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ORIGINAL ARTICLE

To preserve, release, and litigate: Dimensions of executive branch transparency

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Abstract

Transparency is essential for public awareness of government activity and in holding officials accountable for their behavior and decisions. However, executives understandably have a desire to maintain autonomy over the flow of information outside of the executive branch, which can sometimes lead to a clash between government openness and executive control over information. This article investigates executive branch transparency along two specific dimensions: threats to the preservation of government information, and the judicial monitoring of executive branch transparency. Federal law directs executive branch actors to preserve government information. Statutes and regulations detail governing policies as well as guidelines that apply to every presidential administration. However, we consider each rule and recommendation through the lens of the Trump administration to gain greater clarity and precision. The Trump administration proves a useful focus for our empirical analysis because of its recency as well as multiple reports of its improper handling and preservation of records. We lay out and develop a typology of threats to record preservation. Preservation conflicts have emerged across multiple presidential administrations and have become increasingly common and visible. Judicial monitoring of executive branch transparency has become a crucial tool to address the withholding of records. We show that federal judges can play a vital role in defining the boundaries of government transparency through their decisions in Freedom of Information Act (FOIA) litigation. The U.S. Department of Justice oversees and often leads the government's defense against FOIA actions. We find that federal judges are most likely to require executive branch responsiveness and disclosure when the judges' underlying policy preferences are most distant from that of the administration. Our findings should inform reforms to protect government transparency.

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executive authority, judicial decision making, transparency, U.S. Department of Justice

INTRODUCTION

The Trump campaign and presidency were marked by multiple controversies centered on transparency or the lack thereof. Prior to his election, then-candidate Donald Trump broke with presidential campaign norms by refusing to release his tax returns. Attempts by Democratic-controlled House committees and Democratic New York state officials to access President Trump's tax records were contested by Trump at every stage. The resulting court battles lasted throughout his presidency and eventually reached the U.S. Supreme Court.[1] The Trump White House also broke with the Obama administration's practice of releasing White House visitor logs, removing from public view the record of who visited the White House and when (Kennedy, 2017). At the same time, Freedom of Information Act (FOIA) complaints and conflicts reached a record high, with greater delays faced by requesters, increased withholding of records, and suggestions of political appointee interference in the release of requested records (Green, 2019; Mehta, 2018).

Transparency conflicts continued well after the end of the Trump presidency. Trump sued the National Archives to prevent the agency from releasing documents to the January 6th Committee, which scrutinized the attack on the Capitol by the former president's supporters (Kim, 2021). Trump claimed executive privilege protected the documents from disclosure. The federal trial and appeals courts in DC disagreed (Savage, 2022). With a lone dissent by Justice Clarence Thomas, the U.S. Supreme Court refused to intervene and allowed the release of the contested documents to the January 6th Committee.[2] President Trump and administration officials also removed multiple boxes of classified, confidential, and top secret documents upon leaving the White House, prompting an investigation by the Department of Justice (DOJ) into the legality of the removal (Haberman et al., 2022).

Each of the above examples raises a slightly different concern related to transparency, thus illustrating the complexity of the concept (Ball, 2009; Fenster, 2006). The issue of Trump's taxes created questions of whether the then-presidential candidate was being honest about his wealth and, more substantially, whether the financial documents would reveal evidence of legal impropriety. The lack of visibility for the White House logs meant that less information was readily available regarding who had access to the nation's top executive officials. The multitude of FOIA controversies raised concerns that the Trump administration had taken a hostile posture toward the implementation of the central federal legislative vehicle for public access to federal records. And the improper removal of classified documents, including those posing national security risks, from government oversight presented a potential violation of multiple federal laws that could result in the prosecution of former president Trump.

This article investigates conflicts and controversies involving executive branch transparency during the Trump administration, and beyond, along two specific dimensions: an accounting of events through the preservation of government information, and the judicial monitoring of executive branch transparency. Importantly, concerns of insufficient government openness and political interference into access to government information transcend a single presidential administration and plague executive officials in the state, federal, and international context. The Trump administration is not the first administration to face criticism over its transparency practices (Arnold, 2014; Baron, 2019; Johnson, 2021a; Rozell, 1999; Rozell & Epstein, 2015; Selin & Milazzo, 2021; Wagner, 2019). However, the spotlight shone substantially brighter on transparency concerns given President Trump's unconventional presidential campaign, his presidential scandals, and his willingness to eschew presidential norms.

[1] *Trump v. Mazars USA, LLP* 591 U.S. ___ (2020) and *Trump v. Vance* 591 U.S. ___ (2020).
[2] *Trump v. Thompson* 595 U.S. ___ (2022).

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Many accountability mechanisms, such as congressional oversight practices, federal investigations, and even public opinion toward executive branch policy, require information gleaned through routinized government transparency practices. Acting as a key democratic check, transparency facilitates the awareness and assessment of information needed to detect and restrain overreaches of political power.

We proceed as follows: first, we examine conflicts surrounding the creation and conservation of government information, outlining the category of threats and risks to a comprehensive record of events, and explaining that not all incidents of record loss are intentional. Federal law dictates how, when, and why the government must preserve information (Wagner, 2019). Transparency advocates argue, however, that these policies lack the necessary enforcement tools, necessitating congressional intervention.

Second, we discuss recommendations for reform of the Presidential Records Act (PRA), modeled after reporting requirements of the Federal Records Act (FRA). While reports that President Trump tore up (and even flushed) papers might seem to cast doubt on the power of the PRA, administration officials' and civil servants' persistent efforts to constrain and correct Trump's actions speak to the ability of the PRA to engender expectations of protecting those documents. Importantly, using National Archives data on record disposition, we show that most instances of formally *reported* improper record destruction do not necessarily involve intentional obfuscation of record preservation. But a lack of consequences against those who "willfully" destroy government records, particularly given the high-profile examples during the Trump administration, could reduce incentives for compliance with transparency policies in future administrations.

Third, we examine the role of the courts to define and enforce transparency. As seen in the January 6th Committee record request dispute, federal judges authorized the release of records even when those judges (and justices) were appointed by the very president challenging the disclosure. Importantly, when conflicts over government openness arise, federal district courts frequently determine whether the executive branch has lawfully withheld requested information. The mere prospect of federal trial court intervention can also serve an important disciplining effect on government officials who wish to avoid the time and cost associated with litigation. We explore this dynamic through an analysis of 2020 DOJ FOIA litigation that specifically involves disputes over records that the DOJ has declined to release to requesters. FOIA disputes are not the only legal conflict over executive branch transparency; however, the relative frequency of FOIA litigation allows for systemic examination of judicial monitoring of government transparency. And FOIA litigation has played a key role in defining legal issues related to agency autonomy and authority outside of the FOIA context. Over time, FOIA requests and litigation toward the DOJ has generally increased. And we find that federal judges are most likely to require executive branch responsiveness and disclosure when the judges' underlying policy preferences are most distant from that of the administration.

Finally, we explain that in addition to the legal dynamics of records disputes, the political characteristics of the agency withholding requested information, in this instance the DOJ, will affect whether district judges defer to agency autonomy to withhold government information.

A RECORD OF EVENTS

One basic presupposition of conflicts over information is that the records central to the dispute exist and are readily available. President Trump and administration subordinates, however, were repeatedly accused of improper handling and preservation of government documents (Cortez, 2019), potentially in violation of several federal laws including the PRA and the FRA.

