

February 2021

## Populism and Transparency: The Political Core of an Administrative Norm

Mark Fenster

University of Florida Levin College of Law, [fenster@law.ufl.edu](mailto:fenster@law.ufl.edu)

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### Recommended Citation

Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. Cin. L. Rev. 286 (2021)

Available at: <https://scholarship.law.uc.edu/uclr/vol89/iss2/2>

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## POPULISM AND TRANSPARENCY: THE POLITICAL CORE OF AN ADMINISTRATIVE NORM

*Mark Fenster*<sup>\*</sup>

### I. INTRODUCTION

Transparency has become a preeminent administrative norm with unimpeachable status as a pillar of democracy.<sup>2</sup> Over the past several decades, nations throughout the world have enacted new laws promising a more thoroughly visible, accountable state.<sup>3</sup> Academics and think tanks have developed and provided support for the claim that information disclosure can help solve political and social problems,<sup>4</sup> while non-governmental organizations advocate nationally and transnationally on transparency's behalf.<sup>5</sup> No reasonable elected official would publicly disavow government openness.

But the rise of right-wing populism, reminiscent of older forms of militaristic authoritarianism,<sup>6</sup> threatens transparency's ascent. Recently elected governments in Europe and the Americas represent a counter-

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\*. Stephen C. O'Connell Professor Law, Levin College of Law, University of Florida. Many thanks to David Pozen and David Fontana for comments on earlier drafts. I am extremely grateful for fine research assistance from Zoe Stein, Vanessa Gray, Nyja Brown, and Anne Kelley.

2. See, e.g., STANLEY FISH, *THE FIRST 153* (2019) (characterizing transparency as a "theology"); Christopher Hood, *Transparency in Historical Perspective*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 3 (Christopher Hood & David Heald eds., 2006) ("Transparency has attained quasi-religious significance in debate over governance and institutional design.").

3. See ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 15–17 (2006); Greg Michener, *FOI Laws Around the World*, 22 *J. DEMOCRACY* 145, 145–46 (2011) (describing rapid diffusion of FOI laws since 1990). The U.S. Freedom of Information Act's influence on the global application of transparency has been profound. See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 *U. PA. L. REV.* 1097, 1098–99, 1105–06 (2017) [hereinafter Pozen, *Freedom*].

4. See, e.g., Padideh Ala'i & Robert G. Vaughn, *Introduction*, to *RESEARCH HANDBOOK ON TRANSPARENCY I* (Padideh Ala'i & Robert G. Vaughn eds., 2014) (recent collection of academic work on national and international transparency laws); *THE RIGHT TO KNOW* (Ann Florini ed., 2007) (influential work on comparative and international transparency policies); ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007) (influential work evaluating effectiveness of transparency policies).

5. See COLIN DARCH & PETER G. UNDERWOOD, *FREEDOM OF INFORMATION AND THE DEVELOPING WORLD* 51–52, 103 (2010); ROBERTS, *supra* note 2, at 107–11.

6. See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 12–13 (2018) (likening the current rise of authoritarianism to Mussolini's Fascist Italy); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* 262–64 (2018) (likening the current rise of authoritarianism to the Roman Republic).

movement away from liberal-democratic institutions that promote the visibility and popular accountability that transparency promises.<sup>7</sup> Under Vladimir Putin, Russia's expansive state secrecy has enabled widespread corruption.<sup>8</sup> In Hungary, Victor Orbán's Fidesz party has consolidated power in order to establish what he has called an "illiberal state" that limits access to information.<sup>9</sup> Brazil's Jair Bolsonaro, whose election in 2018 constituted a return to authoritarian right-wing leadership after more than a decade of left-wing rule, has reduced government transparency and led attacks on independent journalists.<sup>10</sup> Even the United States, whose fifty-year-old Freedom of Information Act (FOIA)<sup>11</sup> has served as a model for much of the activism that the age of transparency called forth,<sup>12</sup>

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7. See JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* 88–108 (2016); CAS MUDDE & CRISTOBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 62–78 (2017); Jan-Werner Müller, *Populism and the People*, 41 LONDON REV. BOOKS 35, 35 (2019), available at <https://www.lrb.co.uk/v41/n10/jan-werner-muller/populism-and-the-people>. African populists have demonstrated similar tendencies. See Danielle Resnick, *The Influence of Populist Leaders on African Democracy*, in THE ROUTLEDGE HANDBOOK OF GLOBAL POPULISM 267, 268 (Carlos de la Torre ed., 2018) [hereinafter HANDBOOK OF GLOBAL POPULISM] (discussing lack of transparency in populist South African and Zambian governments).

