventually win out in "the marketplace of ideas."[12] We may find it difficult to share that optimism, at least in the short run,

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*supra* note 1, at 10–15, 24–28; Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (1976).

[8] Youngstown Tube & Sheet Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

[9] *See, e.g.*, Michael J. Ahn, *Effective Policy Communication in the Age of Information Overload and YouTube*, BROOKINGS TECHTANK (Aug. 11, 2014), https://www.brookings.edu/blog/techtank/2014/08/11/effective-policy-communication-in-the-age-of-information-overload-and-youtube/.

[10] *See* Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017); Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RESEARCH CENTER (Oct. 19, 2017), https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/. The problem may seem more acute in our time, but "[t]he longer history of the twentieth century public sphere . . . is one of pervasive misrepresentation, lies, and propaganda of precisely the kinds that so worried critics of the public domain after World War One—and of the kinds that concern observers again now." John Fabian Witt, *Weaponized from the Beginning*, SSRN 20 (Sept. 2, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4208158.

[11] *See, e.g.*, Glenn Kessler, *A Bottomless Pinocchio for Biden—and Other Recent Gaffes*, WASH. POST (Nov. 7, 2022), https://www.washingtonpost.com/politics/2022/11/07/bottomless-pinocchio-biden-other-recent-gaffes/; Chris Cillizza, *Here's Donald Trump's Most Lasting, Damaging Legacy*, CNN (Aug. 30, 2021), https://www.cnn.com/2021/08/30/politics/trump-legacy-fake-news/index.html; Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump's False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 21, 2021), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/; Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS FIXGOV (May 1, 2020), https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/. *But see* Steve Lee Myers & Cecilia Kang, *Barack Obama Takes On a New Role: Fighting Disinformation*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/technology/barack-obama-disinformation.html.

[12] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 90 (1859) (Gertrude Himmelfarb ed., 1982) ("[W]hen an opinion is true, it may be extinguished . . . many times, but in the course of ages there will generally be found persons to rediscover it, until . . . it [eventually] escapes persecution . . . [and] withstand[s] all subsequent

given the seemingly broad dissemination—and widespread acceptance—of misinformation and falsehood. We know that there is no "invisible hand" at work to ensure that truth will always prevail, and we may be tempted to think that increasing access to information will only provide more raw material for those who misinform and misrepresent.[13] That fear may be justified, and we undoubtedly need to do more than we have in the past to try to ensure that falsehood does not prevail.[14] But there is no reason to believe that making information less available to citizens or their representatives will better promote active citizenship or democratic self-government.

In his 1953 book, *The People's Right to Know*, Harold Cross urged Congress to enact legislation that would pierce the veil of unnecessary secrecy.[15] In Cross's view, Congress, the public, and the press had been preoccupied for too long with "other problems that seemed more imminent and menacing,"[16] but he thought that "[t]he time [was] ripe for an end to ineffectual sputtering about executive refusals of access to official records and for Congress to begin exercising effectually its function to legislate freedom of information for itself,

attempts to suppress it."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[13] *See, e.g.*, Sheila Kennedy, *Civic Ignorance and Democratic Accountability*, 51 LOY. U. CHI. L.J. 419, 422 (2019) ("Spin, propaganda, 'fake news,' and outright conspiracies thrive in the Wild West that is the internet, and civic ignorance facilitates their wide acceptance."); Blake Hounshell, Sheera Frenkel, Tiffany Hsu & Stuart A. Thompson, *A Journey into the Misinformation Fever Swamps*, N.Y. TIMES (Aug. 29, 2022), https://www.nytimes.com/2022/08/26/us/politics/misinformation-social-media.html (discussing prevalence of misinformation on social media); *see also* Tiffany Hsu, *When Teens Find Misinformation, These Teachers Are Ready*, N.Y. TIMES (Sept. 2, 2022), https://www.nytimes.com/2022/09/08/technology/misinformation-students-media-literacy.html (discussing high school programs for developing "media and information literacy").

[14] *See* David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 341 (2022) ("We need to do more than tweak the market . . . if we are to ensure that Americans have the capacity for self-governance. . . . [T]he government should be prohibited from knowingly disseminating false and misleading information . . . and it should be obligated to disclose information . . . that makes it possible for the public to understand the actions of government.").

[15] *See* HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 246 (1953). In *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam), the Court held that the First Amendment prohibited courts from enjoining the publication of purloined government documents. *Id.* at 714. Whether a subsequent criminal prosecution could be brought was not raised on the facts of *New York Times*, but some of the Justices discussed the issue. *See, e.g.*, *id.* at 737 (White, J., concurring) ("I would have no difficulty in sustaining [criminal] convictions . . . on facts that would not justify . . . a prior restraint."). The government did prosecute Daniel Ellsberg for his role in the publication of the Pentagon Papers, but the case was ultimately dismissed. *See* TOM WELLS, WILD MAN: THE LIFE AND TIMES OF DANIEL ELLSBERG 551–56 (2001).

[16] CROSS, *supra* note 15, at 246.

the public, and the press."[17] In 1966, Congress finally responded to Cross's call by enacting the Freedom of Information Act ("FOIA"),[18] which provided the public and the press with broad access to government information subject to nine exemptions that permit—but do not require—the withholding of records that are exempt from mandatory disclosure.[19] Although Cross noted Congress's unique role in our system of government (and mentioned its need for executive branch information separately from that of the public and the press),[20] FOIA made no special provision for congressional access to executive branch information, and the Supreme Court soon confirmed that FOIA grants Senators and members of Congress the same rights as everyone else, no more and no less.[21] Congress's particular need would have to be met in other ways.

FOIA was not without its detractors. Government officials overwhelmingly opposed its enactment;[22] President Lyndon B. Johnson feigned enthusiasm when he signed it in 1966;[23] and President Gerald R. Ford vetoed the 1974 amendments.[24] In 1982, then-Professor Antonin Scalia challenged the

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[17] *Id.*; *see also* John Gorham Palfrey, *The Problem of Secrecy*, 290 ANNALS AM. ACAD. POL. & SOC. SCI. 90, 92–93 (1953) (noting that government agencies typically exercise great caution in controlling information because "[u]nwise disclosure is irrevocable and exposes the offending official to criticism, while . . . unwise concealment can always be rectified" and may remain secret); DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 3 (2016) ("[T]he Court has been excessively deferential to the executive branch . . . [when] the executive [invokes] national security, . . . [which] has seriously harmed American democracy, the rule of law, the governing order, and individual liberty."); GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1 (2010) ("[The bomb] redefined the government as a National Security State, with an apparatus of secrecy and executive control.").

[18] 5 U.S.C. § 552. Cross worked closely with members of Congress to achieve his goal. *See* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, at 42–43, 58 (2015).

[19] *See* Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967).

[20] CROSS, *supra* note 15, at 246.

[21] *See* EPA v. Mink, 410 U.S. 73, 79–84 (1973). Congress has enacted other statutes that authorize certain legislators to demand documents from the executive. *See, e.g.*, Comm. on Ways & Means v. United States Dep't of the Treasury, 45 F.4th 324, 340–41 (D.C. Cir. 2022) (demand under 26 U.S.C. § 6103(f)(1)); Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020) (demand under 5 U.S.C. § 2954).

[22] *See infra* pp. 1309–10.

[23] *See, e.g.*, Bill Moyers, *Address: In the Kingdom of the Half-Blind*, NAT'L SEC. ARCHIVE, at 2 (Dec. 9, 2005), https://nsarchive2.gwu.edu/anniversary/moyers.pdf.

[24] *See, e.g.*, Andrew Glass, *House Overrides FOIA Veto, Nov. 20, 1974*, POLITICO (Nov. 20, 2014), https://www.politico.com/story/2014/11/house-overrides-freedom-of-information-act-expansion-veto-113032; *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SEC. ARCHIVE (Nov. 23, 2004), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm. The 1974 amendments were part of a series of reforms enacted in response to the Watergate scandal. *See* Campaign Finance Act of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974), and the Ethics in Government Act, Pub. L. 95-521, 92 Stat. 1824 (1978), which included provisions relating to the appointment of special prosecutors. Other amendments followed. *See* Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (1976); Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat.

theoretical foundation of FOIA, arguing that disclosure of executive information was not properly a matter for the public and the press, but was best left to the operation of institutionalized checks and balances, the push-and-pull between the President and Congress.[25] Today, however, it seems clear that congressional oversight and FOIA are both needed, and both require repair.

In Part I, we review the need for public and congressional access to information, the important changes wrought by FOIA, and then-Professor Scalia's challenge to FOIA's theoretical underpinnings. Part II discusses the concept of active, democratic citizenship and the informational needs of the public and the press in a democratic society. Part III critiques some aspects of the courts' enforcement of FOIA, particularly their reluctance to vigorously interrogate the truth of the government's representations, or to examine requested records in camera, notwithstanding the statutory requirement of non-deferential, de novo review. The recent decision in *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*[26] is instructive in that regard.[27] Part IV reviews Congress's recent difficulties in acquiring information from the executive. We note that the Supreme Court has recently limited Congress's subpoena power by holding that the courts are authorized to narrow the scope of congressional subpoenas. In addition, the judges of the District of Columbia Circuit have sharply divided on the standing of congressional committees to seek enforcement of their subpoenas. We end with a brief conclusion.

## I. ACCESS TO EXECUTIVE INFORMATION: FOIA AND THE SCALIA CRITIQUE

Before the enactment of FOIA, access to government information was governed by section 3 of the Administrative Procedure Act of 1946.[28] Those seeking access to government information under that provision were required to

3207 (1986); Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048 (1996); Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524 (2007); FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (2106). *See generally FOIA Legislative History*, NAT'L SEC. ARCHIVE, https://nsarchive2.gwu.edu/nsa/foialeghistory/legistfoia.htm (last visited July 13, 2022).

[25] *See infra* p. 1310 & note 44.

[26] 538 F. Supp. 3d 124, 133 (D.D.C. 2021), *aff'd*, 45 F.4th 963 (D.C. Cir. 2022).

[27] In line with other scholars, we will assume that FOIA should be limited as much as possible to the production of records that are imbued with a public interest, and that much of the material currently sought through FOIA requests should be made available in other ways. *See* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 186–87 (2021).

[28] *See* Pub. L. 79-404, § 3, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 1002(c) (1964)).

persuade a government official that they had a legitimate need for the information, that is, that they were "'properly and directly concerned' in the information requested," and, "[e]ven then, access was . . . subject to a general exception for 'information held confidential for good cause found.'"[29] Denials of access were final and unreviewable.[30] Whether one could acquire government information depended, as Harold Cross put it, not on any determination of legal rights, but "upon the favorable exercise of official grace."[31]

One of FOIA's most significant innovations was to make non-exempt information available to "any person," without requiring any showing of particularized need.[32] The "basic purpose" of FOIA was "to open agency action to . . . public scrutiny," regardless of "the particular purpose for which the document is being requested."[33] Another important innovation was to provide for de novo review of disclosure decisions, with the burden of persuasion resting with the government.[34] "As one member of Congress said at the time, 'for the first time in . . . history, a citizen will no longer be at the end of the road when

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[29] Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 761 n.120 (2002) (quoting 5 U.S.C. § 1002(c) (1964)).

[30] *See, e.g.*, H.R. REP. NO. 89-1497, at 5 (1966) ("In a sense, 'public information' is a misnomer for [the 1946 law], since the section permits withholding of Federal agency records if secrecy is required 'in the public interest' or if the records relate 'solely to the internal management of an agency.' Government information also may be held confidential 'for good cause found.' Even if no good cause can be found for secrecy, the records will be made available only to 'persons properly and directly concerned.' . . . Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records."); Ramsey Clark, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, U.S. DEP'T OF JUST. (June 1967), https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act#section (similar).

[31] CROSS, *supra* note 15, at 197.

[32] *See, e.g.*, Sam Lebovic, *How Administrative Opposition Shaped the Freedom of Information Act*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 13, 14 (David E. Pozen & Michael Schudson eds., 2018) (FOIA authorized "anyone to request government records," without requiring a showing of need, created a presumption of disclosure, and empowered the courts to force disclosure).

[33] U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)).

[34] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) ("Upon complaint, the district court . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld . . . . In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action."); *see also Reps. Comm. for Freedom of Press*, 489 U.S. at 755 ("FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" (quoting 5 U.S.C. § 552(a)(4)(B))); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) ("[B]urden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document."); Nathan Slegers, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 212 (2004) (noting that courts owe no deference to agency withholding decisions).

his request for a Government document arbitrarily has been turned down by some bureaucrat.'"[35] De novo review was particularly appropriate because the withholding of agency records "is one of the few administrative actions in which the agency's own illegitimate self-interest is often at stake."[36] In 1974, following the Supreme Court's narrowing construction of FOIA in *EPA v. Mink*,[37] Congress amended the statute to make clear that the courts were authorized to inspect records in camera, thereby enhancing the muscularity of de novo review.[38] In 2016, Congress established a "presumption of disclosure" and a "foreseeable harm" standard, whereby agencies are admonished to withhold records only if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption."[39]

It is hardly surprising that government officials voiced strong opposition to FOIA at the time it was enacted in 1966, and again when it was amended in 1974. After all, access to government information had not been a matter of legal right, but of absolute, unreviewable bureaucratic discretion. It was, as Harold

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[35] Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 197 (2013) (quoting 112 Cong. Rec. 13659 (1966) (statement of Rep. Gallagher)).

[36] *Id*. at 186. Courts typically grant some degree of deference to agency determinations. *See, e.g*., Alfred C. Aman, Jr., *Administrative Law in the United States—Past, Present and Future*, 16 QUEEN'S L.J. 179, 183–84 (1991) ("Questions involving the exercise of agency discretion are usually subject to a kind of rational basis test inherent in the . . . arbitrary and capricious standard of review. Underlying this standard of review is the assumption that agencies are best able to determine what policies it would be wise to pursue."). But such deference is inappropriate in circumstances in which government officials may be tempted to act from self-interest, as when they invoke the state secrets privilege. *See, e.g*., United States v. Zubaydah, 142 S. Ct. 959, 985, 992–93 (2022) (Gorsuch, J., dissenting). In *United States v. Zubaydah*, Justice Gorsuch thought that courts should not accord the "utmost deference" to governmental representations in state secrets cases, and that they "may—and often should—review the evidence supporting the government's claim of privilege *in camera*." *Id*. at 994. Justices Black, Frankfurter, and Jackson dissented on similar grounds in *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (Black, Frankfurter & Jackson, JJ., dissenting), agreeing with the court of appeals that meaningful review required in camera, ex parte examination of the evidence. *See* Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951); *see also* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1013 (2018) ("[The Supreme Court in *Reynolds*] warns courts against insisting on *in camera* review where they believe that the government has met the standard for invoking the privilege . . . . Given that warning, lower courts often shy away from examining documents *in camera* . . . .").