PRA

Congress passed the PRA in 1978 in response to President Richard Nixon's attempt to restrict access to documents related to his tenure in office and the Watergate break-in scandal orchestrated by his

presidential reelection campaign (Montgomery, 2002, 2003; Wiles, 2020). Before the passage of the PRA, presidential documents were considered to be under the ownership of an individual president, and presidents would sometimes donate papers to libraries, gift them, or destroy them (Kumar, 2002; Montgomery, 2003).[3] However, the PRA dictated that presidential records created on or after January 20, 1981, are the property of the United States. Additionally, presidents are required to manage and preserve records "produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President."[4] The definition of presidential records outlines a broad category of media including documents, files, documentary material, art, maps, and recordings.[5] Recognizing the rise of digital communication, Congress and the president would later amend the PRA in 2014 to explicitly require the president, and others falling under the domain of the PRA, to forward governmental communication taking place on nongovernmental electronic media to official government accounts.[6]

The PRA dictates that no sooner than 5 years after the end of a presidential administration, documents are eligible for release to the public under the FOIA, subject to withholding under FOIA exemptions, with the exception of Exemption 5.[7] However, outgoing presidents are able to restrict public access for certain categories of documents to the public for a period up to 12 years.[8] After the 12-year period, the Archivist must notify the former and incumbent president if the Archivist intends to release requested records to provide an opportunity for presidential review of the materials slated for release.[9] Either the incumbent or former president (or both) can raise a claim of executive privilege to prevent the release of the requested information. The claim of privilege is then reviewed by the Attorney General, presidential counsel, and the Archivist (when a former president makes a claim of privilege) to determine whether the claim of privilege will hold. Importantly, as seen in the litigation involving the release of Trump administration presidential records to the January 6th Committee immediately at the end of Trump's presidency, presidential records can be subject to release by request of courts or Congress prior to these time restrictions.[10]

Despite the pronouncements of the PRA, multiple media outlets reported that President Trump would routinely destroy government documents by physically shredding or hiding them (Karni, 2018; Parker et al., 2022; Wiles, 2020). Career employees also reported spending substantial time and effort to tape and piece shredded documents together to remain in compliance with the PRA (Karni, 2018). President Trump's destructive handling of documents was effectively confirmed when it was reported that a number of documents reviewed by the January 6th Committee were taped together (Parker et al., 2022). In addition to the physical destruction of documents, the National Archives and Records Administration (NARA) noted in the course of the investigation of the physical removal of classified documents that social media records from the Trump administration were incomplete, as well as a lack of preservation of government communication conducted through nongovernment channels.[11] And perhaps most salient of the various post–Trump administration transparency controversies, the National Archives requested that the DOJ investigate the removal of approximately 15 boxes of classified records, which ultimately resulted in a DOJ raid of President Trump's Mar-a-Lago residence (Haberman et al., 2022). The DOJ

[3]In 1974, Congress passed the Presidential Recordings and Materials Preservation Act (44 USC §2107), which applied directly to the Nixon administration and required the preservation of materials and recordings involving Richard Nixon and other federal officials.
[4]44 USC § 2203.
[5]44 USC § 2201.
[6]44 USC § 2209.
[7]FOIA Exemption 5, which allows the government to withhold records under attorney-client privilege and/or attorney work-product privilege, and the deliberative process privilege—a form of executive privilege—would not apply to PRA records requested under FOIA.
[8]44 USC §2204 (a): The categories are like FOIA exemption categories and include records involving trade secrets, national defense, personnel, and medical files that would lead to an invasion of personal privacy.
[9]The currently applicable Executive Order 13489, issued by President Obama, set this period to at least 30 days.
[10]44 USC § 2205.
[11]Letter to U.S. Representative Carolyn Maloney (D-NY), Chairwoman of Committee on Oversight and Reform. February 18, 2022. U.S. Archivist David Ferriero, National Archives & Records Administration. https://www.archives.gov/files/foia/ferriero-response-to-02.09.2022-maloney-letter.02.18.2022.pdf.

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search affidavit for Mar-a-Lago revealed that investigators were particularly interested in documents related to national defense and whether President Trump violated the Espionage Act, along with other laws outlawing the destruction and falsification of federal records.[12]

The Trump administration is not the first presidential administration accused of running afoul of federal records laws, particularly requirements of the PRA. The George W. Bush administration faced criticism of potentially violating the PRA and losing millions of emails that included correspondence involving Bush II White House officials and advisors.[13] The missing emails, which were later recovered during the Obama administration, created obstacles to gleaning information related to a number of ongoing investigations, including the dismissal of U.S. attorneys by then-Attorney General Alberto Gonzales as well as decision making related to the Iraq War invasion (Burleigh, 2016; Hicks, 2014; Stolberg, 2007). Part of the Bush II email controversy involved officials reportedly using a private email server owned by the Republican National Committee, so emails were not archived or saved on government servers/sources.[14] An interim report by the White House Committee revealed that some of the email traffic from Bush II White House officials involved official government business, including "appointments and other personnel matters" (Burleigh, 2016; Hicks, 2014; Stolberg, 2007).

President George W. Bush also faced direct disapproval for his issuance of Executive Order 13233 directed at the PRA, which observers argued expanded the ability, and expectation, of an incumbent president to restrict access to presidential records (Kumar, 2002; Rozell, 1994). Specifically, EO 13233 allowed an incumbent president to withhold access to privileged records from a previous administration over the objections of the former president. It also explains that "absent compelling circumstances," incumbent presidents are to concur with the decisions of former presidents to raise privilege claims over requested documents.[15]

FRA

While the Obama administration faced less PRA-related criticism, Obama political appointees were accused of FRA violations. The FRA of 1950 requires agencies to establish a records management program to ensure the proper preservation of federal records[16] and also protect against the "removal or loss of records."[17] However, numerous Obama administration senior officials in federal agencies were accused of using nongovernment channels of communication, which were not properly preserved as part of the federal record (Martinson, 2012). The most salient instance involved then-Secretary of State Hillary Clinton's use of private email to conduct State Department business (Wagner, 2019). In addition to engaging in improper preservation practices with electronic communication, officials across multiple administrations have also been accused of improperly removing records upon their departure (Johnson, 2021a; Martinson, 2012; U.S. Government Accountability Office, 1991; Wagner, 2019). As with the PRA, the FRA was amended in 2014 to require federal employees to transfer government communications to official government accounts within 20 days.[18] Table 1 provides our categorization

[12]Affidavit in Support of an Application under Rule 41 for a Warrant to Search and Seize. September 26, 2022. https://s3.documentcloud.org/documents/22267243/102-1.pdf.

[13]Letter to Fred F. Fielding, Counsel to the President, White House Office. August 30, 2007. U.S. Representative Henry A. Waxman (D-CA), Chairman on Committee on Oversight and Reform. https://nsarchive2.gwu.edu/news/20070905/index.htm.

[14]Interim Report: Investigation of Possible Presidential Records Act Violations. United States House of Representatives Committee on Oversight and Government Reform Majority Staff. June 2007.

[15]Exec. Order. No. 13233 (November 1, 2001). https://www.govinfo.gov/content/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-eo13233.pdf.

[16]44 USC § 3301 (a)(1)(A): Federal Records are defined as:

> all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

[17]44 USC § 3105.

[18]44 USC § 2911.

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TABLE 1 Threats to development of comprehensive record of information.

Accidental destruction of records	• Exposure to elements (flood, fire, degradation)
	• Deletion during digital migration process
	• Destruction resulting from confusion over disposal guidelines
Accidental transfer/archival of records	• Physical records misplaced during relocation, transport
	• Digital records stored incorrectly
Intentional improper[a] destruction of records	• Purposeful destruction of physical record
	• Deletion of digital record
Intentional improper[a] transfer/archiving of records	• Physical removal of records from government storage
	• Transfer and deletion of digital records from government storage to nongovernment storage
	• Lack of transfer of digital communication from nongovernment storage to government storage
Record falsification	• Distortion or fabrication of information
Lack of capture	• Activity/transaction not documented

[a]"Improper" in this context implies destruction and/or removal outside of recognized legal disposal guidelines and does not include records intentionally disposed of according to federal guidelines.

of the difficulties that can befall accurate information preservation. Statutory penalties for "willfully and unlawfully" concealing, removing, or destroying records include fines, imprisonment for up to 3 years, and disqualification from holding public office.[19]

Understanding the causes and scope of information loss

Many motivations underlie the purposeful destruction and concealment of government records, including attempts to hide illegal or embarrassing behavior, a desire to protect other parties, or a general preference toward greater privacy in communication, which could lead to the destruction or concealment of information considered politically insignificant. As Table 1 shows, however, not all threats to a comprehensive government information profile come from intentional malfeasance. A variety of federal policies and guidelines dictate the proper scheduling for the disposal and transfer of federal records (U.S. Government Accountability Office, 2020). And given the sheer magnitude of records and documents that circulate throughout the Executive Office of the President and the entire federal executive branch, accidental loss of government information can occur as noted in Table 1. Potential causes vary and include unintentional deletion, disposal, confusion over disposal guidelines, or even exposure to the elements. Improper record and information destruction imbued with *ill intent*, however, is antithetical to democratic values of transparency and openness.