8. See Leanid Kazrytski, *Fighting Corruption in Russia: Its Characteristics and Purpose*, 29 SOC. & L. STUD. 421, 421 (2019), doi:10.1177/0964663919859052; Kenneth Rapoza, *In Russia, Putin Prefers Secret Government*, FORBES (May 19, 2013, 9:19 PM), <https://www.forbes.com/sites/kenrapoza/2013/05/19/in-russia-putin-prefers-secret-government/#61dbfca846d1>. The "Panama Papers" leak revealed the extent to which Russian oligarchs and state officials secreted money from the country. See Roman Amin, *Russia: Banking on Influence*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (June 9, 2016), <https://www.occrp.org/en/panamapapers/rossiya-putins-bank/>.

9. See Patrick Kingsley & Benjamin Novak, *In Hungary, Viktor Orbán Showers Money on Stadiums, Less So on Hospitals*, N.Y. TIMES (Oct. 26, 2019), <https://www.nytimes.com/2019/10/26/world/europe/viktor-orban-soccer-health-care.html> (noting that Orbán's "government has weakened accountability and transparency"); see also Lili Bayer, *Orbán Rejects EPP Concerns on Rule of Law*, POLITICO (June 13, 2019, 3:50 PM), <https://www.politico.eu/article/viktor-orban-rejects-epp-concerns-rule-of-law/>; Gábor Halmai, *Illiberalism in East-Central Europe*, EUROPEAN UNIVERSITY INSTITUTE WORKING PAPERS (2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3486420](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486420); *The entanglement of powers: How Viktor Orbán hollowed out Hungary's democracy*, ECONOMIST (Aug. 29, 2019), <https://www.economist.com/briefing/2019/08/29/how-viktor-orban-hollowed-out-hungarys-democracy>.

10. See Jessie Bullock, *The Bolsonaro Administration Is Quietly Reducing Transparency in Brazil*, GLOBAL ANTICORRUPTION BLOG (Feb. 25, 2019), <https://globalanticorruptionblog.com/2019/02/25/the-bolsonaro-administration-is-quietly-reducing-transparency-in-brazil/>; Andrew Downie, *Bolsonaro is making Brazilian journalists' jobs more difficult*, COMMITTEE TO PROTECT JOURNALISTS BLOG (Mar. 21, 2019, 1:20 PM), <https://cpj.org/blog/2019/03/bolsonaro-is-making-brazilian-journalists-jobs-mor.php>.

11. 5 U.S.C. § 552 *et seq.* (2018).

12. See Daniel Berliner, Alex Ingrams, & Suzanne J. Piotrowski, *The Future of FOIA in an Open Government World: Implications of the Open Government Agenda for Freedom of Information Policy*

has joined this trend under President Donald Trump, whose administration proved less than compliant with FOIA and other administrative laws and norms.<sup>13</sup>

Contemporary populist movements have not, however, entirely rejected transparency as an ideal. The populist rebuke of power inequities and its advocacy for popular sovereignty implicitly and sometimes explicitly includes a demand for a more visible, accessible state.<sup>14</sup> Italy's populist Five Star Movement, for example, pledged to form an open government by establishing direct communication channels with the public,<sup>15</sup> while Donald Trump found electoral success in part by condemning President Obama<sup>16</sup> and Hillary Clinton<sup>17</sup> for their secrecy, echoing complaints that transparency advocates themselves have made.<sup>18</sup>

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*and Implementation*, 63 VILL. L. REV. 867, 867 (2019); Pozen & Schudson, *infra* note 150, at 2–3.