[37] 410 U.S. 73, 93–94 (1973) (finding that courts were not authorized to conduct in camera review of classified records, and that the government should be permitted to demonstrate that other records were not subject to disclosure without the necessity of in camera review). When Congress amended Exemption 1 in 1974 to overrule that decision, it clearly signaled that courts should engage in muscular review, even in cases involving classified documents. *See* S. REP. NO. 93-854, at 168 (2d Sess. 1974) (FOIA courts should not defer to agencies).

[38] The amended language provides that "the court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . and the burden is on the agency to sustain its action." An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561, 1562 (1974).

[39] FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538, 539.

Cross put it, simply a matter of "official grace."[40] The prospect of moving from a world of absolute discretion uninhibited by any prospect of judicial review to one in which officials would be bound by law, with their decisions subject to de novo review, must have seemed threatening, and all the more so because the duty that Congress created extended to "any person." That distress could only have become more acute in 1974, when Congress specifically authorized the courts to inspect requested records in camera. Even so, it seems unlikely that even FOIA's most vociferous critics could have foreseen that the "any person" standard would eventually result in a majority of FOIA requests being made by persons seeking to advance private interests.[41] As Margaret Kwoka has shown in her comprehensive empirical study of FOIA cases, an overwhelming number of requests are filed by business entities seeking government information for competitive advantage, entrepreneurs seeking information for resale to customers, and parties engaged in administrative proceedings in which discovery is not otherwise available, rather than by citizens, the press, or public interest organizations focused on holding the government accountable—the parties whom the drafters of FOIA mainly had in mind when they provided for disclosure to "any person."[42]

Among those who thought that FOIA was wrongheaded from the start was Assistant Attorney General Antonin Scalia, who encouraged President Ford to veto the 1974 amendments.[43] Having left government for the academy, then-Professor Scalia renewed his criticism of FOIA in 1982, stating that its "defects . . . cannot be cured as long as we are dominated by the obsession that gave them

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[40] CROSS, *supra* note 15, at 197.

[41] *See* Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2254 (2018) (discussing FOIA usage by business entities and by individuals seeking information about themselves). Seth Kreimer has made the important point that FOIA's success or failure should be evaluated as part of an overall and interconnected "ecology of transparency." Seth Kreimer, *The Ecology of Transparency Reloaded*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 135, 135–37 (David E. Pozen & Michael Schudson eds., 2018); *see also* KWOKA, *supra* note 27, at 170 (discussing the "possibilities that private profitmaking rather than public good could motivate [FOIA] requests").

[42] KWOKA, *supra* note 27, at 93 ("These private needs for government records are dominant across various types of agencies . . . [a]nd they dwarf the number of requests that are made for the purpose of engaging in public oversight."). As Professor Kwoka has noted, the purposes for which FOIA has mainly come to be used may be worthwhile, but could be better accomplished in other ways. *Id*. at 215, 227; *see also* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1111 (2017) ("FOIA does the least work where it is most needed and . . . does too much work everywhere else."). The Biden administration has taken steps to deal with "private needs" requests in other ways. *See, e.g.*, Memorandum from the Att'y Gen. on Freedom of Information Act Guidelines 2–3 (Mar. 15, 2022), https://www.justice.gov/ag/page/file/1483516/download (making immigration records available without FOIA requests and encouraging other agencies to take analogous proactive disclosures).

[43] *See supra* notes 20–23 and accompanying text.

birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and . . . the press."[44] Professor Scalia dismissed that idea as a "romantic notion" because, in his view, the disclosure of important information ordinarily results from "institutionalized checks and balances"[45]—the constitutional push-and-pull between the political branches, not from the investigative work of private actors.

Developments over the past forty years suggest that Professor Scalia's paradigm is itself a "romantic notion." Those "institutionalized checks and balances" do not function as he thought they would. Under conditions of political polarization and high intraparty cohesion, congressional leaders are unlikely to push the executive when their party holds the White House.[46] When the President belongs to a different party, congressional leaders are more likely to press for information, while the President is less likely to cooperate.[47] The highwater mark was seemingly reached when President Trump announced that his administration would categorically ignore House subpoenas.[48]

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[44] Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGUL., Mar.–Apr. 1982, at 14, 19. It is not clear, of course, that anyone ever thought that "do-it-yourself oversight" could provide "the first line of defense" against an "arbitrary executive." *Id*.

[45] *Id*.

[46] *See, e.g.*, ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 314 (1941) ("The party system often serves to bridge the constitutional division between the executive and legislative branches. Adherence to a common party organization and tradition and program tend to weld [legislative majorities] into a cohesive group, and thus to supply cooperation between otherwise detached units." (emphasis omitted)); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) ("As competition between the legislative and executive branches was displaced by competition between two major [political] parties, the machine that was supposed to go of itself stopped running."). *But see* JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 7 (1963) (positing the existence of separate presidential and congressional branches of both parties).

[47] For example, President George W. Bush asserted executive privilege to prevent the White House counsel from testifying about the mass firings of United States Attorneys. *See, e.g.*, Dan Eggen & Paul Kane, *Miers Won't Discuss Firings; Ex-Aide Denies Bush Role*, SEATTLE TIMES (July 12, 2007), https://www.seattletimes.com/nation-world/miers-wont-discuss-firings-ex-aide-denies-bush-role/; David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES (Mar. 4, 2009), https://www.nytimes.com/2009/03/05/us/politics/05rove.html. The district court rejected the Bush officials' claim of absolute privilege. *See* Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 103 (D.D.C. 2008); *see also* Immunity of the Former Counsel to the President from Compelled Congressional Testimony, 31 Op. O.L.C. 191, 191–93 (2007) (positing absolute testimonial immunity for White House counsel). President Obama asserted executive privilege to prevent the White House Social Secretary from testifying on how uninvited guests had crashed a state dinner. *See* Karen Travers & Jake Tapper, *White House Social Secretary Desiree Rogers Steps Down*, ABC NEWS (Feb. 26, 2010), https://abcnews.go.com/Politics/white-house-social-secretary-desiree-rogers-steps/story?id=9956948.

[48] *See* Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.

Scholars generally agree that FOIA has not created the degree of governmental transparency, citizen empowerment, and democratic renewal that some of its proponents hoped for.[49] From the vantage point of 2022, our governmental institutions might seem no more transparent, our citizens no more empowered, and our democracy no more robust than they were before FOIA was enacted.[50] One might object that the situation would be even more dire if FOIA had not been enacted, however, and that is undoubtedly true. But it seems clear that neither the hopes of those who championed FOIA, nor the fears of its detractors have been fully realized.[51] That is the case, perhaps, because both

[49] *See, e.g.*, Pozen, *supra* note 42, at 1120 (characterizing FOIA response to national security concerns as "transparency theater"); Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint*, 45 CASE W. RES. J. INT'L L. 23, 36 (2012) ("FOIA is a slingshot attempting to pierce the tank armor of government secrecy and over-classification."); Katie Townsend & Adam A. Marshall, *Striking the Right Balance*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 226, 229 (David E. Pozen & Michael Schudson eds. 2018) ("[A]gencies have largely viewed [FOIA's] exemptions not as the outer bounds of what may be withheld from the public if necessary but rather as a full authorization to withhold any and all information that, in their judgment, falls within the scope of the exemption. Requested records are scrutinized [at multiple levels within an agency and sometimes by other agencies and even the White House]. . . . This multistage review process likely contributes not only to delay but also to the extensive redaction of records and the frequent outright denials of requests." (footnote omitted)); Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act: An Article in Honor of Fred Rodell*, 84 YALE L.J. 741, 747 (1975) (noting criticisms by Professors Davis and Emerson).

[50] The reasons are complex. *See, e.g.*, Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555 (2019). We live in a time of intense polarization and of "fake news" and "alternative facts"—when many may doubt that transparency will necessarily produce more knowledgeable citizens or better policy outcomes. As Alasdair Roberts has noted, "transparency by itself is not enough. . . . [W]e cannot assume that the revelation of injustice will lead automatically to a remedy for injustice." ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 238 (2006). We cannot even assume that revelations of injustice—or of untruths—will be accepted for what they are. The fact that 70% of Republicans still believed in June 2022 that Donald Trump won the 2020 presidential election—despite the absence of any evidence to support that belief, and scores of judicial findings to the contrary—further suggests the need for something more than transparency. *See* Jon Greenberg, *Most Republicans Still Falsely Believe Trump's Stolen Election Claims. Here Are Some Reasons Why.*, POYNTER (June 16, 2022), https://www.poynter.org/fact-checking/2022/70-percent-republicans-falsely-believe-stolen-election-trump/. That percentage is approximately the same as it was immediately after the election. *See* Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020), https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488 (noting that immediately following the November election, "70 percent of Republicans [said] they [did not] believe the 2020 election was free and fair, a stark rise from the 35 percent of GOP voters who held similar beliefs before the election").

[51] As previously noted, President Johnson and virtually every government agency initially opposed FOIA in 1966, and President Ford's advisors persuaded him to veto the 1974 amendments. *See supra* notes 20–23 and accompanying text; *see also Administrative Procedure Act: Hearing on S. 1160, S. 1336, S. 1758 & S. 1879 Before the Subcomm. on Admin. Prac. and Proc. of the Comm. on the Judiciary*, 89th Cong. 196 (1965) (statement of Assistant Attorney General Norbert A. Schlei) ("[T]he bill's effort to eliminate any application of judgment to questions of disclosure . . . represents an impossible approach. . . . The inevitable result . . . would be nondisclosure of many matters as to which there can be no justification for nondisclosure and disclosure of many matters which properly should be withheld."); *Federal Public Records Law: Hearing on H.R. 5012 Before the Subcomm. on Foreign Operations and Gov't Info. of the H. Comm. on Gov't Operations*, 89th Cong. 5 (1965)

groups overestimated the potential impact of a statute that cut against the grain of bureaucratic norms; and neither group could have foreseen the very different public world in which FOIA would function six decades later. Certainly, those who were present then could not have anticipated the decline, fragmentation, and polarization of the mainstream news media, let alone the rise of alternative sources of news, analysis, and opinion, or the effect that those phenomena would have on journalism and political culture.[52] Nor could they have imagined the general proliferation of data, the far-reaching effects of digitization, or many of the other dramatic changes in political and social life that would occur in the intervening decades.

## II. EXECUTIVE INFORMATION AND ACTIVE CITIZENSHIP

Early proponents of access to government information were fond of quoting James Madison's August 1822 letter to William Barry: "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the Power that knowledge gives."[53] Those advocates of greater transparency quoted Madison to bolster their plea for greater access to information—a sentiment that seems consistent with Madison's more general view that "every good citizen [should] be at once a centinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the

("The possibilities of injury to private and public interests through ill-considered publication are limitless."). These disasters have not come to pass, but neither has FOIA facilitated the degree of public scrutiny of the executive, or the oversight of democratic institutions, that its sponsors hoped for. *See, e.g.*, H.R. REP. NO. 89-1487, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429; S. REP NO. 88-1219, at 8 (1964); Memorandum from the Att'y Gen. on the Public Information Section of the Administrative Procedure Act (1967), https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act.

[52] *See generally* Margaret Sullivan, *If American Democracy Is Going to Survive, the Media Must Make this Crucial Shift*, WASH. POST (Jan. 3, 2022), https://www.washingtonpost.com/media/2022/01/03/media-democracy-jan6-atlantic-npr/; Amy Mitchell, Carrie Blazina, Jocelyn Kiley & Katerina Eva Masta, *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), https://www.journalism.org/2014/10/21/political-polarization-media-habits/; Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565 (2017), https://www.aeaweb.org/articles?id=10.1257/aer.20160812; Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/; Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531 (2012).

[53] Letter from James Madison to William T. Barry (Aug. 4, 1822), *in* JAMES MADISON: WRITINGS 1772–1836, at 790 (Lib. Am. 1999) [hereinafter Letter to William T. Barry].

authorities of the intermediate governments."[54] Effective sentinels need facts. Strictly speaking, however, the quotation from Madison's letter was inapposite to the debate about government information. The central concern of Madison's letter was the availability of education, not access to government information.[55] But this seeming misuse of Madison's letter is fortuitous because it invites a larger conversation about the importance of education and access to information to active citizenship, and of active citizenship to a vibrant democratic society.

Access to information is one of several conditions that are necessary for sustaining an effective representative democracy.[56] Citizens must also have the education necessary to process the information they acquire, as Madison acknowledged.[57] Citizens will disagree about many matters of importance, as

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[54] James Madison, *Government, in* JAMES MADISON: WRITINGS 1772–1836, at 502 (Lib. Am. 1999); *see also* COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 9 (2009) ("In [Madison's] conception of republicanism, adherence to the form and spirit of popular government . . . meant the recognition of the supremacy of the Constitution . . . . It also meant the *ongoing* sovereignty of public opinion, which requires the active participation of the citizenry in the affairs of the political community."). Madison thought that "the Federalists . . . were attempting to . . . limit the citizenry to a submissive role based merely on their 'confidence in government.'" SHEEHAN, *supra*, at 9. By contrast, "Madison advocated the politics of public opinion, [and] sought to foster . . . an enlightened and broadly based public voice that would control and direct the measures of government." *Id.* Collectively, the Framers seem not to have been greatly concerned with transparency; they provided only that each House should keep a journal of proceedings, to be published "from time to time . . . , excepting such parts as may in their judgment require secrecy," U.S. CONST. art. I, § 5, cl. 3., and that an account of receipts and expenditures should be published "from time to time." *Id.* art. I, § 9, cl. 7. In fact, even Senate proceedings were initially closed to the public. *See, e.g.*, Sean P. Harvey, *Tools for Influence: Albert Gallatin, Geneva, and Federalist Nativism Before the Alien and Sedition Acts*, 41 J. EARLY REPUBLIC 523, 531–32 (2021) (noting that Senate proceedings were opened to facilitate the exclusion of Albert Gallatin, who, ironically, had introduced several resolutions calling for Secretary Hamilton to provide detailed information concerning the national debt and revenue—requests that Hamilton found "distressing"); *see also* RICHARD BROOKHISER, JAMES MADISON 9 (2011) ("[I]n the early 1790s, regularly consulting public opinion was a new concept. Many of Madison's colleagues, including Washington and Hamilton, had little use for it.").