The fear of information loss is heightened during transitions between leaders and the transfer of presidential power (Zoffer, 2020). The Secret Service recently came under scrutiny because of missing text messages exchanged between Secret Service officials on January 5th and January 6th, coinciding with the attack on the U.S. Capitol at the end of the Trump presidency (Harwell et al., 2022). Facing heavy

[19]18 USC § 2071.

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congressional criticism, the Secret Service maintained that the loss of records was unintentional and the product of both a coincidental "device-replacement program" as well as the negligent failure of some officials to follow preservation rules (Roche, 2022).

Anecdotal accounts of missing emails, disappearing documents, and private servers are abundant. Understanding the scope of an incomplete record archive, however, is difficult to discern because instances of information loss may frequently go unreported. National Archives data provide insight into the frequency of record loss (or potential loss) with respect to loss *reported* formally under the FRA. Specifically, NARA has *oversight* authority over agency record management under the FRA, and agency officials are required to notify NARA of "any actual, impending, or threatened" unlawful destruction of agency records.[20] This contrasts with its implementation of the PRA, where NARA provides advice and assistance to the EOP "upon request" (Stuessy, 2019, p. 5). Once notified, NARA will contact the agency for further information and will ask the agency to provide information about corrective action that has occurred or will occur to prevent repeated issues. This notification program provides NARA with a degree of "fire alarm" oversight (McCubbins & Schwartz, 1984) with reports of potential record loss coming not only from agencies, but also from litigants, the public, and media. According to publicly provided case records, between January 20, 2017, and January 20, 2021, NARA reported opening 141 cases in response to notifications of "unauthorized disposition of federal records."[21]

Of those 141 cases, 84% (118) were reported as closed as of July 2022. Importantly, a notification can involve a potential incident of unauthorized record disposition that occurred outside of the incumbent administration, with approximately 17% of reported notifications involving prior (or multiple) presidential administrations. As previously noted, NARA responds to notifications from both inside and outside agencies, and examining the cases noted as closed as of July 2022, the majority of notifications (76%) came from within the agencies themselves.[22] NARA was made aware of the other 23% of potential unauthorized dispositions through the public, media sources, and congressional inquiries.[23] Allegations of unauthorized dispositions originating from outside of agencies are "founded" (as compared "unfounded") at lower rates compared to notifications from inside the agencies. Eighty-seven percent of the unauthorized notification dispositions originating within an agency were "founded" compared to 22% of unauthorized disposition notifications emerging from outside agencies.

It is important to note the difference in tenor of the allegations emerging from inside and outside of agencies. Strict classification of FRA notifications into "accidental" versus intentionally "improper" record loss is difficult given the wide variety of circumstances in which record loss can occur. However, notifications emerging from *within* agencies overwhelmingly describe what could be considered accidental record loss, including examples such as

- records misplaced during employee travel,
- records lost because of water damage,
- digital records lost during device upgrades,
- the accidental shredding/loss of documents by contractors,
- inadvertent overwriting of records,
- loss of records during digital migration, and
- employee confusion over retention schedules for records.

Interestingly, the description of notifications emerging *externally* often reflect records controversies that can garner media attention, such as

[20]44 USC § 3106, 36 CFR Pt. 1230.

[21]"Unauthorized Disposition of Federal Records." Federal Records Management. National Archives and Records Administration. https://www.archives.gov/records-mgmt/resources/unauthorizeddispositionoffederalrecords.

[22]This percentage is out of 115 cases, as three cases letters were not available online.

[23]For one observation in the sample (Case-2019-0001), it was difficult to classify whether the notification was internal or external to the agency, as the notification emerged anonymously through the healthcare.gov website.

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- deletion of emails and calendars by political appointees,
- alleged deletion of FOIA records scheduled for release, and
- deletion of records pertaining to upcoming or ongoing litigation.

The difference in substance of the internal versus external notifications could emerge from a potential distinction in proximity with those involved in record creation and preservation processes as compared to concerns of record preservation raised "from a distance"—for example, a litigant involved in a FOIA dispute. The external notification mechanism, however, can provide an indirect outlet for those within agencies to raise concerns (i.e., to the media) if there is hesitancy going through internal channels.

EXECUTIVE TRANSPARENCY, PRESIDENTIAL RECORDS, AND THE ROOM FOR REFORM

The PRA analysis reveals important considerations for the preservation of executive branch information generally and to the opening Trump administration examples specifically. Transparency discussions often concentrate on high-profile, intentional actions such as those involving the Trump administration. This focus, however, may miss the unintentional loss of other records that can nevertheless compromise our understanding of events. Moreover, unlike the FRA notification program, the PRA presently lacks a method of reporting and tracking of presidential record destruction, either actual or threatened destruction, similar to the FRA. The PRA has long been criticized as weak and lacking enforcement mechanisms. One potential reform is to adopt a statutory reporting requirement *within* the PRA that would require heads of White House office components covered under the PRA to notify the pertinent authority of record loss.[24] The need for such a system under the PRA is particularly pressing, given that

> Unlike federal records, which may be considered temporary or permanent records depending on their content, all presidential records are considered permanent due to their permanent value and, as a result should be maintained in perpetuity by the federal government, subject to some limitations. (Stuessy, 2019, p. 2)

Importantly, such an adjustment would have important implications for the relationship between the White House Office and NARA. A conflict of interest would exist where an independent yet subordinate agency, whose leader can be dismissed by the president (Wiles, 2020), has responsibility for oversight of the White House. NARA has previously had difficulty in gaining cooperation from presidential administrations when controversies of record keeping have occurred. During the Bush II administration's missing email controversy, NARA General Counsel noted:

> We still have made almost zero progress in actually moving ahead with the important and necessary work that is required for a successful transition. Our repeated requests…have gone unheeded. … Of most importance, we still know virtually nothing about the status of the alleged missing White House e-mails.[25]

Given the legal and political complexity surrounding government records, proper oversight of presidential information potentially requires a new oversight body (Fenster, 2008). This proposed institution would be composed of multiple officials from NARA, the DOJ, and congressional oversight

[24]The EOP components that fall within the purview of the Presidential Records Act are the White House Office, Office of the Vice President, Office of Policy Development, the Council of Economic Advisors, the National Security Council, the President's Foreign Intelligence Advisory Board, the President's Intelligence Oversight Board, the National Economic Council, and the Office of Administration (Stuessy, 2019).
[25]U.S. Congress, House Committee on Oversight and Government Reform, Electronic Records Preservation at the White House, 110th Cong.1st Sess. 2008, 17.

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committees with whom NARA currently consults in instances where the incumbent president proposes to dispose of presidential records.[26]

Any reporting system admittedly includes myriad complexities. First, any agency official reluctance to report instances of actual or threatened record destruction would be heightened in the highly politicized environment of the Executive Office of the President. Second, employees and officials may be more comfortable reporting instances of unauthorized record disposition that are clearly unintentional and do not indicate an attempt to willfully violate the law. Finally, administration officials' resistance is likely to increase with any increased involvement of outside parties in presidential records management.