13. See *infra* Part III-A.

14. See generally MARGARET CANOVAN, *THE PEOPLE* 85 (2005) (noting that modern democracy's "sheer complexity offers a standing invitation to populists to insist on returning power to the people, while denouncing as undemocratic all complicating institutional and legal structures"); Paula Diehl, *Twisting Representation*, in *HANDBOOK OF GLOBAL POPULISM*, *supra* note 6, at 129, 131 (identifying as central to populism the embrace of popular sovereignty and denouncing government's lack of accountability, alienation from the people, and failure to represent the people and their interests."); Left-wing populists make similar claims. See Marco Damiani, *Radical Left-wing Populism and Democracy in Europe*, in *HANDBOOK OF GLOBAL POPULISM*, *supra* note 6, at 295, 298 (discussing left-wing populist movements in Spain and France).

15. See Marco Bassini, *Rise of Populism and the Five Star Movement Model: An Italian Case Study*, 11 ITALIAN J. PUB. L. 302, 314, 327 (2019); see also Rogers Brubaker, *Why Populism?* 46 *THEORY & SOC.* 357, 366 (2017) (discussing communicative strategies among varied populist parties and government in Hungary, India, and the Netherlands).

16. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 6, 2012, 1:31 PM), <https://twitter.com/realdonaldtrump/status/210423753388208128> ("Why is @BarackObama spending millions to try and hide his records? He is the least transparent President—ever—and he ran on transparency."); see generally MICHAEL D'ANTONIO, *NEVER ENOUGH: DONALD TRUMP AND THE PURSUIT OF SUCCESS* 284–96 (2015); Kathryn Olmsted, *Fringe Paranoia Goes Mainstream*, 1 *MOD. AM. HIST.* 243, 245 (2018).

17. See Matthew Yglesias, *The 2016 Election Really Was Dominated by a Controversy over Emails*, VOX (Nov. 20, 2018, 9:01 AM), <https://www.vox.com/policy-and-politics/2016/12/25/14037576/trump-won-because-of-emails>; Frank Newport et al., "Email" Dominates What Americans Have Heard About Clinton, GALLUP (Sept. 19, 2016), <https://news.gallup.com/poll/195596/email-dominates-americans-heard-clinton.aspx>. See also Sven Engesser et al., *Populism and social media: how politicians spread a fragmented ideology*, 20 *INFO. COMM. & SOC.* 1109, 1117 (2017) (describing populist criticism of lack of transparency by Austrian populists).

18. See, e.g., Alex Howard, *How should history measure the Obama administration's record on transparency?*, SUNLIGHT FOUND. (Sept. 6, 2016, 12:35 PM), <https://sunlightfoundation.com/2016/09/02/how-should-history-measure-the-obama-administrations->

As a recent book on populism explained, populist movements “tend to call for more transparency and the implementation of more democracy . . . to break the alleged stranglehold of the elite” when they are out of power.<sup>19</sup> Upon gaining power, populist leaders have continued to decry the secret forces they claim are arrayed against them. Their concerns invoke conspiratorial enemies and a “deep state.”<sup>20</sup> One could simply dismiss populists’ seemingly hypocritical embrace of transparency in the face of their resistance to open government mandates as little more than a cynical ploy by contemptuous leaders who oppose disclosure of their own political and personal dealings in any form.<sup>21</sup> This is no doubt at least in part true, as right-wing populists generally derogate to second-order status (or worse) a concept rooted in liberal democratic theory and good-government practices.

But as a governance ideal, transparency has important historical connections and conceptual affiliations with populism. It arose from and is based on the presumptions that citizens must see the state that not only rules but serves them, and that failure to achieve that goal creates a state that is illegitimate, inefficient, and corrupt—presumptions that connect directly with populism’s normative ideals. A transparent state, however, requires laws, regulations, and norms. Grafted onto the modern administrative state, the complex rules that impose transparency have required their own technocratic bureaucracy to foster compliance and enable enforcement. Open government’s detailed, voluminous rules and

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record-on-transparency/ (concluding, based on reports from transparency advocacy groups, that Obama administration’s record was mixed and failed to meet its promises); Bill Allison, *For candidates in 2016, transparency is expected*, SUNLIGHT FOUND. (Mar. 11, 2015, 4:00 PM), <https://sunlightfoundation.com/2015/03/11/for-candidates-in-2016-transparency-is-expected/> (criticizing Clinton for her use of a private email server while conducting official business as Secretary of State).