[55] *See* Letter to William T. Barry, *supra* note 53, at 790 ("Learned Institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty."); Madison, *supra* note 54, at 502 ("A representative republic *chuses* the wisdom, of which hereditary aristocracy has the *chance*; whilst it excludes the oppression of that form. And a confederated republic attains the force of monarchy, whilst it equally avoids the ignorance of a good prince, and the oppression of a bad one.").

[56] Frederick Schwarz has argued that "[t]oday's pervasive secrecy infantilizes the public," and that "[h]idden contempt for citizens and their ability to wrestle with tough issues becomes a self-fulfilling prophecy." FREDERICK A. O. SCHWARZ, JR., DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY 224 (2015). He continues: "Lack of civic literacy makes citizens less knowledgeable. This encourages elitist beliefs that there is no need to involve and no point in involving average people in hard decisions. This in turn encourages more secrecy, which, to complete the vicious circle, further reduces civic literacy." *Id.*; *see also* Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHILOS. 451, 453 (2003) (arguing for importance of good outcomes in addition to vindication of participation values).

[57] Letter to William T. Barry, *supra* note 53, at 790–91.

Madison also recognized,[58] but they must agree, at least at some level, on the difference between truth and falsity.[59] They must also feel a sense of connection to their fellow citizens and to their government.[60] They must have reason to "believe that their 'ownership' of government is real, and that those who guide [it] are committed to acting . . . for the benefit of all."[61] They must also be willing to devote some of their time, energy, and imagination to public affairs, and they must resist to some appropriate degree the myriad diversions that currently compete with political life for our attention.[62] They must take an active interest

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[58] In *Federalist 10*, Madison recognized that people inevitably would have different and conflicting opinions: "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed." James Madison, *The Federalist No. 10* (Nov. 22, 1787), *in* JAMES MADISON: WRITINGS 1772–1836, at 161 (Lib. Am. 1999).

[59] *See, e.g.*, Brian Klaas, *Democracy Requires a Shared Sense of Reality. America is Failing the Test*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/opinions/2019/11/26/democracy-requires-shared-sense-reality-america-is-failing-test/.

[60] *See, e.g.*, SUZANNE METTLER, THE GOVERNMENT-CITIZEN DISCONNECT 1 (2018).

[61] Sullivan, *supra* note 50, at 577.

[62] Carole Pateman has argued for a broader notion of participatory democracy, one that would include greater opportunities for participation in nongovernmental as well as governmental institutions. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 110 (1970). She writes that:

> [T]he existence of a participatory society would mean that [the ordinary citizen] was better able to assess the performance of representatives at the national level, better equipped to take decisions of national scope when the opportunity arose to do so, and better able to weigh up the impact of decisions taken by national representatives on his own life and immediate surroundings.

*Id*. Bernard Crick similarly observes that "the concept of civil society began to take on a new meaning" in the second half of the eighteenth century, pointing:

> to the importance for liberty of semi-autonomous institutions standing between the individual and the state . . . ; gradually all manner of semi-autonomous groups and voluntary bodies were seen in this way . . . . They were as much restraints on the state as formal constitutions and they were the training ground for active citizenship in society as a whole.

Bernard Crick, *Civic Republicanism and Citizenship: The Challenge for Today*, *in* ACTIVE CITIZENSHIP: WHAT COULD IT ACHIEVE AND HOW? 21 (Bernard Crick & Andrew Lockyer, eds. 2010). However, the evidence shows that "many or most of our fellow citizens are losing the desire, the will and the means to be active citizens." *Id*. at 16. As Professor Crick notes, there are other claims on our time and our energies:

> [T]oo few of us are willing to stir our stumps to be *active citizens*, to work at least for a better society. . . . The ten-, eleven-, or twelve-hour working day of the Victorian poor is now normal for all classes, sometimes voluntarily yet more often caught up in a machine that may appear to each individual to be out of control . . . .

*Id*. He writes: "[O]ne sees liberal theory as demanding 'good citizenship' . . . . But it may stop short of demanding 'active citizenship,' what scholars call 'civic republicanism,' people combining together effectively to change or resist change. I call that true citizenship." *Id*. at 23–24. *See generally* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 221–22 (2015) ("The neoliberal solution . . . is always more markets, more complete markets, more perfect markets, more financialization, new technologies, new ways to monetize. . . . [A]nything but deliberate constructions of existence through democratic discussion, law, policy.

in government,[63] and they must believe that "public discussion is a political duty."[64] They must also have confidence that their voices will be heard, and that their participation can make a difference. Citizens must also be willing to share the sacrifices that democracy requires. "The hard truth of democracy is that some citizens are always giving things up for others. Only vigorous forms of citizenship can give a polity the resources to deal with the inevitable problem of sacrifice."[65] In other words, citizens must *care* about government and public affairs.[66]

Sustaining such a democracy also requires the existence of appropriately focused institutions. One such institution is an energetic, responsible, and independent press—one that is able to fairly investigate the actions of public officials in ways that individuals ordinarily cannot accomplish.[67] Access to government information—whether through contacts with decision-makers, cultivating relationships with willing sources, or securing authorized access to

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Anything but the human knowledge, deliberation, judgment, and action classically associated with *homo politicus*.").

[63] *See, e.g.*, Molly Ivins, *Torture in Our Names*, BOULDER DAILY CAMERA (Dec. 5, 2004), https://www.commondreams.org/views/2004/12/05/torture-our-names; *see also* Benjamin Constant, *The Liberty of the Ancients Compared to That of the Moderns*, *in* BENJAMIN CONSTANT, POLITICAL WRITINGS 308–11 (Biancamaria Fontana trans., 1988).

[64] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[65] *See* DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION 29 (2004).

> When political scientists, economists and politicians argue that, if every citizen simply pursues her own self-interest without reservation, the common good will result, they make a sad mistake. No consensually based form of social organization can, over the long term, sustain relationships of cooperation in the face of unrestrained self-interest.

*Id*. at 137.

[66] *See, e.g.*, Dietrich Rueschemeyer, *The Quality of Democracy: Addressing Inequality*, 15 J. DEMOCRACY 7 (2004); *see also* JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 314 (2016) ("The gap between what people need to know as citizens and what they want to know as audience members persists because of rational ignorance, positive spillovers, and public goods. Why invest the time to learn about public policy when the statistical probability of your individual vote influencing the outcome of an election is vanishingly small?").

[67] *See, e.g.*, Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html?searchResultPosition=3; Azmat Khan & Ivor Prickett, *The Human Toll of America's Air Wars*, N.Y. TIMES (Dec. 19, 2021), https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html?searchResultPosition=2; Azmat Khan, Haley Willis, Christoph Koettl, Christiaan Triebert & Lila Hassan, *Documents Reveal Basic Flaws in Pentagon Dismissals of Civilian Casualty Claims*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html?searchResultPosition=1.

government records—is the lifeblood of journalism.[68] Moreover, journalists have special advantages in pursuing government information. FOIA requests for information of broad public consequence often require expertise, in knowing both what to request and how to request it in a way that maximizes the likelihood of disclosure.[69] In addition, the administrative processing of FOIA requests, as well as the litigation that frequently follows, may take months or years to complete.[70] Few individuals will have the resources necessary to sustain them through such an arduous and expensive endeavor. For that reason, journalists have played an outsized role in using FOIA to ferret out government information.[71] But recent trends in the economics of journalism, and especially the decline of local newspapers,[72] have resulted in fewer FOIA requests by media.[73] A few national media outlets continue to seek access to government information concerning important national issues, and nongovernmental

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[68] It is not surprising, therefore, that the press has been deeply involved in law reform efforts aimed at securing greater access to government records. *See, e.g.*, RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 598–605 (2011); Shannon E. Martin & Kamilla Benko, *Forming FOIA: The Influence of Editors and Publishers on the Freedom of Information Act*, 14 MEDIA HIST. MONOGRAPHS 1 (2011).

[69] *See* KWOKA, *supra* note 27, at 52–53 (summarizing telephone interviews with experienced journalists who credit their success with FOIA requests to deep expertise in a particular subject matter, to expertise in formulating FOIA requests, and to the availability of sufficient time and resources).

[70] In 1967, Professor Davis predicted that "[a]dministrative violations will be widespread, and most of them will go uncorrected. . . . In many vast fields . . . no case will be brought to compel disclosure, and the officers will know that such a case is unlikely." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 805 (1967).

[71] The investigative reporting concerning the 2014 police killing of Laquan McDonald, a Black Chicago teenager, illustrates the use that journalists can make of FOIA and other tools. *See, e.g.*, Ben Austen, *Chicago After Laquan McDonald*, N.Y. TIMES MAG. (Apr. 24, 2016), https://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html (detailing journalists' efforts to expose cover-up of police officer's shooting of Black teenager sixteen times); Jamie Kalven, *Sixteen Shots*, SLATE (Feb. 10, 2015), https://slate.com/news-and-politics/2015/02/laquan-mcdonald-shooting-a-recently-obtained-autopsy-report-on-the-dead-teen-complicates-the-chicago-police-departments-story.html (original reporting); Tanveer Ali, Jon Seidel & Andy Grimm, *A Timeline of Events Since the Laquan McDonald Shooting*, CHI. SUN-TIMES, https://graphics.suntimes.com/laquan-mcdonald-jason-van-dyke-shooting-trial/timeline/; Austin Brown, *A Readers' Guide to the City's Laquan McDonald Emails*, S. SIDE WKLY. (Jan. 12, 2016), https://southsideweekly.com/a-readers-guide-to-the-citys-laquan-mcdonald-emails/.

[72] *See, e.g.*, MARGARET SULLIVAN, GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY 17 (2020) ("[According to Warren Buffett,] the newspaper business over the past few decades 'went from monopoly to franchise to competitive . . . to toast.'"); HAMILTON, *supra* note 66, at 8 ("The collapse of advertising revenues at U.S. newspapers . . . translated into a drop of nearly 40% in the number of full-time journalists at daily newspapers between 2007 and 2014 . . . . ").

[73] HAMILTON, *supra* note 66, at 177 (noting that FOIA requests by local newspapers fell by nearly 50% between 2005 and 2010, while FOIA requests are up at niche and nonprofit media and NGOs).

organizations have also taken up the slack,[74] but the role of media in general has declined.

If they are willing, government officials can promote transparency by adopting measures that push back against the culture of secrecy that seems endemic to bureaucracy.[75] However, as Max Weber recognized, knowledge is power, and officials are naturally reluctant to share information for that reason.[76] In addition, the requested information may sometimes reflect badly on the officials' job performances, either individually or collectively. It is unsurprising, therefore, that FOIA was initially opposed by virtually every federal agency,[77] or that it contains a series of exemptions that grant discretion to withhold certain

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[74] *See* James T. Hamilton, *FOIA and Investigative Reporting*, *in* TROUBLING TRANSPARENCY 116 (David E. Pozen & Michael Schudson eds., 2018). A matter of continuing concern has been the extent to which business entities have utilized FOIA, not based on any view of the public interest, but for their own pecuniary interest. To the extent that the government subsidizes those requests, or they displace requests that are made in the public interest, the current situation is unsatisfactory.

[75] In 1982, President Reagan issued Executive Order No. 12,356, which set forth the government's FOIA enforcement policy until the end of the George H.W. Bush administration. Exec. Order No. 12,356, 47 Fed. Reg. 14874 (Apr. 2, 1982); *see* Sullivan, *supra* note 1, at 19 n.45. Beginning with the Clinton administration, various Attorneys General have sought to influence bureaucratic culture with respect to disclosure by indicating the circumstances in which the Department of Justice would defend an agency's withholding of records under their leadership. Memorandum from Janet Reno to Heads of Dep'ts & Agencies on The Freedom of Information Act (Oct. 4, 1993), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-reno-memo-foia.pdf; Memorandum from John Ashcroft, Att'y Gen., to Heads of All Fed. Dep'ts & Agencies on The Freedom of Information Act (Oct. 12, 2001), https://www.justice.gov/archive/oip/011012.htm; Memorandum from Eric Holder, Att'y Gen., to Heads of Exec. Dep'ts & Agencies on The Freedom of Information Act (FOIA) (Mar. 19, 2009), https://sgp.fas.org/foia/ag031909.pdf; Memorandum from Merrick Garland, Att'y Gen., to Heads of Exec. Dep'ts & Agencies on The Freedom of Information Act Guidelines (Mar. 15, 2022), https://www.justice.gov/ag/page/file/1483516/download; *see* HAMILTON, *supra* note 66, at 150 ("Sarah Cohen points out that government is more likely to provide data that companies can build a business around, that invite suggestions or crowdsource ideas from the public, or that allow individuals to act in their role as consumers (e.g., find safer car seats, more healthy foods). She has noticed that with open government initiatives, officials are less likely to offer up data that help reporters hold them accountable to voters." (footnote omitted)).

[76] *See* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H.H. Gerth & C. Wright Mills eds. & trans., 2009) ("Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. 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."); *see also id.* at 233–34 ("[T]he bureaucracy . . . fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.").

[77] *See* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, at 56 (2015) ("[I]t attracted consistent opposition from the executive, whether under Eisenhower, Kennedy, or Johnson. Every single government executive agency that testified in the hearings on the bill in 1966 was against it.").

records.[78] Nor is it surprising that the executive regularly invokes those exemptions and also regularly rejects Congress's efforts to find out what it is doing.[79]

At least theoretically, FOIA's exemptions "must be narrowly construed,"[80] and the 2016 amendments create both a presumption of disclosure and a foreseeability of harm requirement for withholding.[81] A spirit or culture of greater transparency could mean that the government would exercise its discretion in a way that favored disclosure rather than secrecy. Naturalizing such an attitude throughout the government would almost certainly ensure greater transparency and more consistent access to government records.[82] But even assuming the existence of such a culture, there may be limits to how far the executive will be willing to go in declining to invoke a possibly relevant exemption or refusing to proactively post information, particularly when the requested information is not flattering. The same is true with respect to the

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[78] *See, e.g.*, DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 174 (1998) ("[A]n inevitable conflict remains between the right of access prescribed in the FOIA and the authority of the executive branch to preserve certain secrets."). Administrations have differed in their constructions of the Act. *See* Sullivan, *supra* note 1, at 19 n.45.