The PRA could be meaningfully reformed by adding specific, routinized reporting requirements of potential record loss. One key concern: without meaningful reform, future presidents and subordinate executive branch officials may continue to engage in either reckless handling or willful destruction of presidential records. Despite the apparent weaknesses of the PRA, however, those around President Trump worked to engender presidential compliance in multiple ways. White House counsel and aides repeatedly warned the President that the destruction of documents was a violation of the PRA (Karni, 2018). As noted, career bureaucrats worked to reconstruct documents when physically possible. Their attempt to blunt presidential resistance to legal requirements does illustrate a coercive effect of the PRA, even when the applicable policy architecture lacks a history of penalizing lapses in policy compliance.

Disputes over existing records

Assuming that a presidential administration has preserved records, how do federal courts adjudicate disputes over the release of those records? Under the Trump administration, requesters filed a record number of FOIA lawsuits in federal district court challenging the administration's responses. The DOJ is assigned responsibility for overseeing FOIA disputes generally and defending FOIA disputes directly if it wishes. Given that the DOJ is most likely to step in to the most important disputes, we focus on judicial monitoring of executive branch transparency through the lens of DOJ FOIA litigation involving disputes over withheld records.

JUDICIAL MONITORING OF EXECUTIVE BRANCH TRANSPARENCY

The Russian government engaged in a "sweeping and systematic" strategy to interfere in the 2016 U.S. presidential election, including hacking Democratic Party accounts and harnessing an extensive Internet troll farm to manipulate social media.[27] In the summer before the election, the Australian government informed the U.S. DOJ that the Trump campaign may have collaborated with Russian agents. FBI Director James Comey was investigating that allegation among others when he was fired by newly elected President Donald Trump. In May 2017, former FBI Director Robert S. Mueller III was appointed by the DOJ to take over the Russia investigation.[28]

Special Counsel Mueller's probe yielded multiple indictments and culminated in a much-anticipated report—the "Mueller Report"—submitted to Attorney General William P. Barr on March 22, 2019. Less than 48 hours after receiving the 400-plus page report, Barr issued a brief letter to Senate Judiciary Committee Chair Lindsey Graham, summarizing the findings and concluding that there was no basis for

[26] 44 USC § 2203.

[27] The facts provided here are drawn from Report on the Investigation into Russian Interference in the 2016 Presidential Election, Volume I, https://www.justice.gov/storage/report_volume1.pdf, and Volume II, https://www.justice.gov/storage/report_volume2.pdf. See Volume I at 1 ("The Russian government interfered in the 2016 presidential election in sweeping and systematic fashion. Evidence of Russian government operations began to surface in mid-2016").

[28] *Id.* ("The order appointing the Special Counsel authorized him to investigate 'the Russian government's efforts to interfere in the 2016 presidential election,' including any links or coordination between the Russian government and individuals associated with the Trump campaign").

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charging President Trump or any of his associates.[29] Facing a backlash from Congress, the public, and even the special counsel himself,[30] Barr relented, delivering to Congress a highly redacted version of the report on April 18, 2019.[31] He continued, however, to justify his hasty exoneration of Trump by citing an undisclosed Office of Legal Counsel memorandum (the "Barr Memo").

Roughly 2 years later, on May 3, 2021, D.C. District Court Judge Amy Berman Jackson ordered the now infamous Barr Memo be released: "It is time for the public to see [the Barr Memo], too."[32] This politically significant act was taken by a single federal trial judge appointed a decade earlier by President Barack Obama, whereas the Biden administration's DOJ insisted that the document remain withheld from public view.

Judge Berman Jackson did so in a ruling on a FOIA lawsuit brought by watchdog group Citizens for Responsibility and Ethics in Washington (CREW). The DOJ withheld the Barr Memo along with some of the other records requested by CREW, relying on the "deliberative process privilege," which protects agency records that include content that is both "pre-decisional" to the final agency decision and "deliberative," reflecting a "give and take" exchange of information and ideas between agency personnel (Johnson, 2021a; Weaver & Jones, 1989; Wetlaufer, 1990). In the dispute over the Barr Memo, Judge Berman Jackson ruled that the DOJ did not meet its burden of sustaining its invocation of the privilege and ordered the DOJ to produce the withheld portions of the document to CREW.[33]

Federal courts, and particularly district courts, play a central role when the public's or Congress's wish to access government records is met with resistance or complete refusal by the executive branch. Through these decisions, federal judges define the government's right to control information relative to the public's right to know. The Barr Memo case is a high-profile example of a transparency dispute involving the FOIA. However, hundreds of FOIA complaints are filed each year in federal district court. Despite the centrality of the judicial branch to overseeing executive branch discretion, we know surprisingly little and almost nothing systematically about transparency dispute litigation.

Understanding FOIA litigation outcomes is important for multiple reasons. First, cases that arise in this context reverberate beyond the bounds of the FOIA and have provided legal guidance in defining legal issues related to agency authority, such as what counts as an "agency"[34] and what is considered an "agency record."[35] Second, empirical examination of transparency litigation can provide important insight into how agency behavior (e.g., legal justifications used to withhold documents) and factors outside of agency control (e.g., judicial preferences) interact to produce judicially mandated transparency. Third, cases involving the DOJ are particularly salient for other agencies. The DOJ is not only tasked with providing policy guidance to agencies and overseeing compliance as they implement FOIA provisions, but it also directly defends or manages the defense of agencies sued under FOIA. At the same time, the DOJ is one of the most frequently sued agencies under FOIA. These factors, in addition to the DOJ's position as the nation's top law enforcement

[29]See Letter from William P. Barr, Attorney General, to Hon. Lindsey Graham, Chairman, Committee on the Judiciary, United States Senate, et al. (March 22, 2019), https://www.justice.gov/archives/ag/page/file/1147986.

[30]See, e.g., *Citizens for Responsibility and Ethics in Washington v. U.S. DOJ*, 538 F. Supp. 3d 124 (D.D.C. 2021) [hereinafter "*CREW* opinion"] ("The 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 took to their microphones and Twitter feeds to decry what they feared was an attempt to hide the ball"); Letter from Robert S. Mueller III, Special Counsel, to Hon. William P. Barr, Attorney General of the United States (March 27, 2019), available at https://apps.npr.org/documents/document.html?id=5984399-Mueller-Letter-to-Barr.

[31]Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election, DOJ Justice News (April 18, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian.

[32]*CREW* opinion, *supra* note.

[33]Berman Jackson also found that the DOJ's claimed of attorney-client privilege was improperly applied to the Barr Memo. Berman Jackson ruled that another document in dispute in the case was properly withheld under Exemption 5. The Biden DOJ appealed Berman Jackson's ruling to the U.S. Court of Appeals for the D.C. Circuit, which upheld Berman Jackson's decision (Weiner, 2022).

[34]*United States DOJ v. Tax Analysts* 492 U.S. 136 (1989).

[35]*Department of Interior v. Klamath Water Users Protective Association* 532 U.S. 1 (2001).

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agency, would lead one to reasonably expect a high degree of deference for the agency in disputes over transparency. We argue, however, that the willingness to support executive branch autonomy over internal information will be influenced by the preference congruence, or lack thereof, between the DOJ and the presiding judge. Below, we provide a brief overview of the history of FOIA, data on the administration of FOIA between 2010 and 2020, and an analysis of DOJ FOIA litigation with decisions rendered in 2020.

FOIA

President Lyndon B. Johnson signed the FOIA in 1966 as an amendment to the third section of the Administrative Procedure Act, but not without substantial resistance from executive branch officials. As Baron (2019, p. 2) states, "Control over information is a tool of power" and is not a tool that many presidents would readily give up. However, scholars, journalists, and members of Congress, including key FOIA architect Representative John E. Moss (D-CA), who himself had difficulty acquiring executive branch information, advocated extensively for greater formalized executive branch transparency (Baron, 2021; Smith, 1981).