19. Mudde & Kaltwasser, *supra* note 6, at 93.

20. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 6, 2018, 7:19 AM), <https://twitter.com/realdonaldtrump/status/1037661562897682432> (“The Deep State and the Left, and their vehicle, the Fake News Media, are going Crazy - & they don’t know what to do.”); Franklin Foer, *Viktor Orbán’s War on Intellect*, ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/> (quoting Hungarian Prime Minister Orbán’s warning of an enemy that is “[n]ot open, but hiding; not straightforward, but crafty; not honest, but base”).

21. See, e.g., Ben Norton, “FOIA Superhero” Launches Campaign to Make Donald Trump’s Administration Transparent, SALON (Nov. 27, 2016, 8:00 PM), <http://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent> (quoting FOIA advocate as asserting that “[t]he Trump administration has made it clear that it is entirely hostile to the notion of transparency”).

the complexity of bureaucratic implementation operate in tension with the concept's populist understanding of a simple, visible state. The relationship between transparency and populism, which has not received sufficient academic attention,<sup>22</sup> illuminates and explains transparency's complicated politics and administrative frustrations in a period of renewed populism, as well as in the inevitable reaction against it.

This Article explains the connections and tensions between transparency and populism. Part II introduces populism as a general political phenomenon that has emerged and evolved over the past century. Shifting between left and right, and occasionally mixing political elements in novel ways that are contingent upon their particular historical circumstances, populist movements claim to authentically construct and then represent an idea of "the people" in opposition to an "elite" power bloc. Part III discusses how populism's complaints about secrecy among the elite and powerful overlap with the complaints about secrecy that transparency advocates make. Both populists and transparency advocates tend to view power and its exercise skeptically,<sup>23</sup> and both claim that an

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22. The most significant exception is the anthropologist Gregg Hetherington's work on the relationship between transparency and populism in Paraguay. *See* KREGG HETHERINGTON, *GUERRILLA AUDITORS: THE POLITICS OF TRANSPARENCY IN NEOLIBERAL PARAGUAY* 189 (2011); Gregg Hetherington, *Populist Transparency: The Documentation of Reality in Rural Paraguay*, 1 *J. LEGAL ANTHROPOLOGY* 45, 47 (2008). *See also* MARK FENSTER, *THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION* 37-38 (2017) (discussing relationship in passing); NADIA URBINATI, *ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY* 60-61, 180-83 (2019). Instead, commentators and political theorists have described transparency variously: as an essential liberal democratic norm and human right that transcends the political, *see, e.g.*, SUZANNE J. PIOTROWSKI, *GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM* 10 (2007) ("Not only does transparency give us a better understanding of what government is doing, but it encourages those who work for government to better meet their obligation to us"); Patrick Birkinshaw, *Transparency as a Human Right*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 47 (Christopher Hood & David Heald eds., 2006) ("Not only is [freedom of information] instrumentally important in realizing other human rights such as freedom of speech and access to justice or other desiderata such as accountability, it is intrinsically important: the right to know how government operates on our behalf."); as a consequentialist tool to hold the state accountable and limit corruption, *see, e.g.*, Archon Fung & Stephen Kosack, *Does Transparency Improve Governance?* 17 *ANN. REV. POL. SCI.* 65 (2014) (reviewing empirical literature on transparency as an accountability tool); as a lever by which parties and politicians impugn incumbents and opponents, *see* text accompanying *supra* notes 102-105; and as a means used by private actors to further commercial and ideological interests. *See* Margaret Kwoka, *FOIA, Inc.*, 65 *DUKE L.J.* 1361 (2016) (commercial uses of FOIA); David E. Pozen, *Transparency's Ideological Drift*, 128 *YALE L.J.* 100, 108-15 (2018).