[79] *See, e.g.*, Elise J. Bean, *Emerging Case Law on Congressional Oversight*, 66 WAYNE L. REV. 1, 7–8 (2020) (discussing the Trump administration's "aggressive and novel stances aimed at limiting the very ability of Congress to obtain information"); *see also infra* pp. 1340–42. Of course, the Trump administration was not the first to deflect Congress's requests. *See, e.g.*, Ed Henry, *White House Aide Avoids Testifying on Security Breach*, CNN POL. (Dec. 4, 2009, 9:33 AM), https://edition.cnn.com/2009/POLITICS/12/03/white.house.powers/index.html. In fact, the practice began with George Washington. *See* Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 632 (1997). The Department of Justice, under Presidents George W. Bush and Barack Obama, readily supplied justifications for refusing to provide information concerning matters within Congress's oversight and legislative authority. *See, e.g.*, Assertion of Exec. Privilege Over Deliberative Materials Generated in Response to Cong. Investigation into Operation Fast & Furious, 36 Op. O.L.C. 1, 1 (2012), https://www.justice.gov/media/1116031/dl?inline; Assertion of Exec. Privilege Concerning the Dismissal & Replacement of U.S. Att'ys, 31 Op. O.L.C. 1, 1, (2007), https://www.justice.gov/media/519551/dl?inline.

[80] *See, e.g.*, Milner v. Dep't of Navy, 562 U.S. 562, 565 (2011) (quoting Fed. Bureau of Investigation v. Abramson, 456 U.S. 615, 630 (1982)).

[81] *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (2016).

[82] Ensuring sound administrative practice through the modification of agency culture is necessarily more effective than the repeated correction of individual agency decisions through the exercise of judicial review. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 235 (2d ed. 1957). As David Pozen has noted, government officials are most familiar with the contents of agency records, but they have only a passive role in responding to FOIA requests; the requester plays the active part, but has only limited information about the records. *See, e.g.*, Pozen, *supra* note 42, at 1102–05. Government officials are uniquely positioned to determine what should be proactively disclosed, assuming they can overcome possible personal or institutional self-interest. The 2016 amendments encourage agencies to engage in proactive disclosure. *See generally* FOIA Improvement Act of 2016 § 2.

executive's likely response to congressional requests for information. That is why the availability of meaningful judicial review is critical.

## III. JUDICIAL PERFORMANCE IN FOIA CASES

As previously discussed, one of FOIA's most important innovations was to provide for de novo judicial review, with the burden of persuasion resting with the government.[83] In addition, Congress made clear in 1974 that the courts were authorized to conduct an in camera inspection of the contested records, even in the case of classified documents.[84] In other words, the statute clearly requires that courts decide whether an agency's decision to withhold records is legally correct; that is, whether the withheld records fall within one of FOIA's nine exemptions from mandatory disclosure. The 2016 amendments also create a presumption of disclosure and require an agency to determine whether harm would foreseeably result from disclosure. Although it is too early to say what effect these new provisions may have on the judiciary's approach, it seems clear that the demanding form of judicial review prescribed by the statute has not always been the norm. Thus, the United States Court of Appeals for the District of Columbia Circuit has declared that the courts should accord "substantial weight" to agency affidavits in FOIA cases involving national security,[85] and the Supreme Court has held that the CIA Director's determinations "are worthy of great deference given the magnitude of the national security interests and potential risks at stake."[86] In addition, "[c]ourts generally afford some deference to agencies 'specializing in law enforcement' that claim their records are eligible for Exemption 7(C) protection."[87] This judicially-created deference even extends to so-called "Glomar responses"—that is, to situations in which the government declines "to confirm or deny the existence of" a requested record because doing so might itself endanger national security.[88]

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[83] *See, e.g.*, U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989) ("FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" (quoting 5 U.S.C. § 552(a)(4)(B))); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) ("[B]urden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document.").

[84] *See supra* note 37 and accompanying text.

[85] *See* Halperin v. CIA, 629 F.2d 144, 147–48 (D.C. Cir. 1980) (quoting S. REP. NO. 1200, 93d Cong. 12 (1974), U.S. Code Cong. & Admin. News 1974, at 6267, 6290); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 165 (2006).

[86] CIA v. Sims, 471 U.S. 159, 179 (1985).

[87] Bartko v. U.S. Dep't of Just., 898 F.3d 51, 64 (D.C. Cir. 2018) (quoting Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just., 331 F.3d 918, 926 (D.C. Cir. 2003)).

[88] *See* Phillippi v. CIA, 546 F.2d 1009, 1013–14 (D.C. Cir. 1976).

Professor Kwoka has observed that "[d]eference doctrines have crept into parts of four of FOIA's nine statutory exemptions. None is based on statutory text or reflects congressional intent. Rather, the deference doctrines reflect courts' views on the propriety of second-guessing the executive branch in particular circumstances, divorced from the mandate of the governing law."[89] Moreover, most FOIA cases are decided on motions for summary judgment, almost always based solely on government affidavits or declarations, and without the benefit of discovery.[90] Summary judgment may be granted if the government's affidavits are "relatively detailed and non-conclusory,"[91] and "not controverted by either contrary evidence in the record nor by evidence of agency bad faith."[92] Without discovery, requesters will be hard-pressed to challenge the truthfulness or completeness of the government's affidavits. The government will invoke the "presumption of regularity,"[93] and, as the court said in *Wolf v. CIA*, "[u]ltimately, an agency's justification for invoking a FOIA exemption [will be deemed] sufficient if it appears 'logical' or 'plausible.'"[94]

The district courts might be expected to succeed in performing a more rigorous form of de novo review if they examined the requested documents in camera,[95] but that seldom happens. As a general matter, federal district courts have heavy caseloads, and a conscientious in camera inspection can be a very

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89 Kwoka, *supra* note 35, at 220 (footnote omitted).

90 *Id.* at 224–25.

91 SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)).

92 Mil. Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

93 *See, e.g.*, Am. Fed'n of Gov't Emps., AFL-CIO v. Reagan, 870 F.2d 723, 727 (D.C. Cir. 1989); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827) ("Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favourably applied to the chief magistrate of the Union."); Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2432 (2018); *cf.* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311–13 (1994) (discussing broad knowledge in criminal justice community of widespread perjury by police officers); United States v. Cortina, 630 F.2d 1207, 1208 (7th Cir. 1980) (affirming district court order suppressing all the evidence in a federal criminal case because of a perjurious search warrant affidavit, which, according to the court of appeals, amounted to "a fraud upon the judicial system").

94 473 F.3d 370, 374–75 (D.C. Cir. 2007); *see, e.g.*, Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) ("[L]ittle proof or explanation is required beyond a plausible assertion that information is properly classified."); Elec. Priv. Info. Ctr. v. Off. of the Dir. of Nat'l Intel., 281 F. Supp. 3d 203, 211 (D.D.C. 2017) ("Overall, the court need only examine whether the agency's classification decision 'appears "logical" or "plausible."'" (quoting Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009))).

95 *See, e.g*, Dep't of the Air Force v. Rose, 425 U.S. 352, 381 (1976) ("We hold . . . 'that the in camera procedure [ordered] will further the statutory goal of Exemption Six: a workable compromise between individual rights "and the preservation of public rights to Government information."'" (alteration in original) (quoting Rose v. Dep't of Air Force, 495 F.2d 261, 269 (2d Cir. 1974))).

time-consuming activity, depending on the volume of responsive material the agency has identified.[96] For this reason, the courts have long required agencies that are resisting the disclosure of requested documents to prepare a so-called "*Vaughn* Index,"[97] which "must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption."[98] In addition, judges might reasonably doubt the wisdom of devoting the time necessary for such a review, given that it will take the form of an ex parte proceeding, and they will necessarily be reviewing the documents without the benefit of an adversarial presentation.[99] The results of their review will largely depend on the truthfulness, thoroughness, and good faith of government officials. If the materials touch at all on matters of national security, the government may also argue that the records should not be disclosed because some crafty enemies will be able to put the pieces of the "mosaic" together (even if the court lacks the

[96] Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

[97] *See id.* at 823–27 (determining that the government should provide a detailed and justified index of requested records that it believes to be exempt from disclosure as a means of compensating for the information imbalance that necessarily exists between the government and the requester). *See generally* Kwoka, *supra* note 35, at 222–24 (noting that the District of Columbia Circuit initially considered attempting to compensate for that information imbalance by requiring routine in camera review, but recognized that such a requirement would overburden the courts without effectively remedying the plaintiff's inability to test the government's claim of exemption).

[98] Citizens Comm'n on Hum. Rts. v. FDA, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). Although the requirement originally was intended to remedy the information imbalance between agency and requester, it has tended over time to handicap requesters. *See Vaughn*, 484 F.2d at 823 ("In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information."). *See generally* Kwoka, *supra* note 35, at 222–23; Andrew O. Martyniuk, *An End to an FBI General Presumption of Confidentiality Under Freedom of Information Act Exemption 7(D):* United States Department of Justice v. Landano, *113 S. Ct. 2014 (1993)*, 63 U. CIN. L. REV. 523, 546 (1994) (noting that a *Vaughn* index may not have provided much information, but "coupled with the affidavit of an FBI agent, [it] served as another means of obviating the need for *in camera* review").

[99] Courts have noted the drawbacks of ex parte proceedings in other contexts. *See, e.g.*, United States v. Dinsio, 468 F.2d 1392, 1394 (9th Cir. 1972) ("The grand jury must make a foundational showing that the exemplars have some relevance to the investigation that it is conducting. Dinsio cannot be expected to demonstrate just cause in a factual vacuum. She cannot be relegated to the status of 'a blind man striking at an invisible foe.'" (quoting Chernekoff v. United States, 219 F.2d 721, 724 (9th Cir. 1955))).

background or skill necessary to do so),[100] and that the blood of innocent people will be on the judge's hands if the judge orders disclosure.[101]

Judges may also feel that they are not competent to make de novo decisions, and that the stakes are too high to take the risk.[102] Others may share Justice Scalia's view that the executive's most appropriate and effective watchdog is the legislative branch, not citizen volunteers intent on ferreting out government misconduct or ineptitude. In any event, the courts of appeals frequently admonish the district courts that although FOIA permits the courts to review requested records in camera, such review should generally occur only in the most unusual circumstances.[103] Most interestingly, some judges apparently

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[100] *See* David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005) ("In the context of national security, the mosaic theory suggests the potential for an adversary to deduce from independently innocuous facts a strategic vulnerability, exploitable for malevolent ends. The Department of the Navy . . . defines the theory as '[t]he concept that apparently harmless pieces of information when assembled together could reveal a damaging picture.'" (alteration in original) (quoting 32 C.F.R. § 701.31 (2005))). Interestingly, the Republican National Committee ("RNC") recently invoked the "mosaic" trope to oppose a third-party vendor's compliance with a congressional subpoena calling for certain RNC fundraising materials that may have influenced those who stormed the Capitol on January 6, 2021. *See* Republican Nat'l Comm. v. Pelosi, No. 22-659, 2022 U.S. Dist. LEXIS 78501, at *16 (D.D.C. May 1, 2022).

[101] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."). In his 1974 veto message, President Ford suggested that in connection with classified materials courts should "consider all attendant evidence prior to resorting to an *in camera* examination of the document," 120 CONG. REC. 36243 (Nov. 18, 1974) (Freedom of Information Act—Veto Message from the President of the United States), but Congress did not amend the statute to so provide.

[102] Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?*, SSRN 1, 48 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964.

[103] *See, e.g.*, Juarez v. Dep't of Just., 518 F.3d 54, 60 (D.C. Cir. 2008) ("If a district court believes that *in camera* inspection is unnecessary 'to make a responsible de novo determination on the claims of exemption,' . . . it acts within its 'broad discretion' by declining to conduct such a review." (internal citations omitted) (quoting Carter v. Dep't of Com., 830 F.2d 388, 392 (D.C. Cir. 1987))); Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982) ("Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts 'need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.'" (quoting Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977))); Friedman v. U.S. Secret Serv., 282 F. Supp. 3d 291, 308 (D.D.C. 2017) ("Only where the court believes *in camera* review is needed 'to make a responsible de novo determination on the claims of exception' is such review appropriate." (quoting Larson v. Dep't of State, 565 F.3d 857, 870 (D.C. Cir. 2009))); *see also* Int'l Couns. Bureau v. U.S. Dep't of Def., 864 F. Supp. 2d 101, 105 (D.D.C. 2012) ("FOIA allows but does not require courts to conduct *in camera* review of information withheld from disclosure by an agency."); Elec. Priv. Info. Ctr. v. U.S. Dep't of Just., 442 F. Supp. 3d 37, 48 (D.D.C. 2020) (cautioning that in camera review should be reserved for exceptional cases); Lindsey v. Fed. Bureau of Investigation, 490 F. Supp. 3d 1, 25 (D.D.C. 2020) (declaring in camera review inappropriate because the agency's claims were described with "sufficient detail"); Elec. Priv. Info. Ctr. v. Off. of the Dir. of Nat'l Intel., 281 F. Supp. 3d 203, 217–18 (D.D.C. 2017) (denying a request to review the report in camera); Schaerr v. U.S. Dep't of Just., 435 F. Supp. 3d 99, 116 n.14 (D.D.C. 2020) ("[T]he purpose of *in camera* review is to consider the applicability of an exemption to a

doubt that their judicial colleagues can be trusted to keep the government's secrets. Justice Thomas recently expressed such a general distrust of Article III judges in his partial concurrence in *United States v. Zubaydah*.[104] He wrote:

> While the Executive can control its subordinates' access to state secrets and enforce penalties if such material is mishandled, it has little control once state secrets fall into the Judiciary's hands. Disclosure to a judge, therefore, poses a very real national-security threat. The plurality's cavalier statement that "sometimes" *in camera* review is warranted fails even to acknowledge that risk.[105]

Given the truncated nature of the judicial proceedings in which FOIA requests are adjudicated, the natural reluctance of judges to second-guess the executive (a reluctance the executive does its best to reinforce), and the admonitions against in camera review that are regularly directed to the trial judges who must decide these cases in the first instance, it is not surprising that only a miniscule number of judicial review actions are successful.[106]

Would it make a difference if courts were more willing to review records in camera? That is a difficult question because, by definition, neither the courts nor the readers of their opinions can know what is contained in records that have not been examined. Just as we cannot know about the prevalence of a particular disease if we do not test for it, we are hard-pressed to know how many rejected FOIA requests were truly meritorious unless the courts do more than simply accept the government's word. However, a recent case suggests the importance of a genuinely de novo form of judicial review—one in which the court rigorously interrogates the government's affidavits and is willing, when necessary, to inspect the records the government would withhold.