Congress has amended FOIA multiple times throughout its nearly 60-year history (Kwoka, 2021), though the basic premise of the initial law remains. FOIA allows the public to access agency records unless the records are protected from disclosure by one of nine FOIA exemptions, which can exempt records from release for reasons such as national security, personal privacy interests, and the protection of commercial trade secrets. Those who feel that an agency has improperly denied access to government records can sue in federal district court to require the agency to release the requested records.[36] FOIA requesters can also file suit if agencies do not respond to requests within the statutorily defined time frames, when there is concern that the agency did not adequately search for records, or when disagreement arises over the fees that were assessed to accompany the request.

FOIA requests and litigation trends

As shown in Figure 1, the use of FOIA to gain access to internal government records has generally increased over time, although requests have been slightly lower for fiscal years 2019 and 2020. The DOJ regularly falls within the top five agencies for most FOIA requests received, comprising approximately 11% of FOIA requests per fiscal year between 2010 and 2020.[37]

The federal executive branch has recently experienced an increase in FOIA cases filed in federal court (in concert with rising requests), reaching a record-high number of cases filed in district court during the Trump administration (Mehta, 2018). Although the rate of FOIA litigation filings relative to requests is quite low, increasing litigation rates, even when the agency is successful, is not inconsequential. First, defending FOIA decision making and withholdings can have a direct impact on agency resources. During fiscal year 2020, FOIA litigation expenses totaled approximately 7% of FOIA costs (Figure 2), and FOIA litigation costs have slowly increased as a proportion of total FOIA expenses. In addition to monetary costs, judges will sometimes order agency officials to either reconduct searches for agency records, review redactions, or revise litigation materials and affidavits previously submitted in court to justify agency withholdings, which can lead to redirection of personnel from other agency activities.

[36] 5 USC § 552.
[37] Freedom of Information Act Summary of Annual Reports, 2010–2020.

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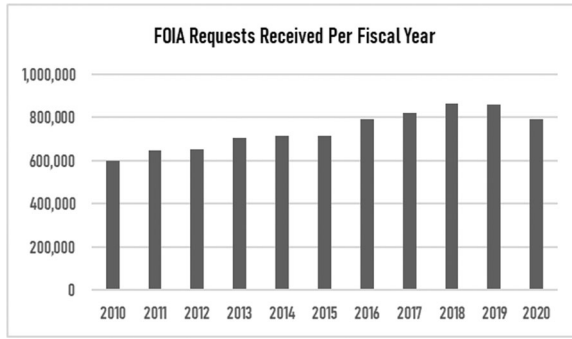

FIGURE 1 FOIA requests received per fiscal year. *Source:* DOJ Office of Information Policy Summary of Annual FOIA Reports, 2010–2020. DOJ, Department of Justice; FOIA, Freedom of Information Act.

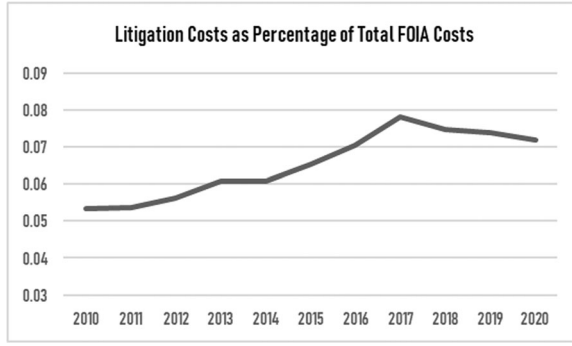

FIGURE 2 FOIA litigation costs. *Source*: DOJ Office of Information Policy Summary of Annual FOIA Reports, 2010–2020. DOJ, Department of Justice; FOIA, Freedom of Information Act.

DOJ AND FOIA

It is customary for each incoming Attorney General to circulate a memo providing guidance to agencies on various aspects of FOIA implementation. Importantly, a certain degree of discretion exists around most FOIA exemption. Specifically, although a record *may* be protected by privilege, an agency could still determine to release a requested document.

Attorney General guidance can either encourage discretion in the direction of greater openness or greater conservatism in releasing records that may be exempt from disclosure. Attorneys General Eric Holder's and Merrick Garland's guidance memos both reference a preference for openness,[38] whereas Attorney General John Ashcroft's memo was criticized for seemingly encouraging caution with disclosures (Coglianese, 2009; Johnson, 2021b). Interestingly, William Barr did not release a formal FOIA guidance memo, which meant that the previous memo released by Attorney General Eric Holder would remain in place during his tenure. Barr, however, verbally expressed his frustration with the policy. Specifically, during a speech to the Federalist Society, he noted of FOIA:

[38]Garland, Merrick. Office of the Attorney General. Memorandum for Heads of Executive Departments and Agencies. March 15, 2022. https://www.justice.gov/ag/page/file/1483516/download.

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> There is no FOIA for Congress or the Courts. Yet Congress has happily created a regime that allows the public to seek whatever documents it wants from the Executive Branch at the same time that individual congressional committees spend their days trying to publicize the Executive's internal decisional process. That process cannot function properly if it is public, nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people.[39]

The Trump administration faced extensive criticism for its administration of FOIA with reports noting decreases in disclosure rates for information and increased delays in response rates beyond the statutorily defined time frame (Bridis, 2018). Wasike's (2020) comparison of FOIA under the Obama administration and Trump administration (through fiscal year 2018) confirmed that requests were processed at slower rates under the Trump administration. Additionally, the use of exemptions to restrict the release of information increased. Importantly, some of the trends witnessed during the Trump administration started to emerge in earlier administrations, and shifts in presidential administrations cannot explain all comparative differences (Wasike, 2020).[40]

As shown in Figure 3, the raw number of requests for records to the DOJ increased during the Trump administration as compared to the Obama administration. According to Figure 4, the proportion of information released in full decreased slightly, whereas the information withheld in full on the basis of exemptions increased during the latter periods of the Trump administration. As noted earlier, the DOJ appears frequently as a litigant relative to other agencies, usually comprising the largest percentage of cases from a single agency (although the percentage of DOJ filings, out of all filings, decreased recently). During fiscal year 2020, DOJ filings, where the DOJ and/or component was a plaintiff, comprised approximately a quarter of FOIA cases filed in district court (Figure 5). However, the proportion of DOJ cases filed during the Trump administration never exceeded 31%, as they did multiple years during the Obama administration.

DOJ and FOIA litigation outcomes

One of the most important provisions from FOIA is that courts have authority to review and overturn agency decisions on whether to disclose information to requesters. Federal courts are put in an explicit oversight role over agency decision making. Existing studies find high rates of deference to agencies in disputes over withheld information (Johnson, 2019; Mart & Ginsburg, 2014; Perlin, 2020; Verkuil, 2002). In our empirical analysis, we find that federal courts exhibit substantial deference to agency use of withholdings. We argue, however, that judicial deference to agencies will vary depending on the congruence between judicial and agency preferences. An abundance of research has confirmed that federal judicial decision making is influenced by judicial ideological and partisan preferences (George & Epstein, 1992; Songer & Sheehan, 1992). A single dispute can "transmit" ideological signals in multiple ways, and one of the

[39]Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention.

Washington, DC ~ Friday, November 15, 2019.

https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture.

[40]However, some agencies, particularly the secretaries' offices of cabinet agencies, experienced substantial increases in FOIA requests during the Trump administration that would have strained their capacity to respond to requests even prior to the pandemic. For example, during 2019, congressional testimony on transparency under the Trump administration, the chief FOIA officer for the United States Department of the Interior (DOI) noted that the DOI Secretary's Office experienced a 210% increase in requests received since 2016. FOIA: Examining Transparency under the Trump administration. Hearing before the Committee on Oversight and Reform, House of Representatives, 116th Congress, First Session, March 13, 2019. Serial No. 116-09.