23. Populists view the exercise of power skeptically when they are out of power; transparency advocates view the exercise of power especially skeptically when they are dissatisfied with the lack of information or candor surrounding its use.

increased flow of information and communication enables and even encourages political reform by forcing the state to reveal itself. But they are not identical. Whereas transparency advocates emphasize technical mandates and widely-recognized but unwritten norms of disclosure, populists champion simpler political norms and emotional connections among leaders, movements, and the public. Transparency is understood and promoted in both populist and technocratic registers, and the differences between them at times render the concept contradictory, even perhaps at times meaningless.

Part IV uses Donald Trump's presidential term as a case study in the relationship between transparency and populism. It begins by describing the extent to which his administration failed to comply with formal administrative laws and well-established disclosure norms. Nevertheless, the former president and his supporters claim that he in fact governed quite transparently<sup>24</sup> through his direct, affective public communication rather than by complying with the laws and norms of public administration. He offered a seemingly accessible version of his thoughts and emotions in real time through his Twitter account and his extended, often improvisational performances during the rallies he continued to hold after his election. Thus, President Trump simultaneously departed from administrative laws and norms while repeatedly invoking their spirit, and in the process sought to reframe transparency's meaning in terms more favorable to his manner of governance.

Part V concludes by explaining how right-wing populism's rise has laid bare transparency's internal conflict between its status as an administrative concept defined and implemented by law, regulations, and norms, and its operation as a contested political concept that overlaps with populism. The tension between these distinct ways of understanding transparency clarifies both transparency's politics and its limitations and disappointments.

## II. POPULISM: THE PEOPLE AGAINST THE ELITE

Populism has regularly waxed and waned as a prominent political force

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24. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 24, 2019, 9:47 AM), <https://twitter.com/realdonaldtrump/status/1121048120312389634> ("No Collusion, No Obstruction - there has NEVER been a President who has been more transparent.").

since its formal emergence in the U.S. during the late 19th century,<sup>25</sup> despite the apocalyptic dangers to democracy its critics regularly predict will follow in populism's wake.<sup>26</sup> It continues to play a key role in the modern political understanding of popular sovereignty<sup>27</sup> and has regained its standing in the last decade. In the U.S. for example, populist ideas circulated in the Tea Party's insurgency among the Republican base during the Obama presidency, the Occupy Wall Street movement on the political Left, beginning in 2011, and then among both Democrats and Republicans in the 2016 election.<sup>28</sup> Right-wing populism's current rise in European nations began well before the 2016 U.S. presidential election.<sup>29</sup> Left-wing populist parties have been successful in Greece and Spain,<sup>30</sup> and populism has been a constant and prevalent strain of Latin American politics since the previous century.<sup>31</sup> Despite scholars' normative disagreement over populism's significance, I explain in this Part, the academic literature has reached a general consensus about certain of its characteristics.<sup>32</sup>

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25. Judis, *supra* note 6, at 18–19.

26. See, e.g., WILLIAM GALSTON, ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY 4-5 (2018) (characterizing populism as a “deformation of liberal democracy” and symptomatic of the latter’s “worrying retreat”); JAN-WERNER MÜLLER, WHAT IS POPULISM? 6 (2016) (criticizing populism as “blatantly antidemocratic” and a “degraded form of democracy”); Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123, 1140-44 (2018).

27. Duncan Kelly, *Populism and the History of Popular Sovereignty*, in OXFORD HANDBOOK OF POPULISM 511, 529 (Cristóbal Rovia Kaltwasser et al. eds., 2017).

28. Judis, *supra* note 6, at 53–87.

29. Europe’s surge in populism predated the current reemergence in the U.S. See generally TWENTY-FIRST CENTURY POPULISM: THE SPECTRE OF WESTERN EUROPEAN DEMOCRACY (Daniele Albertazzi & Duncan McDonnell eds., 2008); CAS MUDDE, POPULISM IN EUROPE AND THE AMERICAS (2012); CAS MUDDE, POPULIST RADICAL RIGHT PARTIES IN EUROPE (2007).