In *Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*, Citizens for Responsibility and Ethics in Washington

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specific record; plaintiff points to no case law that would suggest that *in camera* review is a tool for testing an agency's assertion that merely revealing the existence of records would cause harm.").

[104] 142 S. Ct. 959, 977 (2022) (Thomas, J., concurring). *But see* Tim McLaughlin, *US Military Leak Suspect Got Offer to Bolster Intelligence Skills*, REUTERS, https://www.reuters.com/world/us/us-military-leak-suspect-got-offer-bolster-intelligence-skills-2023-05-19/ (May 19, 2023, 1:25 PM) ("Superiors of the U.S. Air National Guardsman accused of leaking military secrets offered him intelligence-related training even after they admonished him twice for his handling of classified information, according to a memo disclosed this week by U.S. Justice Department attorneys.").

[105] *Zubaydah*, 142 S. Ct. at 977.

[106] *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, 744–50 (2014).

("CREW"), a government watchdog group, requested records relating to the creation of Attorney General William Barr's summary of the *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (the "Mueller Report"),[107] a two-volume, 448-page document that Special Counsel Robert Mueller transmitted to the Attorney General on Friday, March 22, 2019.[108] Two days later, the Attorney General sent the leaders of the House and Senate Judiciary Committees a four-page letter that purported to summarize the report.[109] The letter explained that although Mueller had not drawn any conclusions about the President's possible obstructions of justice, the Attorney General had determined that the evidence was insufficient to establish such an offense.[110] Based on the Attorney General's letter, President Trump immediately "declared himself to have been fully exonerated."[111]

As Judge Amy Berman Jackson, the trial judge, noted, "[t]he Attorney General's characterization of what he'd hardly had time to skim, much less, study closely, prompted an immediate reaction, as politicians and pundits . . . decr[ied] what they feared was an attempt to hide the ball."[112] "Even the customarily taciturn Special Counsel was moved to pen an extraordinary public rebuke,"[113] asserting that the Attorney General's summary "did not fully capture the context, nature, and substance of [his] work and conclusions"[114] and "threaten[ed] to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome

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[107] 538 F. Supp. 3d 124, 129 (D.D.C. 2021), *aff'd*, 45 F.4th 963 (D.C. Cir. 2022); SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2–3 (Mar. 2019), https://www.justice.gov/archives/sco/file/1373816/download. The report consists of two volumes. "*Volume I* describes the factual results of the Special Counsel's investigation of Russia's interference in the 2016 presidential election and its interactions with the Trump campaign," while "*Volume II* addresses the President's actions towards the FBI's investigation into Russia's interference in the 2016 presidential election and related matters, and his actions towards the Special Counsel's investigation." *Id.* at 2–3.

[108] MUELLER, *supra* note 107, at 2–3; *see Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 128.

[109] *Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 128.

[110] *Id*.

[111] *Id*. at 128–29.

[112] *Id*. at 129.

[113] *Id.*; *see also* Jan Wolfe, *Newsmaker: Taciturn Mueller Faces U.S. Congress on Probe of Trump*, REUTERS (July 24, 2019, 6:06 AM), https://www.reuters.com/article/us-usa-trump-mueller-profile-newsmaker-idUSKCN1UJ167. Mueller had privately advised the Department that he thought the summary was inaccurate and misleading on Monday, March 25, the day after it was transmitted to Congress. *See Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 129.

[114] *Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 129 (citing Letter from Robert S. Mueller, III, Special Couns., to Hon. William P. Barr, Att'y Gen. of the U.S. (Mar. 27, 2019), https://apps.npr.org/documents/document.html?id=5984399-Mueller-Letter-to-Barr).

of the investigations."[115] The report was not released for another three weeks, despite Mueller's request for its immediate release.[116]

When the Attorney General finally presented the report to Congress on April 18, "[h]e asserted that he . . . [had] reached the conclusion . . . announced in [his] March 24 letter [to the Judiciary Committee leaders] 'in consultation with the Office of Legal Counsel and other Department lawyers.'"[117] CREW immediately filed a FOIA "request for any records related to those consultations," and the Department of Justice withheld some records under the deliberative process and attorney-client privileges.[118] CREW then filed a FOIA complaint to compel disclosure of the documents the Attorney General reviewed before commenting on the report.[119] CREW eventually accepted most of the government's withholdings, but the parties failed to agree on two documents,[120] one of which—a March 24, 2019 OLC memorandum to the Attorney General—the court ordered to be disclosed.[121]

To be properly withheld under the deliberative process prong of FOIA Exemption 5, a document must be both "predecisional" and "deliberative."[122] "A document is predecisional if '"it was generated before the adoption of an agency policy" and [it is] deliberative if "it reflects the give-and-take of the consultative process."'"[123] Purporting to rely on the deliberative process

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115 *Id.*

116 *Id.*

117 *Id.* (quoting *Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. DEP'T JUST.: JUST. NEWS (Apr. 18, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian). In recent years, much criticism has been leveled at Office of Legal Counsel ("OLC"), the Department of Justice division responsible for providing legal advice to the President and to other Executive Branch officials. *See, e.g.*, Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L., ETHICS & PUB. POL'Y 723, 729–30 (2021); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 517–19 (2021).

118 *Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 129.

119 *Id.*

120 *Id.* at 130. According to the court, the agency identified sixty-one responsive documents; it initially released thirty-two with partial redactions and withheld twenty-eight in full, claiming that they were exempt from mandatory disclosure under FOIA Exemption 5. *Id.*

121 *Id.* at 129–30. Although it found the government's declaration insufficient to justify the withholding of the second document, the court was nonetheless persuaded by its in camera review that the document was properly withheld. *Id.* at 136.

122 *Id.* at 133 (quoting Jud. Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006)).

123 *Id.* at 134 (quoting *Jud. Watch, Inc.*, 449 F.3d at 151). As the court further noted, "[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Id.* (quoting *In re* Sealed Case ("Espy"), 121 F.3d 729, 737 (D.C. Cir. 1997)).

privilege, the government produced only a heavily redacted portion of page one of the OLC Memorandum.[124] The government submitted declarations by two Department of Justice attorneys. Paul Coburn, Special Counsel in OLC, explained that the OLC Memorandum "is a predecisional deliberative memorandum," which "was submitted to the Attorney General to assist him in determining whether the facts set forth in Volume II of [the Mueller] report 'would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution.'"[125] Coburn also stated that, "[f]ollowing receipt of the memorandum, the Attorney General announced his decision publicly in a letter to the House and Senate Judiciary Committees."[126] Coburn further explained that the memorandum was pre-decisional because it "contain[ed] advice and analysis supporting a recommendation regarding the decision [that the Attorney General] was considering" and "because it was provided prior to the Attorney General's decision in the matter."[127] The second declaration was submitted by Vanessa R. Brinkmann, Senior Counsel in the Department of Justice's Office of Information Policy, who likewise stated that the document was "pre-decisional" because "it was provided to the Attorney General prior to his final decision on the matter," namely, his determination as to "whether the evidence developed by [the Special Counsel] is sufficient to establish that the President committed an obstruction-of-justice offense."[128]

But the government's declarations were false, as Judge Jackson learned from her in camera review.[129] The memorandum could not have been written to assist the Attorney General in reaching a decision about whether to prosecute the President for obstruction of justice because the Attorney General had never considered any such course of action.[130] Judge Jackson observed: "[T]he Court cannot find the record to be 'predecisional,' because the materials in the record, including the [OLC] memorandum itself, contradict the FOIA declarants' assertions that the decision-making process they have identified [i.e., deciding whether to prosecute the President] was in fact underway."[131]

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124 *Id.* at 136–37.
125 *Id.* at 138 (emphasis omitted).
126 *Id.* (emphasis omitted).
127 *Id.* (emphasis omitted).
128 *Id.* at 138–39 (emphasis omitted).
129 *Id.* at 137, 139–40.
130 *Id.*
131 *Id.* at 137.

Significantly, the government had urged the court not to review the OLC Memorandum in camera, and its strategy for defeating disclosure of the document apparently rested on an assumption that the trial judge would not bother to look at it.[132] Only by looking at the OLC Memorandum would the court become aware that the memorandum had two sections—not just one, as the government's declarations and pleadings implied—or that the section that the government concealed from CREW and the court would, taken together with the redacted portions of the other section, establish the falsity of the government's narrative.[133] Judge Jackson wrote: "The omission of any reference to Section 1 [of the OLC memorandum] in the agency declarations, coupled with the agency's redaction of critical caveats from what it did disclose, served to obscure the true purpose of the memorandum."[134] Once Judge Jackson had seen Section I, she knew that the purpose of the OLC Memorandum was not to provide advice to the Attorney General about prosecuting the President.[135] Such a prosecution was precluded by the Department of Justice's longstanding policy that prosecuting a sitting President would violate Article II of the Constitution.[136] No one in the Department of Justice was reconsidering that policy, and no one was considering the possibility of prosecuting President Trump.

The only question the Attorney General was considering concerned the kind of public statement he should make about the Mueller Report.[137] That fact is underscored by the government's redactions to Section II. The unredacted part of Section II begins by stating that the Attorney General had asked his team to

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[132] *See id.* at 138–42.

[133] *Id.*

[134] *Id.* at 139.

[135] *Id.* at 139–41. The government created the impression in its evidentiary materials and argument that the only subject addressed in the OLC Memorandum was whether to prosecute President Trump. *Id.* But Section I of the OLC Memorandum, the existence of which was concealed from CREW and the court, addressed an entirely different subject. *Id.* As the court observed:

> The declarations do not even reveal that there is a Section I, or that any issue other than the strength of the evidence is discussed. But one of the apparent purposes of the memorandum was to justify the Attorney General's plan to opine about the strength of the evidence, even though he and his team were well aware that under DOJ policy [to the effect that a sitting president could not be prosecuted], there was no prosecution decision to be made.

*Id.* at 140–41.

[136] *See* Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Couns., on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office 34 (Sept. 24, 1973), https://irp.fas.org/agency/doj/olc/092473.pdf. The conclusion was reaffirmed in 2000. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (2000), https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf.

[137] *Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 139.

evaluate whether the evidence uncovered by the Special Counsel would support initiating a criminal prosecution, thereby implying that the initiation of a criminal prosecution was being considered, but the government omitted additional language from that sentence, which specified that the evaluation should proceed "without regard to any constitutional barrier to such a prosecution under Article II."[138] In addition, the memorandum states that "*were there no constitutional barrier*, we would recommend . . . that you decline to commence such a prosecution."[139] The italicized words were also redacted.

As the trial court concluded, "the analysis set forth in the memo was expressly understood to be entirely hypothetical, and the redactions deliberately obscured this fundamental aspect of the exercise."[140] In addition, "the declarants did not choose to bring that language, which contradicts the assertion that the Attorney General was in fact wrestling with a difficult decision about a high-profile criminal prosecution, to the Court's attention."[141] In fact, the Attorney General was "wrestling" only with a public relations question.

In other words, the picture painted by the government's declarations bore no relationship to the record evidence. The court observed that

> the affidavits are so inconsistent with [the record] evidence [that] they are not worthy of credence. The review of the unredacted document *in camera* reveals that the suspicions voiced by . . . the plaintiff . . . were well-founded, and that not only was the Attorney General being disingenuous [in his March 24, 2019 letter], but DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege.[142]

The court further concluded that "[t]he agency's redactions and incomplete explanations obfuscate the true purpose of the memorandum, and the excised portions contradict the notion that it fell to the Attorney General to make a prosecution decision or that any such decision was on the table at any time."[143] Indeed, "Section I shows that . . . Attorney General Barr had a completely

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[138] *Id.* at 139–40.

[139] *Id.* at 140 (alterations in original).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 143. The court noted that its in camera inspection also confirmed the suspicions raised by Judge Walton in *Electronic Privacy Information Center v. United States Department of Justice*, 442 F. Supp. 3d 37, 48 (D.D.C. 2020). *Citizens for Resp. & Ethics in Wash.*, 538 F. Supp. 3d at 143.

[143] *Id.*

different reason for opining on the subject, and the redacted information reveals that the authors and recipient of the memo fully understood that any prosecution was legally barred."[144]

A panel of the United States Court of Appeals for the District of Columbia Circuit subsequently affirmed the judgment of the district court.[145] The court noted that "[t]he Department's submissions[] . . . [to the district court] indicated that the [OLC] memorandum conveyed advice about whether to charge the President with a crime," but that the district court's in camera review showed "that the Department in fact never considered bringing a charge."[146] "Assessing whether a record is pre-decisional or deliberative necessarily requires identifying the decision (and the associated decisional process) to which the record pertains."[147] Because its submissions did not disclose the relevant decisional process, the Department of Justice had "not tie[d] the memorandum to deliberations about the relevant decision" and had therefore "failed to justify its reliance on the deliberative-process privilege."[148] In fact, as the district court found, "the memorandum concerned a separate decision that had gone entirely unmentioned by the government in its submissions to the court—what, if anything, to say to Congress and the public about the Mueller Report."[149]

The Department of Justice made a different argument on appeal: that the materials were privileged because they pertained to the Attorney General's decision about what to tell Congress and the public about the Mueller Report.[150] That argument "might well have justified the Department's invocation of the privilege," the court of appeals observed, but "the Department never . . . mentioned . . . that decisional process [while the case was pending] in the district court."[151] Ironically, the Department of Justice asserted that the district court should have discovered the argument for itself, based on its in camera review of the record.[152] The court of appeals observed: "The Department thus now seeks to prevail based on the district court's in camera review even though the

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144 *Id.* Because there was no legal decision to be made, the attorney-client privilege prong of FOIA Exemption 5 was also inapplicable. *See id*. at 145.

145 Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 45 F.4th 963, 966–67 (D.C. Cir. 2022).

146 *Id*. Later in its opinion, the court of appeals further discussed the Department's artful redactions. *Id*. at 975–77.

147 *Id*. at 972.