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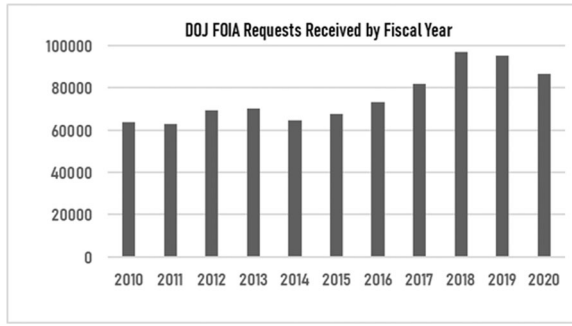

FIGURE 3 DOJ FOIA requests received, FY 2010–2020. *Source:* DOJ annual FOIA reports, FY 2010–2020. DOJ, Department of Justice; FOIA, Freedom of Information Act.

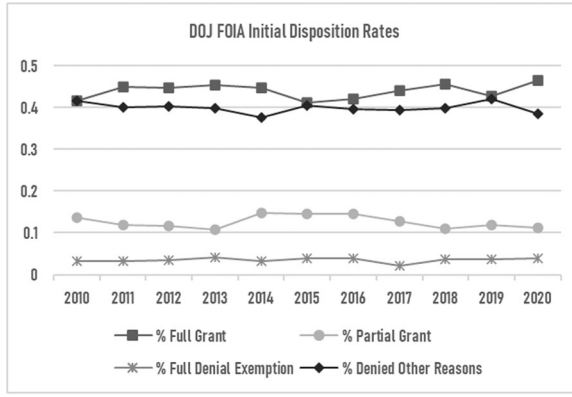

FIGURE 4 DOJ FOIA initial disposition rates, FY 2010–2020. *Source:* DOJ annual FOIA reports, FY 2010–2020. DOJ, Department of Justice; FOIA, Freedom of Information Act.

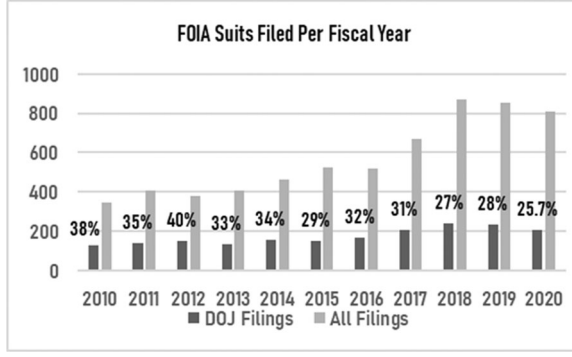

FIGURE 5 Filed FOIA suits per fiscal year. *Source:* FOIAProject.org. FOIA, Freedom of Information Act.

clearest signals is the "direction" of the decision under review by the federal judge. For example, an agency rule allowing drilling in previously protected areas can transmit conservative ideological cues to a reviewing judge (Eilperin, 2020). In the era of the COVID-19 pandemic, an agency rule requiring vaccines for employees in certain work environments can send liberal ideological signals

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to the reviewing judge.[41] And research confirms higher rates of judicial support for agency decisions that align with judicial preferences (Caruson & Bitzer, 2004; Crowley, 1987; Fix, 2014; Humphries & Songer, 1999; Raso & Eskridge, 2010; Sheehan, 1990; Smith, 2007).

Litigation is also imbued with ideological signals from the direct parties, particularly when disputes involve advocacy organizations requesting judicial rejection of agency decisions. Signals emerge through the utilization of amicus briefs from outside parties requesting that the reviewing court keep a government policy or decision in place (Collins, 2018). Transparency disputes, however, present complexity relative to the liberal-conservative typology applied to many agency decisions. Specifically, as seen in the Barr Memo examples, administrations of both parties generally occupy the same position in disputes over government records—a preference to maintain the confidentiality of disputed records. Additionally, requesters across the ideological spectrum (from conservative-leaning Judicial Watch to liberal-leaning ACLU) are requesting agencies to perform the same action-release records that agencies are withholding.

In transparency disputes, substantive agency policy is not at issue (per se). While traditional ideological cues in agency litigation may be muddled, building from previous research (Johnson, 2019) we argue that judicial preference for greater government transparency will vary depending on the preference congruence between the withholding organization and the judge. Specifically, judges with conservative preferences will exhibit more deference toward conservative-leaning agencies, particularly under conservative leadership, whereas incongruent preference signals from the withholding agency, in this case to liberal judges, will produce less support toward the agency's assessment toward nondisclosure.[42] The DOJ is often categorized as a conservative agency across presidential administrations (Clinton & Lewis, 2008), with presidential administrations having the ability to shift agency policy and outcomes in a conservative or liberal direction. Under the Trump administration and William Barr's leadership, one would expect the agency to fall within a right-learning conservative categorization, reducing deference from liberal justices toward agency withholdings. Stated differently, judges are generally biased in favor of DOJ; however, that favoritism decreases for liberal judges and increases for conservative judges toward agencies under highly conservative leadership.

> ***Political Alignment Hypothesis:*** *Judges will be more likely to defer to the DOJ's decision to withhold records when the judge's ideological preferences align with the withholding agency's preferences.*

DATA AND METHODS

To examine our political alignment hypothesis, we use 2020 FOIA cases involving the DOJ or a DOJ bureau as the withholding agency. FOIA litigation can involve challenges to the adequacy of the agency search, disputes over agency delay in response, and disputes over the requester fee categorization. Exemption challenges, however, are particularly acute and salient transparency conflicts. Specifically, is a government agency willing to release records and information that it *acknowledges* it has in its possession? We focus our analysis on cases where a judge makes a direct assessment on whether the DOJ can continue to withhold the requested information using the agency's application of one or more FOIA exemptions. The nine FOIA exemptions appear in Table 2.

[41] *Biden v. Missouri* 595 U.S. ___ (2022).

[42] While the immediate analysis focuses on ideological cues from the agency, we also recognize that the presence of litigants such as conservative-leaning organizations such as Judicial Watch can potentially activate judicial ideological and partisan considerations in disputes over documents. For example, a conservative federal judge may view the ACLU's request for records from the Trump DOJ with greater skepticism as compared to a similar request for records from Judicial Watch.

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TABLE 2 Freedom of Information Act exemptions.[a]

Exemption 1: Protects "national security information that is properly classified under the procedural and substantive requirements of the current Executive Order on classification."
Exemption 2: Protects records that are "related solely to the internal personnel rules and practices of an agency."
Exemption 3: Protects information that has been "specifically exempted from disclosure by statute."
Exemption 4: Protects "trade secrets" and "commercial or financial information obtained from a person privileged or confidential."
Exemption 5: Protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
Exemption 6: Protects "information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy."
Exemption 7: Protects "six different types of law enforcement information."
Exemption 8: Protects "matters contained in or related to examination, operating, or conditions reports prepared by or for regulators or supervisors of financial institutions."
Exemption 9: Protects "geological information and data, including maps, concerning wells."

[a]5 U.S.C. § 552 (b).