30. See Alexandros Kioupkiolis, *Podemos: The Ambiguous Promises of Left-Wing Populism in Contemporary Spain*, 21 J. POL. IDEOLOGIES 99 (2016); Marco Lisi et al., *Economic Crisis and the Variety of Populist Response: Evidence from Greece, Portugal and Spain*, 42 W. EURO. POL. 1284 (2019); Yannis Stavrakakis & Giorgos Katsambekis, *Left-Wing Populism in the European Periphery: The Case of SYRIZA*, 21 J. POL. IDEOLOGIES 119 (2014).

31. See MICHAEL L. CONNIFF ET AL., POPULISM IN LATIN AMERICA (Michael L. Conniff ed., 2d ed. 2012); CARLOS DE LA TORRE, POPULIST SEDUCTION IN LATIN AMERICA (2d ed. 2010).

32. The academic literature on populism reflects populism’s tendency to fluctuate in importance. See generally CHARLES POSTEL, THE POPULIST VISION 6–9 (2009) (offering an historiography of the literature). One can find an enormous range of hand-wringing critiques of populism as an historical phenomenon and more focused, limited embraces of certain aspects of populist politics and the history of populist movements, usually reflecting the commentator’s political commitments. Compare JOHN LUKACS, DEMOCRACY AND POPULISM: FEAR AND HATRED (2005) (condemning populism’s key role in all of the destructive political movements and events of the 20th Century), with John B. Judis, *Rethinking*



### A. *Populism's Dualist Vision*

Current and past populist movements tend to share strong but thin political commitments. Most significantly, they promote deep-seated, dualist visions of the political and social world, on one side of which stands the “people” that a movement calls into existence and whose interests it claims to champion. On the other side is the existing structure of power and the power bloc that controls it.<sup>33</sup> This dualism reduces political debate and noise to simple binaries between vague, undefinable categories.<sup>34</sup> Populist movements and leaders promise to transform the political and social order by restoring the people (in whatever way they are defined) to their rightful place in power and moral authority through self-rule. What was once broken will be repaired; the people that had been divided will find a unified wholeness under their own direct rule.

Populism's foundational division between people and the power bloc produces three additional binaries that lend specificity and definition to each populist movement.<sup>35</sup> The first is that the power bloc represents the interests of an “elite.”<sup>36</sup> Individual movements fill this vague category distinctly. Right-wing populists generally define the elites they oppose in intellectual and cultural terms, while left-wing populists tend to concentrate their hostility on economic elites.<sup>37</sup> The population of these elites may overlap, but different kinds of populist movements condemn elites for perpetrating different wrongs. Second, populist movements

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*Populism*, DISSENT 16 (Fall 2016) (describing populism, and political theories of populism, as a positive development), and CHANTAL MOUFFE, FOR A LEFT POPULISM (2018) (embracing populism for a renewed left politics). Social scientists and political theorists provide a less normative, more descriptive account of populism's development and effects. See JAMES A. MORONE, THE DEMOCRATIC WISH (rev. ed. 1998); MUDDE & KALTWASSER, *supra* note 6; MÜLLER, *supra* note 6; Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 POL. STUD. 2 (1999); POPULISM: ITS MEANING AND NATIONAL CHARACTERISTICS (Ghita Ionescu & Ernest Gellner eds., 1969); OXFORD HANDBOOK OF POPULISM (Cristóbal Rovia Kaltwasser et al., eds., 2017); POPULISM AND THE MIRROR OF DEMOCRACY (Francisco Panizza ed., 2005).

33. Canovan, *supra* note 31, at 3–4.

34. See generally ERNESTO LACLAU, ON POPULIST REASON 18 (2005) (explaining that populist reason “simplifies the political space, replacing a complex set of differences and determinations by a stark dichotomy whose two poles are necessarily imprecise”).