148 *Id*. at 967.

149 *Id*.

150 *Id*. at 975–76.

151 *Id*. at 972.

152 *Id.* at 977–78.

Department . . . objected to that review. We cannot accept the Department's argument."[153]

Justice Scalia thought that the idea of popular access to government information was simply a "romantic notion," and that meaningful disclosure of government information was "primarily the product of the institutionalized checks and balances within our system of representative democracy."[154] Justice Scalia will be proved right, at least insofar as judicial enforcement of FOIA is concerned, if courts continue to take the government at its word, affirming denials of FOIA requests without meaningful judicial review, whenever the government can produce a "logically coherent" or "plausible" affidavit or declaration to justify the withholding. On the other hand, the decisions in *Citizens for Responsibility & Ethics in Washington* demonstrate the power of FOIA when courts are willing to interrogate the government's submissions and review the requested records for themselves, if necessary. In that event, the idea that FOIA can contribute to transparency and accountability could not be dismissed as "fanciful" or "romantic."

One problem with FOIA is that appellate courts do little to encourage trial courts to take a hard look at the government's purported reasons for withholding, and they actively discourage them from looking at the withheld records for themselves. For their part, trial courts undoubtedly need little encouragement to forego searching review. They have plenty of work to do with the limited resources they command, and they may justifiably doubt that they will be able to accomplish much by viewing the records in an ex parte proceeding without the benefit of an informed adversarial presentation. Without the possibility of genuine de novo review, however, there is little assurance that the kind of situation laid bare in *Citizens for Responsibility & Ethics in Washington* is uncommon. Judge Jackson's decision in *Citizens for Responsibility & Ethics in Washington* shows that meaningful review is necessary for the government to be held accountable. Government affidavits and declarations are more likely to be accurate and complete if those who prepare them believe that courts may interrogate them in a meaningful way. Reviewing courts might encourage trial courts to look more critically at the government's submissions to identify individual cases that might warrant in camera review, or simply to select a few cases at random for closer examination from time to time.[155] The point is that

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153 *Id*. at 978.

154 Scalia, *supra* note 44, at 19.

155 *See* Sinnar, *supra* note 36, at 1014 (discussing Judge Alvin Hellerstein's "sampling" methodology).

government officials must reasonably believe that their work will be subject to meaningful review.

Perhaps there is a limit to what we can expect Article III judges to do in FOIA cases, given the other demands that are placed on their time and resources. For that reason, there may be some merit to other reforms that have been suggested, such as giving greater authority to the Office of Government Information Services ("OGIS")[156] to make binding decisions in FOIA cases, or to engage in in camera review.[157] Those reforms would have the benefit of at least diverting some cases from the dockets of Article III courts, while also providing requesters with a disinterested, expert decision in a presumably more efficient and less costly way than the current regime. Even if some of the initially diverted cases would still require decision by an Article III court, those cases would at least come to the courts on appeal from the decisions of neutral and disinterested tribunals, rather than from an agency charged with deciding whether to disclose its own secrets.[158] Whatever the fate of such suggested reforms ultimately may be, it is imperative that the de novo review currently mandated by FOIA take the form of a credible exercise in judicial review.

## IV. EXECUTIVE INFORMATION AND THE PEOPLE'S REPRESENTATIVES

Whatever might be thought of Justice Scalia's peremptory dismissal of FOIA,[159] he was certainly correct in emphasizing the potential importance of Congress's role in ensuring executive transparency and accountability.[160]

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[156] *About OGIS*, NAT'L ARCHIVES, https://www.archives.gov/ogis/about-ogis (last visited Jan. 31, 2023) ("As the Federal Freedom of Information Act (FOIA) Ombudsman, OGIS resolves FOIA disputes, identifies methods to improve compliance with the statute, and educates our stakeholders about the FOIA process.").

[157] *See, e.g.*, OGIS 2.0: REIMAGINING FOIA OVERSIGHT, REIMAGINING OGIS WORKING GROUP AND LEGISLATION SUBCOMMITTEE, RECOMMENDATIONS TO THE FEDERAL FOIA ADVISORY COMMITTEE 9–10 (May 4, 2022), https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf; FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, REPORT TO THE ACTING ARCHIVIST OF THE UNITED STATES 27 (June 9, 2022), https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/foia-advisory-committee-report-recommendations.final_.draft_.6.2.2022-1.pdf.

[158] This is not the place to sketch out the details of such a process, but it would be necessary to ensure that the process complies with the Supreme Court's evolving "unitary executive" jurisprudence. *See generally* Collins v. Yellen, 141 S. Ct. 1761 (2021); United States v. Arthrex, 141 S. Ct. 1970 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (2018); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

[159] Scalia, *supra* note 44, at 19.

[160] Congress's effectiveness in checking the executive depends on political considerations that the Framers did not contemplate when they theorized the need for setting ambition against ambition with "[t]he interest of the man . . . connected with the constitutional rights of the place." THE FEDERALIST NO. 51 (James Madison).

Congress has been investigating the executive's activities, and pressing the executive for information relevant to the performance of its duty to "take care that the laws be faithfully executed," albeit with varying degrees of fervor and success, since the administration of George Washington.[161]

Justice Felix Frankfurter emphasized the importance of Congress's investigatory powers in *United States v. Rumely*,[162] which involved a private citizen's First Amendment challenge to a congressional investigation, rather than an interbranch dispute between Congress and the executive.[163] In *Rumely*, the Court held that the relevant congressional committee's investigation exceeded the limits of its delegated authority,[164] but Justice Frankfurter reiterated the important role that Congress plays when it investigates the executive's discharge of its constitutional and statutory responsibilities. Quoting Woodrow Wilson, Justice Frankfurter wrote:

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Significantly, the Framers did not anticipate the rise of political parties or the importance of party affiliation in government. *See id.*; *see also* sources cited *supra* note 46.

[161] *E.g.*, Todd B. Tatelman, *The Law: Presidential Aides: Immunity from Congressional Process?*, 39 PRES. STUD. Q. 385, 389 (2009) (discussing President Washington's refusal to provide the House with the Jay Treaty negotiating documents, not because of any broad assertion of "blanket power to withhold from the Congress," as some have thought, but based on the House's lack of any constitutional role in treaty formation and consequent lack of constitutional authority to request the documents (emphasis omitted)); *see id.* at 387 (contrasting President Washington's reasons for refusing to comply with Congress's investigation into Major General Arthur St. Clair's military losses); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 287–324 (2018) (discussing constitutional significance of the Jay Treaty debate); *see also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[162] 345 U.S. 41 (1953). The Supreme Court has generally held that Congress may undertake an investigation in pursuit of a valid legislative purpose or in aid of another of its enumerated powers, such as impeachment, the disciplining of members, or resolving a disputed election. *See* Michael D. Bopp, Thomas G. Hungar & Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J.L. & POL. 1, 8–9 (2021); *see also* CONG. RSCH. SERV., CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 38–42 (May 12, 2021), https://crsreports.congress.gov/product/pdf/R/R45442/6 (detailing means by which individual members may access executive branch information). In the past, "[c]ourts were generally willing to accept Congress's stated legislative purpose at face value, making clear that the inquiry into whether an investigation serves a legislative purpose is a relatively narrow one." Bopp et al., *supra*, at 10.

[163] *Rumely*, 345 U.S. at 44. Rumely was prosecuted for refusing to provide a House committee with the names of individuals who had made purchases in bulk of "books of a particular political tendentiousness." *Id.* at 42.

[164] *Id.* According to Justice Frankfurter, there was no need to decide the constitutional question because the committee's inquiry exceeded the scope of its authorizing resolution, and Rumley could not therefore be punished. *Id*. at 46–48. While Justices Douglas and Black concurred, they would have reached the constitutional question: "Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment." *Id.* at 58 (Douglas, J., concurring).

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.[165]

Congress has exercised this "informing function" since the earliest days of the Republic, sometimes meeting resistance from the executive, but often managing to negotiate an acceptable accommodation. As the Supreme Court has noted, "[h]istorically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process.'"[166] Recently, however, that "give-and-take" has given way to polarization and deadlock in times of divided government, making it less likely that the relevant congressional body (the House, the Senate, or one of their respective committees) will reach a satisfactory accommodation with the executive.[167] Congress and the executive increasingly have looked to the courts to resolve those disputes.

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[165] *Id*. at 43 (majority opinion) (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (1885) (Walter Lippmann ed. 1956)).

[166] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2029 (2020) (quoting *Hearings on S. 2170 et al. Before the Subcomm. on Intergovernmental Rels. of the Senate Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel)); *see also* Ryan Goodman, Christine Berger & Margaret Shields, *Modern History of Disclosure of Presidential Records: On the Boundaries of "Executive Privilege,"* JUST SECURITY (Sept. 30, 2021), https://www.justsecurity.org/78413/modern-history-of-disclosure-of-presidential-records-on-the-boundaries-of-executive-privilege/.

[167] Until the passage of [the Legislative Reorganization Act of 1946, P.L. 79-601, 60 Stat. 812],

> none of the regular or "standing" committees of the House or Senate had the power of subpoena. Investigations supported by the subpoena power were always authorized by special resolutions particularizing the subject of inquiry, and committing its execution to either a select or a standing committee. But the Legislative Reorganization Act for the first time gave permanent statutory subpoena power to each and every standing committee of the Senate, available for use in connection with "any matter within its jurisdiction."

TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 232 (1955). "[T]he Legislative Reorganization Act did *not* confer the power of subpoena on the standing committees of the House of Representatives" because "neither the Republican nor Democratic [House] leaders . . . thought it wise to give the House committees permanent and general subpoena power." *Id*. at 233. Taylor thought that decision appropriate because "at least the House itself still determines what investigations shall be undertaken by its committees, while in the Senate the McCarthy and Jenner committees charted their own courses, with little

This turn to the courts has been controversial, and it remains to be seen whether it will result in greater transparency and accountability. Traditionally, as commentators have recently noted, "the judiciary has generally been highly deferential to Congress, . . . 'only inquir[ing] as to whether the documents sought by the subpoena are "not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties."'"[168] In addition, "[a]n invasive 'line-by-line' review of [a subpoena] has been deemed an inappropriate exercise of judicial review on the ground that the Constitution does not require that 'every piece of information gathered in [a Congressional] investigation be justified before the judiciary.'"[169] The courts have also favored Congress's subpoena power by limiting the ways in which congressional subpoenas may be challenged. For example, the courts have held that the Speech or Debate Clause[170] prohibits the recipient of a congressional subpoena from challenging its validity in a suit against the issuing entity;[171] the recipient may challenge the validity of the subpoena only by "resisting a civil enforcement action brought by Congress, defending against a criminal contempt prosecution, or by means of a petition for habeas corpus in the case of individuals confined for contempt through an order of Congress."[172] In other words, subpoenaed parties cannot sue for an injunction or declaratory judgment.[173]

effective supervision by the parent legislative chamber." *Id*. House rules currently authorize the issuance of subpoenas by standing and select committees without a House vote specifically authorizing an investigation. *See* House Rule XI (2)(m); *see also* Senate Rule XXVI.

168 Bopp et al., *supra* note 162, at 8 (second and third alterations in original) (quoting Bean LLC v. John Doe Bank, 291 F. Supp. 3d 34, 44 (D.D.C. 2018)).

169 *Id.* (second alteration in original) (quoting *Bean LLC*, 291 F. Supp. 3d at 44); *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506, 509 (1975) (recognizing that investigations sometimes involve "blind alleys" and need not have a "predictable end result" to satisfy the requirement that the subpoena relate to a valid legislative purpose or to a subject on which legislation could be had); Barenblatt v. United States, 360 U.S. 109, 127–28 (1959) (same). Committees may investigate the executive's administration of existing laws as well as the potential need for new legislation, and they may seek to expose waste, fraud, abuse, or maladministration. Watkins v. United States, 354 U.S. 178, 187 (1957).

170 U.S. CONST. art. I, § 6, cl. 1.

171 *See, e.g.*, *Eastland*, 421 U.S. at 495.

172 Bopp et al., *supra* note 162, at 7. The courts apply a highly deferential form of review in each of these various types of proceedings. *Id.* at 8.

173 An important exception to that general rule exists, however, when the congressional subpoena has been addressed to a third-party custodian, rather than to the owner of the records. In such cases, the owner may test the validity of the subpoena by seeking to enjoin the third-party custodian from complying with it. *Id.* at 8. The Speech and Debate Clause protects only against involuntary participation in a lawsuit, so it does not apply when congressional parties choose to intervene. *See* Republican Nat'l Comm. v. Pelosi, No. 22-659, 2022 U.S. Dist. LEXIS 78501, at *32 (D.D.C. May 1, 2022).

The future of this turn to the courts remains uncertain for at least two reasons. First, the Supreme Court recently held that the principle of separation of powers requires that the courts adopt a more demanding standard of review when congressional subpoenas seek disclosure of a President's records, even when those are private business records unrelated to his official duties.[174] That more demanding standard obviously makes it more difficult to secure information in an investigation of the President, and Congress's oversight functions would be further impaired if the standard were extended in some form to other executive officials.[175] Second, the validity of a judicial (as opposed to congressional) subpoena has sometimes been tested on a motion to enforce or compel compliance with it. Whether a congressional committee may file an enforcement action to compel compliance with its subpoena has been less clear.[176] A divided panel of the United States Court of Appeals for the District of Columbia Circuit recently held that the House Judiciary Committee lacked Article III standing to seek judicial enforcement of its subpoena.[177] That decision was reversed by the en banc court,[178] but, on remand for further proceedings, the original panel held that the case should nonetheless be dismissed because, even if the Committee satisfied Article III standing requirements, it lacked a cause of action to enforce the subpoena.[179] The parties thereafter reached a settlement, and the second panel opinion was vacated,[180] but the court of appeals obviously remains deeply divided about the authority of House committees to seek judicial enforcement of their subpoenas.

Two cases involving former President Donald Trump are instructive. In the first, we will see the Supreme Court's new limits on the permissible scope of congressional subpoenas. The second concerns the Presidential Records Act of 1978.[181] We will then consider the evolving jurisprudence relating to a

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174 *See* Trump v. Mazars, 140 S. Ct. 2019, 2035–36 (2020).

175 *Id.* at 2033–35.