We use the 2020 DOJ Litigation and Compliance Report to identify FOIA cases involving FOIA exemption statutory subsections.[43] Each year, the DOJ publishes a FOIA Litigation and Compliance Report (as required by the FOIA statute) that provides a listing of FOIA cases with decisions rendered for the most recent calendar year. Included in the listing of cases is whether the dispute involved one or more FOIA exemptions. For calendar year 2020, the DOJ Litigation and Compliance Report lists 904 FOIA cases with decisions rendered in district and circuit courts. Of those cases, 167 were noted as involving FOIA exemption subsections in a district court decision. Along with law student research assistants, we examined all 860 district cases listed in the 2020 DOJ Litigation and Compliance Report to determine whether the case involved an explicit judge ruling on whether an agency was required to release records withheld under a claimed exemption. This review produced approximately 200 cases. After potential exemption cases were identified, law student research assistants used Westlaw, Bloomberg Law, and PACER to retrieve and code the corresponding opinions.[44] For the purposes of the immediate analysis, we isolated cases involving the DOJ, or DOJ bureau, as a defendant. From these DOJ cases, we excluded cases where the judge did not make a ruling on the applicability of any of the claimed exemptions, as well as cases where none of the exemptions claimed by the DOJ were challenged by the plaintiff (the requester).[45] These specifications produced 48 cases for our analysis.[46]

We then transformed the case-level observations into exemption-level observations. Specifically, FOIA litigation is extraordinarily complex and in the context of our analysis, one case can produce multiple observations. For example, imagine a single case involving FOIA requests to the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) and both DOJ bureaus partially deny the request based on Exemptions 2 and 5. This one case would produce four distinct observations involving two agencies (two exemption outcomes for the FBI, and two exemption outcomes

[43]"2020 Litigation and Compliance Report." Office of Information Policy. The DOJ. https://www.justice.gov/oip/2020-litigation-and-compliance-report.
[44]We use a double-coding process to identify and categorize pertinent information from each opinion. Specifically, each case was assigned to two research assistants, who would then confer to resolve any discrepancies that emerged in coding.
[45]This would include cases where the plaintiff did not respond to the DOJ's motion to the district court for summary judgment in the DOJ's favor.
[46]Cases involving decisions by magistrate judges (three) are excluded because magistrate judges are not appointed directly by the president but instead by the district judges on the court.

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for DEA). Our transformation produced 131 exemption-level observations that included a direct judicial assessment of whether the exemption was properly applied.[47] The key data point of interest is the judicial outcome of each exemption challenge for each case and whether the judge required the agency to release some, all, or none of the requested records.

Analysis

Our dependent variable is an indicator variable that equals one (1) when the judge exhibits complete deference to the agency's exemption application and allows the DOJ to withhold all of the records withheld under a given exemption; and zero (0) when an agency has to release some or all of the requested records. As expected, the DOJ receives a high degree of deference toward its application of exemptions. The DOJ received complete deference in 85% of the exemption outcome observations in our analysis.

We conceptualize our key independent variable, judicial preferences, in multiple ways. Judges appointed by *Democratic* presidents are coded as (1), and Republican-appointed judges are coded as (0). Sixty-six percent of observations involve Democratic-appointed judges. We also measure judicial preferences using district court *Judicial Common Space* scores developed by Boyd (2015), which are bounded −1 to 1, with increasing scores indicating increased judicial conservatism.[48] The mean JCS score for judges in our analysis is −0.029. We expect Democratic and liberal judges to exhibit less deference to DOJ withholdings.

Control variables

We control for *Litigant Type* and divide litigants into three categories: individuals, trade associations/interest groups/nonprofits (e.g., Judicial Watch, Brennan Center), and media (e.g., Buzzfeed, NPR). Individual litigants serve as the base category in our analysis (68% of observations), and we expect litigants classified in the individual category to have lower rates of success as compared to the other categories of litigants who may have resource advantages (Galanter, 1974). We also control for the *D.C. District Court* venue, as 78% of observations were heard in the D.C. district. The greater judicial familiarity of D.C. District Court judges with FOIA could potentially lead to decreased deference as compared to judges in districts that receive FOIA cases at a lower rate and may exhibit a greater willingness to defer to agency interpretations of FOIA.[49] We control for the influence of judicial exemption decisions involving the *Exemption 7* category. Exemption 7 protects "records of information compiled for law enforcement purposes."[50] However, the exemption incorporates six distinct subcategories that provide protections for a variety of law enforcement records. Exemption 7 cases are the model category in our analysis and comprise 40% of observations. Given the congruence between the content of the exemptions and the DOJ's jurisdiction, we expect judicial deference to increase in Exemption 7 rulings.[51]

[47]These 131 exemptions exclude instances where an exemption application is challenged but the judge did not decide whether the individual exemption was properly applied.

[48]Scores for the 115th and 116th Congress were previously calculated using Vice President Pence's Nominate Score (0.655), as President Trump's score was not previously available. For this analysis, we replaced the JCS scores for judges in the 115th and 116th Congress that are listed at 0.655, with President Trump's score of 0.403.

[49]See Appendix A, Table A1 for descriptive statistics.

[50]5 USC § 552(b)(7).

[51]Exemption 7 subcategories are often the most frequently claimed exemptions by agencies when responding to FOIA requests. During fiscal year 2020, Exemption 7(C) and Exemption 7(E) made up approximately 52% of all cited exemptions to withhold records in response to FOIA requests (DOJ OIP 2021). Exemption 7(C) protects records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemption 7(E) coverage includes records that "would disclose techniques and procedures for law enforcement investigations or prosecutions."

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TABLE 3 Judicial deference toward DOJ FOIA withholdings.

Variables	(1) Model 1	(2) Model 2
Democratic-Appointee Judge	−0.933	
	(0.727)	
Judicial Ideology (JCS)		1.521**
		(0.620)
Litigant (Individual)	–	–
Litigant (Media)	−0.612	−0.880
	(1.256)	(1.344)
Litigant (Trade/Interest Group)	0.200	0.207
	(0.841)	(0.870)
Exemption 7	0.246	0.243
	(0.435)	(0.439)
D.C. District	−0.080	0.065
	(0.821)	(0.911)
Constant	2.372**	1.786*
	(1.165)	(0.939)
Observations	131	131

Note: The dependent variable is whether the judge allows the DOJ to withhold all records claimed under a particular exemption (complete deference). Standard errors are clustered by case citation in parentheses.

Abbreviations: DOJ, Department of Justice; FOIA, Freedom of Information Act.

**$p < 0.05$; *$p < 0.10$.

All tests are two-tailed, and observations are clustered by case citation given that one case can have more than exemption-level observation.[52] The results of our analysis appear in Table 3.

Results and discussion

When viewing model 1, we see that the coefficient estimates for judge party are in the expected direction, but the estimates lack statistical significance. This finding is reflected in a difference-of-means analysis, which shows that Democratic-appointee judges have a lower mean of complete deference decisions (0.81) compared to Republican-appointee judges (0.91). This difference, however, did not meet the traditional threshold of statistical significance ($p = 0.14$). The estimates for judicial preferences in model 2 are more precise and align with our key hypothesis. According to the results in model 2, as judicial conservatism increases, as measured by Judicial Common Scores, the likelihood increases that a judge would rule that the DOJ's application of an exemption was proper and does not require the release of records. It is important to note, as the graph of predicted probabilities in Figure 6 illustrates, that even for the most liberal judges in our sample, the probability of complete deference to DOJ withholdings is quite high. For example, for a judge with a JCS score of −0.438 (the most liberal score in our sample), the probability of complete deference to the application of a FOIA exemption is 0.77. For a more

[52]We also estimate models clustered by judge in Table A3. The results are consistent with the estimates in Table 3.

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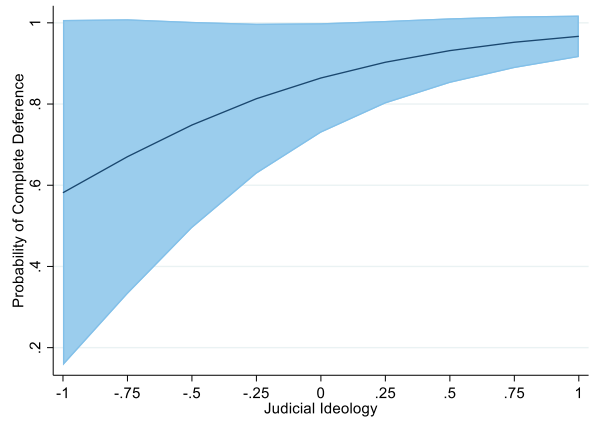

FIGURE 6 Judicial ideology and probability of complete deference toward DOJ record withholdings. Figure shows 95% confidence intervals. DOJ, Department of Justice.

moderate judge with a JCS score of 0.02 (a one standard deviation increase), the probability of finding that the DOJ does not have to release withheld records claimed under a FOIA exemption is 0.87. The coefficient estimates for the remaining variables in the models are imprecise and lack statistical significance.[53]

This analysis provides a glimpse into the adjudication of transparency disputes during the final year of the Trump administration. Importantly, judicial preferences of the judges who hear FOIA litigation challenges are beyond the control of the DOJ. Understandably, there are a variety of factors within the DOJ's control that would contribute to their high rate of success. Specifically, the DOJ would be expected to be selective in which cases it decides to continue to litigate and to pursue cases where the likelihood of success is the highest. While this analysis focuses on DOJ litigation outcome for 1 year, subsequent research under additional presidential administrations will allow for greater examinations of the influence of judicial preferences in executive branch transparency litigation.