35. See MUDDE & KALTWASSER, *supra* note 6; MÜLLER, *supra* note 25, at 19–22.

36. MUDDE & KALTWASSER, *supra* note 6, at 11–14; MÜLLER, *supra* note 25, at 2–3; Canovan, *supra* note xx, at 3–4.

37. MUDDE & KALTWASSER, *supra* note XX, at 12–13; MÜLLER, *supra* note xx, at 2–3; Canovan, *supra* note 31, at 3–4.

express deep skepticism about pluralism as a political theory and about pluralistic governance as a preeminent institutional and procedural principle.<sup>38</sup> This binary rests on a deep suspicion of governing institutions, including the state, civil service, and political parties, which appear structurally and inevitably unjust to unprivileged commoners.<sup>39</sup> Electoral contests too appear unfair or even fixed. Third, the boundary between people and the power bloc radiates from some defined identity, drawn in terms of nation, race/ethnicity, masculinity, class, or some combination thereof. The idea of a “people” draws categorical boundaries between those who are within and outside of the group, in the process shaping the individual and group ideal of the people whose interests the movement would further.<sup>40</sup>

### *B. Populism’s Claim to Authenticity*

Populist movements contend that the existing power bloc fails to represent the legitimate majority’s true interests.<sup>41</sup> At its core, populism’s anti-elitism rejects what it views as the hidden nature of the present institutional order.<sup>42</sup> Bureaucracies that operate and communicate in a technocratic manner—relying on their expertise as authority, engaging in complex but facially fair procedures, and communicating in dry, neutral language—appear especially suspect when contrasted with a populist

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38. MUDDE & KALTWASSER, *supra* note 6, at 7–8; MÜLLER, *supra* note 25, at 3.

39. LACLAU, *supra* note 33, at 137; Kenneth M. Roberts, *Populism and Political Powers*, in OXFORD HANDBOOK OF POPULISM, *supra* note 31, at 287, 289–90.

40. MUDDE & KALTWASSER, *supra* note 6, at 18–19; MÜLLER, *supra* note 25, at 3–4. Current right-wing populist movements have tended to emphasize national identity as their core principle, but they often tie their idea of nationhood to race, ethnicity, and ideology as well. As Benjamin De Cleen has argued, populism and nationalism are not coextensive, and just as not all populists are nationalists, so not all nationalists are populists. See *Populism and Nationalism*, in OXFORD HANDBOOK OF POPULISM, *supra* note 31, at 342, 358–59.

41. Populism’s theory of representation presumes that distance and intermediation necessarily interfere with popular sovereignty and therefore prevent the people’s rule. For more complex theories of representation, see, for example, HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967) (the canonical consideration of the issue in political theory); Mónica Brito Vieira, *Introduction to RECLAIMING REPRESENTATION : CONTEMPORARY ADVANCES IN THE THEORY OF POLITICAL REPRESENTATION* (Mónica Brito Vieira ed., 2017) (providing a history and literature review of representation as a concept in political theory).

42. See EDWARD SHILS, *THE TORMENT OF SECRECY* 44–47 (1956); Yannis Papadopoulos, *Populism, the Democratic Question, and Contemporary Governance*, in *DEMOCRACIES AND THE POPULIST CHALLENGE* 45, 47, 57 (Yves Mény & Yves Surel eds., 2002).

style that appeals directly to the people in plain, emotional language.<sup>43</sup> Any legislative and executive institutions that would illegitimately buttress state authority while falsely claiming to represent the people do so without the people's knowledge or approval.

Populist movements make two promises to correct this problem: they pledge to remove the distance between the people and state by offering a truer form of representation, one that authentically pursues the public's real interests by respecting the people's sovereignty;<sup>44</sup> and they promise to banish anything hidden from the public that would interfere with this newly direct, redemptive relationship between state and public.<sup>45</sup> The people will rule themselves through their authentic representative(s).<sup>46</sup> Benjamin Arditi has characterized populism's ability to engage "an imaginary identification" among movement followers that *feels* direct and unmediated.<sup>47</sup> The charismatic leadership that populist movements typically rally around helps to create such identification, allowing one or a small number of leaders to represent and speak for the whole, in the process establishing popular loyalty to the leader and group.<sup>48</sup> The immediacy of these feelings, apparent in followers' evident devotion to the populist cause or leader at gatherings and rallies, demonstrates what Chantal Mouffe has identified as the "passions" of collective populist identity—passions that existing political institutions consider suspect and prevent from expression.<sup>49</sup> Populist movements often appear insurgent

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43. BENJAMIN MOFFITT, *THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION* 43–47 (2016); Paul Taggart, *Populism and the Pathology of Representative Politics*, in *DEMOCRACIES AND THE POPULIST CHALLENGE* 62, 76–77 (Yves Mény & Yves Surel eds., 2002).