176 *See, e.g.*, Bopp et al., *supra* note 162, at 4 ("[W]hether and in what circumstances Congress can sue to vindicate its constitutional powers in light of the Supreme Court's decision in *Raines v. Byrd* [521 U.S. 811 (1997)] is just one of the open questions that courts have had to address in the disputes between the Trump Administration and congressional committees.").

177 Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 522 (D.C. Cir. 2020).

178 Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).

179 Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020). The second panel decision was also divided.

180 Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021).

181 44 U.S.C. §§ 2201–09.

congressional committee's authority to enforce its subpoena or otherwise secure access to executive information.

In *Trump v. Mazars USA*, then-President Trump, his children, and certain related business entities brought suit to prevent certain entities with whom the Trumps had business relationships from turning over their accounting and banking records in compliance with certain congressional subpoenas.[182] In an opinion by Chief Justice Roberts, the Court observed that "disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy."[183] The Court further noted that the political branches had always resolved such disputes through "negotiation and compromise—without the involvement of this Court—until the present dispute."[184] The question for decision was what showing the House committees needed to meet to justify subpoenas that called for the President's private business records. For his part, the President argued that the House had no valid legislative purpose and was seeking the records "to harass

[182] 140 S. Ct. 2019, 2026 (2020). Three House committees issued the relevant subpoenas, which overlapped as to the information they requested: the House Committee on Financial Services issued subpoenas to Deutsche Bank and Capitol One; the Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank; and the House Committee on Oversight and Reform issued a subpoena to Mazars. *Id.* at 2027. President Trump challenged the Oversight Committee's subpoena in the United States District Court for the District of Columbia; he contested the remaining subpoenas in the United States District Court for the Southern District of New York. *Id*. at 2028. The District Court for the District of Columbia "granted judgment for the House," and the court of appeals affirmed with one judge dissenting. *Id.* The dissenting judge thought that the House was investigating the President's wrongdoing, and that it was required to do that under its impeachment power, rather than its legislative power. *Id.* The Southern District of New York "denied a preliminary injunction, and the Second Circuit affirmed in substantial part," with one judge dissenting on the ground that he did not see "why a congressional investigation aimed generally at closing regulatory loopholes in the banking system [would] need [to] focus on over a decade of [the President's] financial information." *Id*. at 2028–29 (internal quotation marks and citations omitted).

[183] *Id*. at 2031.

[184] *Id*. Although it had not previously addressed the validity of a congressional subpoena for a sitting President's information, the Court noted that it had upheld a subpoena addressed to a sitting President in a federal criminal proceeding, as well as the efforts of a federal prosecutor to "obtain information from a [sitting] President despite assertions of executive privilege," and a private litigant's right to sue a sitting president for damages and take appropriate discovery in federal court. *Id*. at 2026. "This case [was] different," however, by virtue of the parties' constitutional relationship:

> Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the president—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity.

*Id*. The parties agreed that the case was justiciable. *Id*. at 2031. Clearly, it involved the vindication of a private right. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63, 170 (1803) (discussing justiciability of claims for violations of private rights).

him, expose personal matters, and conduct law enforcement activities beyond its authority."[185] He also argued that the subpoenas "violated the separation of powers," but he did not invoke executive privilege with respect to any of the records.[186] He further argued that because the subpoena sought records belonging to the President (albeit private business records), "the usual rules for [assessing the validity of] congressional subpoenas do not govern," and that the House should instead be required to show "a demonstrated, specific need," just as if the records were official documents protected by executive privilege.[187] For its part, the House attributed no legal significance to the fact that the subpoenaed records belonged to the President. Because the records were private business records, the House argued, it needed to show only that "its subpoenas . . . relate[] to a valid legislative purpose or concern[] a subject on which legislation could be had."[188]

The Supreme Court rejected both of the proffered tests.[189] The fact that the records were private business records was relevant, but so too was the fact that they belonged to a sitting President.[190] The Court emphasized that "the House's approach aggravate[d] [separation of powers concerns] by leaving essentially no limits on the congressional power to subpoena the President's personal records," thereby allowing "Congress [to] 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared."[191] The Court further observed that "[w]e would have to be 'blind' not to see . . . that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved."[192] Further, the Court stated that "[t]he interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal

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185 *Mazars*, 140 S. Ct. at 2026.

186 *Id.* at 2028.

187 *Id.* at 2032 (internal quotation marks omitted). According to the Court, applying the demanding standard applicable to privileged, official documents to the President's private papers "would risk seriously impeding Congress in carrying out its responsibilities." *Id.* at 2033.

188 *Id.* (first alteration added) (internal quotation marks omitted).

189 *Id.* at 2024. The President and the Solicitor General argued that Congress should be held to the standard applicable to presidential assertions of executive privilege—that is, a showing of "demonstrated, specific need" for the requested information. *Id.* at 2032. The Court rejected that test on the ground that applying that standard outside the context of privileged information "would risk seriously impeding Congress in carrying out its responsibilities." *Id.* at 2024. The Court likewise rejected the House's argument that the President should not be treated differently from any other citizen where personal papers were involved. *Id.* at 2033.

190 *See id.* at 2034.

191 *Id.* (quoting THE FEDERALIST NO. 71 (Alexander Hamilton)).

192 *Id.* (citations omitted).

capacity," noting that "[t]he President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs."[193]

On the other hand, the President's argument that his private business records should be afforded the same protection as official documents protected by executive privilege gave insufficient effect to Congress's legitimate interests.[194] The Court therefore concluded that:

> [I]n assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President.[195]

In such circumstances, the Court explained, the courts must (a) "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; (b) "insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective"; (c) "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose"; and (d) "be careful to assess the burdens imposed on the President by a subpoena."[196] In other words, the Court required a far more intrusive judicial inquiry into the validity of a congressional subpoena than would normally be the case.

As previously noted, the Speech or Debate Clause generally prevents a party from seeking an injunction against a congressional committee, but the Presidential Records Act of 1978[197] grants certain immediately enforceable rights to sitting and former Presidents. Thus, in *Trump v. Thompson*, the House

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193 *Id*. (citations omitted).

194 *Id.* at 2032–33.

195 *Id*. at 2035 (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

196 *Id*. at 2035–36; *see also* Bopp et al., *supra* note 162, at 43–48 (discussing consequences of *Mazars* for congressional investigations). Justice Thomas dissented, stating that "Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power." *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting); *see also id.* at 2047 ("[T]he power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands."). Justice Alito also dissented. *Id.* at 2048 (Alito, J., dissenting). Assuming that such subpoenas were not categorically barred, he would have imposed a more demanding standard. *Id*. at 2048–49.

197 44 U.S.C. §§ 2201–2209.

Select Committee investigating the January 6, 2021 attack on the Capitol requested that the National Archives expeditiously transmit to the committee certain presidential records relating to the attack.[198] After President Biden declined to assert executive privilege over some of the requested records, the former President sought to enjoin the committee and the Archives from proceeding.[199] The Act prohibited the Archives from disclosing a former President's records, against his wishes, without a court order, so there was "no question" of the former President's right to press his case.[200] The district court declined to grant the injunction, and the former President appealed.[201] On appeal, the District of Columbia Circuit framed the question presented as:

> [W]hether, despite the exceptional and imperative circumstances underlying the Committee's request and President Biden's decision, a federal court can, at the former President's behest, override President Biden's decision not to invoke privilege and prevent his release to Congress of documents in his possession that he deems to be needed for a critical legislative inquiry.[202]

The court of appeals specifically found that the former President had failed to establish that the records were privileged "[u]nder any of the tests [he] advocated,"[203] and, therefore, he was not entitled to block disclosure of the records to the House Select Committee.[204] The court said that "[f]ormer President Trump has given this court no legal reason to cast aside President Biden's assessment of the Executive Branch interests at stake, or to create a separation of powers conflict that the Political Branches have avoided."[205] The former President subsequently sought a stay and injunction pending further review, but the Supreme Court denied that relief.[206]

These cases demonstrate the avenues that may be available to the President (and possibly other executive branch officials) to challenge a congressional committee's right to investigate. But what about the ability of Congress to

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198 20 F.4th 10, 16 (D.C. Cir. 2021), *stay and injunction pending appeal denied*, 142 S. Ct. 680 (2022) (mem.).

199 *Id.*

200 *Id.* at 32.

201 *Id.* at 23.

202 *Id.* at 16.

203 *Id.* at 33. The court also declined to review the records in camera, given the former President's failure to put forth any basis to support his claim of privilege. *Id.* at 40 ("He cannot stand silent and leave it to the court to come up with arguments for him.").

204 *Id.* at 48.

205 *Id.* at 49.

206 Trump v. Thompson, 142 S. Ct. 680, 680 (2022) (mem.).

enforce its subpoenas? Are the rights of a congressional committee and those of an executive official reciprocal when it comes to judicial enforcement of congressional subpoenas?

In 1986, OLC identified three possible ways in which Congress might seek to enforce a subpoena directed to an executive branch official.[207] Assistant Attorney General Charles Cooper wrote:

> The House would have three alternatives available to enforce the subpoena: (1) referral to the United States Attorney for prosecution under 2 U.S.C. §§ 192–194; (2) arrest by the Sergeant-at-Arms; or (3) a civil suit seeking declaratory enforcement of the subpoena. The first two of these alternatives may well be foreclosed by advice previously rendered by this Office.[208]

The first alternative is not viable because, although section 192 contains seemingly mandatory language (requiring the United States Attorney to commence a prosecution when requested by Congress), the principle of separation of powers prevents Congress from compelling that action.[209] In addition, the Assistant Attorney General noted that OLC had concluded in a 1984 opinion that "Congress could not, as a matter of statutory or constitutional law, invoke [these provisions] against the head of an Executive Branch agency" who had asserted executive privilege at the direction of the President.[210] With respect to the second alternative, the Assistant Attorney General noted that the Supreme Court had previously upheld Congress's "inherent constitutional authority to" arrest and detain individuals for contempt, but that the power had not been exercised in fifty years, and that OLC had opined in the 1984 opinion that

> the reach of the criminal contempt statute was intended to be coextensive with Congress' inherent civil contempt power (except with respect [to the scope of the] penalties imposed), and concluded

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[207] Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 83 (1986) [hereinafter OLC Opinion].

[208] *Id.*

[209] *Id.* at 83–85. Cooper noted that Congress had invoked these provisions only once, and that the United States Attorney, "whose [statutory] duty it [was] to bring the matter before the Grand Jury," had "declined to refer the contempt citation to the grand jury, pending resolution of a lawsuit filed by the Executive Branch to block enforcement of the subpoena and completion of negotiations between the executive and legislative branches to reach a compromise settlement." *Id.* at 84 (footnote omitted) (quoting 2 U.S.C. § 194). The district court dismissed the government's lawsuit, *see United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983), and the parties eventually reached an agreement. OLC Opinion, *supra* note 207, at 84 n.28.

[210] OLC Opinion, *supra* note 207, at 85.

> that "the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well."[211]

That left only the third alternative. While acknowledging that no statute expressly granted jurisdiction to the federal courts over such suits, the Assistant Attorney General thought that "[t]he most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoena."[212] After reviewing the arguably relevant jurisprudence, he stated: "Thus, although the civil enforcement route has not been tried by the House, it would appear to be a viable option."[213] Finally, the Assistant Attorney General observed in a footnote:

> Any notion that the courts may not or should not review such disputes is dispelled by *United States v. Nixon*, in which the Court clearly asserted its role as ultimate arbiter of executive privilege questions. The need for judicial review in fact was emphasized by this Department in the *United States v. House of Representatives* litigation as a basis for the court to entertain the suit. The Department argued that, in some circumstances, only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of government operations.[214]

If the House cannot bring a civil action to enforce its subpoenas against "recalcitrant executive branch officials," its only remedy will be political—invoking potentially unrelated negative powers such as the disapproval of budget requests.[215] In recent years, the executive branch has become progressively more aggressive in refusing to honor congressional subpoenas, a trend that culminated in President Trump's declaration that his top officials would categorically disregard House subpoenas.[216] As one journalist wrote in

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[211] *Id.* at 86 (quoting Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 140 n.42 (1984)).

[212] *Id.* at 87.

[213] *Id.* at 88.

[214] *Id.* at 88 n.33 (citation omitted).

[215] *See, e.g.*, Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 134 (1996) ("Congress' success [in securing executive compliance] is often a byproduct of the numerous weapons in its arsenal that can be used to punish recalcitrant executive branch officials. Congress, among other things, may publicly embarrass executive branch officials, hold up confirmation hearings of presidential nominees, and enact legislation that restricts agency operations."). Of course, the House has no role in confirming executive branch officials and the enactment of legislation requires a supermajority of both Houses, assuming that the President is prepared to exercise the presidential veto power. In addition, the threat of embarrassment may be less potent today than it was in less polarized periods.

[216] *See, e.g.*, Rachael Bade & Carol D. Leonnig, *White House Instructs Hope Hicks, Former McGahn Aide Not to Comply with Congressional Subpoenas*, WASH. POST (June 4, 2019, 8:06 PM), https://www.washingtonpost.com/politics/white-house-instructs-hope-hicks-former-mcgahn-aide-not-to-

the Trump administration's final year, "Congress has never faced this kind of all-encompassing opposition to administrative oversight."[217] At the same time, new doubts have been raised about the availability of Assistant Attorney General Cooper's third alternative—judicial enforcement of House subpoenas, at least in the absence of specific legislative authority. The basis for those doubts was made clear in a series of District of Columbia Circuit opinions concerning a subpoena directed to former White House Counsel Donald F. McGahn in furtherance of an investigation into President Trump's possible obstruction of the Mueller investigation.[218]

The scene was set for the McGahn litigation in April 2019, when the House Judiciary Committee issued a subpoena calling for McGahn's testimony and the production of documents.[219] Pursuant to an OLC opinion, stating "that certain presidential aides, including McGahn, are 'absolutely immune from compelled congressional testimony,'" President Trump instructed McGahn not to comply with the subpoena.[220] An agreement was eventually reached with respect to the requested documents, but not as to McGahn's testimony.[221] The Committee

comply-with-congressional-subpoenas/2019/06/04/3bad7c44-8626-11e9-98c1-e945ae5db8fb_story.html; Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html; Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests*, POLITICO (June 2, 2017, 5:11 AM), https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034. The former President has similarly instructed former administration officials not to cooperate with the House Select Committee's investigation into the storming of the U.S. Capitol on January 6, 2021. *See, e.g.*, Jacqueline Alamany, Josh Dawsey & Amy B. Wang, *Trump Lawyer Tells Former Aides Not to Cooperate with Jan. 6 Committee*, WASH. POST (Oct. 7, 2021, 4:18 PM), https://www.washingtonpost.com/politics/2021/10/07/trump-lawyer-tells-former-aides-not-cooperate-with-jan-6-committee/.