The DOJ is a particularly salient actor in questions of transparency given its investigatory and enforcement jurisdictions and its responsibilities regarding the implementation of federal transparency policy. This area of executive-judicial relations is understudied but confirms previous findings that illustrate that agencies receive a high rate of deference when withholdings are challenged. This, however, is the first federal FOIA multivariate analysis to simultaneously examine decision making across multiple exemptions. Interestingly, with transparency litigation, there would seem to be several factors that would promote more aggressive judicial monitoring of the executive branch, such as the de novo standard of review (Kwoka, 2013), which dictates low deference to agency decisions—a requirement for FOIA district cases, and FOIA's presumption of disclosure. In addition, judges may have a unique form of leverage when restricting executive authority in the area of transparency. Specifically, one concern with ruling against the executive branch is the potential of nonenforcement, as judicial decisions are rarely self-enforcing (Epstein & Knight, 1997). An executive ignoring a court order can contribute to the perception of a weakened judiciary. Acts of resistance in other legal disputes could entail nonexecutive compliance deep within the bureaucratic hierarchy—less obvious to the public and other actors. However, even in obscure disputes over information, an executive actor's unwillingness to comply in releasing requested information is a highly acute, visible act that could incur sharp outside criticism.

[53]We also estimated model 2 using exemption-level fixed effects. The results appear in Table A2 in Appendix A and are consistent with the results in Table 2 with the effect of judicial ideology being statistically significant at $p < 0.10$.

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CONCLUSION

Transparency is a necessary component for public awareness of government activity and in holding officials accountable for their behavior and decisions (Harden & Kirkland, 2021). And while greater governmental transparency allows for public awareness of when political officials engage in political, legal, and/or social wrongdoing (Cordis & Warren, 2014; Rose-Ackerman & Palifka, 2016), the ability to detect and hold corruption accountable is not necessarily the yardstick by which a populace must measure transparency's benefits. Specifically, even greater knowledge of the politically mundane can facilitate an understanding of the ecosystem of relationships, information, and communication that influence the routinized management of the executive branch. Transparency can also improve governance, as an informed public can provide important feedback to officials about the impact of proposed policy decisions (Roberts, 2006; Yackee & Yackee, 2012). The obstruction of transparency, either through attempts to subvert the preservation of government records or withholding information that the public has a legal right to access, limits the ability of the public to participate in government by way of reduced public awareness.

Although considered a democratic underpinning, transparency and open government are not costless, particularly in terms of financial expenditures (Fenster, 2006). And valid claims to privacy, commercial interests, and national security require weighing transparency's costs against benefits to public awareness. As Coglianese (2009, p. 530) notes, "the most important challenge for open government is not secrecy versus transparency, but figuring out how much transparency, and what type, to have over different aspects of the governmental process." Our article has examined two distinct but related questions: what threats exist to record preservation, and when will federal courts require the executive branch to release records requested by the public?

FOIA disputes entail important questions of executive branch autonomy over information and openness. Given the aforementioned exemptions to FOIA, the existence of a given record does not obligate an agency to release records to the public. Federal courts, however, are increasingly called upon to navigate the boundaries of public access to information. This analysis does not compare DOJ outcomes to other agencies; however, in FOIA litigation, the DOJ seemingly has a comparative advantage given its familiarity with FOIA provisions and the DOJ's experience defending agencies in FOIA litigation. Some of these disputes involve access to prisoner records, whereas others may involve information surrounding the lack of a presidential indictment, such as with the Barr Memo. While the public salience of the information sought in these disputes varies, the seekers regard the records with a high degree of importance. This is evidenced by the decision to pursue litigation against the DOJ, despite the agency's success in defending its withholdings.

Proper preservation of government records allows for contemporaneous and future outside observers to gain important insight into government activity, from the mundane to the momentous. Knowledge of government actions, however, becomes impossible if officials, especially those at the highest levels of the executive branch, do not uphold their legal obligations toward information preservation. These concerns have been present in nearly every administration during the era of the modern presidency. And as we have discussed, the threats to the development of a comprehensive record are varied, and not all entail intentional acts. While the investigation into President Trump's record-handling controversies has now shifted to federal courts, lawmakers must reform the current record management policy infrastructure if they want to reduce unauthorized record loss and protect the continued vitality of the FOIA.

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DATA AVAILABILITY STATEMENT

Data are available upon request to authors.

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APPENDIX A

TABLE A1 Descriptive statistics.

Variables	*N*	Mean	Std. Dev.	Min	Max
Complete deference	131	0.847	0.361	0	1
Democratic-Appointee Judge	131	0.656	0.477	0	1
District JSC Scores (Boyd, 2015)	131	−0.029	0.458	−0.438	0.693
Litigant (Individual)	131	0.679	0.469	0	1
Litigant (Media)	131	0.084	0.278	0	1
Litigant (Trade/Interest Group)	131	0.237	0.427	0	1
Exemption 1	131	0.053	0.226	0	1
Exemption 3	131	0.076	0.267	0	1
Exemption 4	131	0.038	0.192	0	1
Exemption 5	131	0.229	0.422	0	1
Exemption 6	131	0.183	0.388	0	1
Exemption 7	131	0.389	0.489	0	1
D.C. District Court	131	0.786	0.412	0	1

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TABLE A2 Judicial deference toward DOJ record withholdings (case-clustered standard errors and fixed effects).

Variables	Model 1
Judicial Ideology (JCS)	1.388*
	(0.786)
Litigant (Individual)	–
Litigant (Media)	−0.793
	(1.381)
Litigant (Trade/Interest Group)	−0.092
	(0.975)
D.C. District	−1.181
	(1.005)
Constant	18.38***
	(1.098)
Exemption-Level FE	YES
Observations	131

Note: The dependent variable is whether the judge allows the DOJ to withhold all records claimed under a particular exemption (complete deference). Standard errors clustered by case judge in parentheses.

Abbreviation: DOJ, Department of Justice.

***$p < 0.01$; *$p < 0.10$.

TABLE A3 Judicial deference toward DOJ record withholdings (judge-clustered standard errors).

Variables	Model 1
Judicial Ideology (JCS)	1.521**
	(0.653)
Litigant (Individual)	–
Litigant (Media)	−0.880
	(1.486)
Litigant (Trade/Interest Group)	0.207
	(0.890)
Exemption 7	0.243
	(0.412)
D.C. District	0.065
	(0.869)
Constant	1.786**
	(0.845)
Observations	131

Note: The dependent variable is whether the judge allows the DOJ to withhold all records claimed under a particular exemption (complete deference). Standard errors clustered by case judge in parentheses.

Abbreviation: DOJ, Department of Justice.

**$p < 0.05$.

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Tracey E. George is the Charles B. Cox III and Lucy D. Cox Family Chair in Law & Liberty and Professor of Law and Political Science at Vanderbilt University. She also serves as the university's vice provost for faculty affairs and professional education. George uses quantitative social science tools to examine federal and state courts as well as of legal education and the legal profession. Along with Mitu Gulati and Albert Yoon, she is currently studying the design, workings, and impact of elite legal labor markets, including a recent study of lead lawyers in mergers and acquisitions and a forthcoming study of U.S. Supreme Court clerks.

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