[217] Griffin Connolly, *Democrats Learning Their Subpoenas Are Only as Powerful as Trump Allows*, ROLL CALL (May 2, 2019, 5:00 AM), https://rollcall.com/2019/05/02/democrats-learning-their-subpoenas-are-only-as-powerful-as-trump-allows/. Connolly noted that "[t]he executive branch, theoretically, has things it needs from the legislative branch—money to carry out its functions and confirmation of . . . appointees, to name a few—and thus has a vested interest in maintaining a cooperative relationship." *Id.* "But," he added, "the theoretical world is a far cry from the one we live in now." *Id.*

[218] *See supra* notes 177–80 and accompanying text; *see also* Tim Mak, *House Judiciary Launches Probe of Allegations of Obstruction by President Trump*, NPR (Mar. 4, 2019, 11:31 AM), https://www.npr.org/2019/03/04/699976689/house-judiciary-launches-probe-of-allegations-of-obstruction-by-president-trump; Sarah N. Lynch & Andy Sullivan, *In Unflattering Detail, Mueller Report Reveals Trump Actions to Impede Inquiry*, REUTERS (Apr. 18, 2019, 1:04 AM), https://www.reuters.com/article/us-usa-trump-russia/in-unflattering-detail-mueller-report-reveals-trump-actions-to-impede-inquiry-idUSKCN1RU0DN.

[219] *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, 951 F.3d 510, 514 (D.C. Cir. 2020).

[220] *Id.* (internal citation omitted).

[221] *Id.*

thereafter filed a civil action seeking to compel McGahn's appearance.[222] McGahn objected to the court's jurisdiction and further argued that the case was not justiciable, the committee lacked constitutional standing, and the Committee had no cause of action—the district court rejected each of those arguments.[223] The district court also rejected McGahn's claim of absolute testimonial immunity.[224] Once McGahn complied with the subpoena, the court said he could "assert 'any legally applicable privilege in response to the questions asked of [him].'"[225]

A divided panel of the District of Columbia Circuit reversed the judgment of the district court.[226] The majority (Judges Griffith and Henderson) did not reach the absolute testimonial immunity issue, but held that the case should be dismissed because the committee lacked standing to sue.[227] The court subsequently granted a petition for rehearing en banc, limited to the question of "whether the Committee . . . has standing under Article III . . . to seek judicial enforcement of its duly issued subpoena."[228] In an opinion by Judge Rogers, the en banc court answered the question in the affirmative,[229] rejecting the panel's contrary reasoning and remanding the case to the original hearing panel.[230] Judge Rogers emphasized in her opinion that:

> The Constitution charges Congress with certain responsibilities, including to legislate, to conduct oversight of the federal government, and, when necessary, to impeach and remove a President or other Executive Branch official from office. Possession of relevant information is an essential precondition to the effective discharge of all of those duties. . . .
>
> The Committee, acting on behalf of the full House of Representatives, has shown that it suffers a concrete and particularized injury when denied the opportunity to obtain information necessary to the

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222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.* at 514–15 (internal citation omitted).

226 *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020).

227 *McGahn*, 951 F.3d at 513, 530–31.

228 *McGahn*, 968 F.3d at 760. Judge Rogers, the dissenting panel member, wrote the majority opinion for the en banc court. *Id.*; *McGahn*, 951 F.3d at 542 (Rogers, J., dissenting). Chief Judge Srinivasan and Judges Tatel, Garland, Millett, Pillard, and Wilkins joined her opinion. *McGahn*, 968 F.3d at 760. Judges Henderson and Griffith, who constituted the panel majority, filed dissents. *Id.*; *McGahn*, 951 F.3d at 513. Judges Katsas and Rao did not participate. *McGahn*, 968 F.3d at 760.

229 *McGahn*, 968 F.3d at 760.

230 *Id.* at 778.

> legislative, oversight, and impeachment functions of the House, and that its injury would be redressed by the order it seeks from the court. The separation of powers and historical practice objections presented here require no different result. Indeed, the ordinary and effective functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information, and constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary.[231]

Quoting the Supreme Court's decision in *McGrain v. Daugherty*, the court observed that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[232] The court further noted that, "[w]ithout the power to investigate—including . . . the authority to compel testimony . . . —Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."[233] Here, "[b]y refusing to testify in response to the Committee's concededly valid subpoena, McGahn has denied the Committee something to which it alleges it is entitled by law."[234] Such an injury is "a quintessential injury in fact."[235]

The court acknowledged that many disputes between Congress and the executive are compromised, but pointed out that the possibility of compromise logically depends on Congress's legal right to sue for enforcement of its subpoenas.[236] "For more than forty years this circuit has held that a House of Congress has standing to pursue a subpoena enforcement lawsuit in federal court," and the political branches "have long operated under [that] assumption."[237] If the House lacked standing, the Executive would have little incentive to compromise: "Presidents could direct widescale non-compliance with lawful inquiries," as President Trump did here, and "[t]raditional congressional oversight . . . would be replaced by a system of voluntary Presidential disclosures, potentially limiting Congress to learning only what the President wants it to learn."[238] Responding to the dissenters' point that requests for judicial enforcement of congressional subpoenas were a relatively new and infrequent phenomenon, the court noted that the absence of such litigation in the

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231 *Id.* at 760–61.
232 *Id.* at 764 (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)).
233 *Id.* (quoting Quinn v. United States, 349 U.S. 155, 160–61 (1955)).
234 *Id.* at 765.
235 *Id.* at 766 (citing Shays v. FEC, 528 F.3d 914, 923 (D.C. Cir. 2008)).
236 *Id.* at 771.
237 *Id.*
238 *Id.*

past might be attributable to the fact that the executive had not categorically resisted congressional subpoenas as President Trump had done.[239] The dissenters' principal argument rested on the separation of powers,[240] but Judge Griffith also disagreed with the majority on the pragmatic ground that federal courts cannot act with the alacrity necessary for affording an effective remedy in this type of case, a point he thought confirmed by the fact that "Congress has *never* successfully obtained information from an executive-branch official in a lawsuit."[241]

On remand, the original hearing panel addressed the question of whether the committee had a cause of action.[242] On that issue, the court split along the same lines as it had with respect to the standing issue. Writing for the majority, Judge Griffith held that the committee did not have an implied cause of action under Article I to seek enforcement of its subpoena.[243] He also rejected the Committee's argument that, even in the absence of such a cause of action, relief could be granted under the court's "traditional equitable powers" or the Declaratory Judgment Act.[244] The court therefore dismissed the case, noting that, "even though the Committee has the Article III standing necessary to 'get[] [it] through the courthouse door, [that] does not keep [it] there.'"[245] Judge Rogers again dissented.[246] She would have held that the committee had an implied cause of action under Article I and a cause of action under the Declaratory Judgment Act.[247] On the merits, Judge Rogers would have rejected

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[239] *Id.* at 777–78.

[240] *Id.* at 782 (Griffith, J., dissenting).

[241] *Id.* at 792. Delay is especially problematic for the House, which is not a continuing body and expires every two years. It is also the case that House Rule II.8(c) permits a committee to continue with litigation commenced by its predecessor, but that will happen only if the same political party controls the House in the new Congress. *See, e.g.*, Trump v. Mazars, 39 F.4th 774, 786 (D.C. Cir. 2022); *see also* TODD GARVEY, CONG. RSCH. SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 6–12 (Mar. 27, 2019) (discussing cases), https://crsreports.congress.gov/product/pdf/R/R45653.

[242] Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020).

[243] *Id.* Among other things, the majority relied on the fact that Congress has provided such a cause of action for the Senate, but not for the House. *Id.* The provision relating to the Senate grants jurisdiction to the United States District Court for the District of Columbia "over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce . . . any subpoena." 28 U.S.C. § 1365(a). However, even that statute provides that jurisdiction "shall not apply" to any case in which an executive official acting in their official capacity has asserted a "governmental privilege." *Id.* Section 1365 was enacted in response to issues raised at the time of Watergate. *See* Todd B. Tatelman, *Congress's Contempt Power: Three Mechanisms for Enforcing Subpoenas*, 25 GOV'T INFO. Q. 592, 608 (2008).

[244] *McGahn*, 973 F.3d at 123–24 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017)).

[245] *Id.* at 124–25 (alterations in original) (quoting Make the Road N.Y. v. Wolf, 962 F.3d 612, 631 (D.C. Cir. 2020)).

[246] *Id.* at 126 (Rogers, J., dissenting).

[247] *See id.* at 127.

McGahn's claim to absolute testimonial immunity.[248] The District of Columbia Circuit again granted en banc review, but the parties compromised before the en banc court ruled, and the judgment was therefore vacated.[249]

McGahn's case ultimately ended without a definitive ruling,[250] but the litigation shows that the District of Columbia Circuit is deeply divided on the standing and cause of action questions. Some of the judges clearly would not credit OLC's 1986 opinion on the viability of the civil enforcement remedy.[251] Nor does it seem improbable that some of the Justices of the Supreme Court would agree with Judges Griffith and Henderson, at least in the absence of an explicit grant of statutory authority. While Congress obviously cannot negate any constitutional grounds for denying the House's right to judicial enforcement of its subpoenas, it could provide a clearer legal basis for doing so. It would be desirable, therefore, for Congress to enact remedial legislation along the lines of H.R. 6079, which Members Madeleine Dean, Jerry Nadler, and Adam Schiff introduced in November 2021, following the second panel decision in *McGahn*.[252] H.R. 6079 purports to confirm that "the Constitution secures to each House of Congress an inherent right to enforce its subpoenas in court," while providing a mechanism for enforcing that "inherent right."[253]

H.R. 6079 includes a specific finding that "[e]xplicit statutory authorization is not required to secure a right of action [to the House], and [that] the contrary holding . . . in [*McGahn*], entered on August 31, 2020, was in error."[254] The bill further provides that a case may be brought in any federal district court of competent jurisdiction; that the case may be heard by a three-judge district court, with a direct appeal to the Supreme Court, if the plaintiff expressly requests a

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[248] *Id.* at 131–32.

[249] *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, No. 19-5331, 2021 U.S. App. LEXIS 20759, at *1 (D.C. Cir. July 13, 2021) (per curiam); *see also* Andrew Wright, David Rybicki & Nancy Iheanacho, *House Subpoena Power Wins in McGahn Case, with Caveats*, LAW360 (Aug. 6, 2021, 3:37 PM), https://www.law360.com/articles/1410305/house-subpoena-power-wins-in-mcgahn-case-with-caveats.

[250] One might be tempted to conclude that the en banc court implicitly acknowledged the existence of a cause of action in its jurisdictional ruling, but the court was careful throughout the litigation to separate the two issues. *See, e.g.*, Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020).

[251] Comm. on Judiciary of U.S. House of Representatives v. McGahn, 951 F.3d 510, 531 (D.C. Cir. 2020); *McGahn*, 973 F.3d at 123. The number of judges who would disagree with the OLC opinion may actually be greater than the number of dissenters because two recently appointed judges did not participate. *See McGahn*, 968 F.3d at 760.

[252] H.R. 6079, 117th Cong. § 2(2) (2021).

[253] *Id.* § 2(3).

[254] *Id.*

three-judge court in the initial pleading; and that the case must be expedited "to the greatest possible extent."[255] The bill contains further details concerning the handling of such actions and calls for the promulgation of appropriate rules of procedure.[256] It also provides for the assessment of monetary penalties against certain officials who knowingly fail to comply with any part of a congressional subpoena, unless the President has so instructed.[257] If enacted, the bill would effectively repudiate the vacated panel decision in *McGahn* and permit the courts to consider any possible constitutional issue.

## CONCLUSION

No government can function entirely in the round, but a democratic society cannot function as it should unless the people—as well as their representatives—have access to all the information that safely can be shared. As Justice Stephen Breyer has written, "[t]he United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also freedom to participate in the government itself."[258] In other words, citizens are entitled to be treated fairly by their government, but they are also entitled to participate actively in its affairs. In our form of constitutional government, citizens are not meant only to "obey law and perhaps, in periodic elections, . . . confirm the choice of leaders whose election gives them the power to enact into law whatever policies they see fit."[259] Our form of government requires that citizens be active citizens, who do not sleep soundly between elections, stirring only at prescribed intervals to confirm candidates chosen by one party or another. They are meant to contribute to public discussion and constantly audit the performance of their representatives. As General George Marshall observed, "democracy is the most demanding of all forms of Government in terms of the

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255 *Id.* § 3.

256 *Id.*

257 *See id.*

258 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3 (2005).

259 ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 149 (1995) (describing Max Weber's understanding of bureaucratic citizenship). Paul Wilson has contrasted Václav Havel's view of citizenship with that of his rival, Václav Klaus:

> Freedom, in Klaus's view, was something bestowed upon the people by their governors and guaranteed by their elected representatives. Citizenship meant voting once every four years and then leaving civic and economic matters for government and the marketplace to sort out. It was a view that to many, including Havel, seemed suspiciously like the old centrist regime dressed up in new, market-minded, quasi-populist rhetoric.

Paul Wilson, *Václav Havel (1936-2011)*, N.Y. REV. BOOKS (Feb. 9, 2012), https://www.nybooks.com/articles/2012/02/09/vaclav-havel-1936-2011/.

energy, imagination and public spirit required of the individual."[260] Democratic citizens must have access to information. Contrary to the views expressed by Justice Scalia in his 1982 article,[261] therefore, it is not enough that legislators should have access to executive information. Clearly, our legislators have a special need for information, but that does not mean that the rest of us have none. Moreover, the Executive has often frustrated Congress's efforts to secure information, just as it has frustrated the efforts of the public and the press. If representative democracy is to work as it should, we cannot afford to choose between securing information for the legislative branch or securing it for ordinary citizens. Both are required, and both require improvement.

[260] 6 GEORGE C. MARSHALL, THE PAPERS OF GEORGE CATLETT MARSHALL 195 (Larry I. Bland & Mark A. Stoler eds., 2013) (NBC radio address Aug. 15, 1947).

[261] *See* Scalia, *supra* note 44, at 17, 19.