44. See URBINATI, *supra* note 21, at 8–9. On the role of this ideal of the people in early U.S. populist movements, see LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* (1976); MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (2017). On its role in 20th Century French and Russian populist movements, see KEVIN PASSMORE, *THE RIGHT IN FRANCE FROM THE THIRD REPUBLIC TO VICHY* (2012); FRANCO VENTURI, *ROOTS OF REVOLUTION: A HISTORY OF THE POPULIST AND SOCIALIST MOVEMENTS IN NINETEENTH CENTURY RUSSIA* (1960).

45. CANOVAN, *supra* note 13, at 89–90.

46. MUDDE & KALTWASSER, *supra* note 6, at 68.

47. Benjamin Arditi, *Populism, or, Politics at the Edges of Democracy*, 9 *CONTEMP. POL.* 17, 23 (2003).

48. See PAUL TAGGART, *POPULISM* 100–03 (2000); on "charismatic leadership" generally, see MAX WEBER, *ECONOMY AND SOCIETY* 242–44 (Guenther Roth & Claus Wittich eds., 1968).a

49. Chantal Mouffe, *The "End of Politics" and the Challenge of Right-Wing Populism*, in *POPULISM AND THE MIRROR OF DEMOCRACY*, *supra* note 31, at 50, 51. See also Pierre Manent, *Populist Demagoguery and the Fanaticism of the Center*, *AM. AFF.* (Summer 2017), available at <https://americanaffairsjournal.org/2017/05/populist-demagoguery-and-the-fanaticism-of-the-center/> ("The

and angry at the economic and social conditions under which their followers claim to suffer, and their members invest themselves emotionally in both the identity that the group has constructed and in the movement's leadership.<sup>50</sup>

Whether embodied in an individual or dispersed within a party or movement, populist leadership claims to constitute true representation for a singular people.<sup>51</sup> Leaders express the popular will simply and starkly, often through direct, performative mediated address to a mass audience that takes advantage of their stature and celebrity.<sup>52</sup> They traffic in stereotypes, emphasize action, and offer what they propose as “common sense” solutions rather than technical or abstract ones.<sup>53</sup> Indeed, their claim to truly represent the people in opposition to an elite establishment invites them to exercise ostensibly bad manners, creating offense by speaking bluntly and outrageously.<sup>54</sup> Populists channel the popular will by attempting to speak in the people's voice more honestly and bravely than the people themselves.

Populism is therefore not merely a group response to external stimuli (such as an economic crisis), but a political and cultural style that is creatively syncretic.<sup>55</sup> Populist movements link together shared (if not

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populist orientation is often said to have a ‘passionate,’ ‘extreme,’ or ‘irresponsible’ manner and tone. But its content, too, is never credited with the characteristics of reason, moderation, and responsibility. The term ‘populism’ denotes an orientation, a political opinion, or certain orientations or political opinions, which are discredited and denounced.”).

50. See Canovan, *supra* note 31, at 6.

51. See MÜLLER *supra* note 25, at 20–23; SHILS, *supra* note 41, at 98–104.

52. MOFFITT, *supra* note 42, at 84–87 (2016); Julianne Stewart et al., *Conclusion: Power to the Media Managers*, in *THE MEDIA AND NEO-POPULISM: A CONTEMPORARY COMPARATIVE ANALYSIS* 217, 228 (Gianpetro Mazzoleni, Julianne Stewart & Bruce Horsfeld eds., 2003). On the global rise of celebrity-politicians, and their relationship to populism, see generally DARRELL M. WEST & JOHN ORMAN, *CELEBRITY POLITICS* (2003); MARK WHEELER, *CELEBRITY POLITICS: IMAGE AND IDENTITY IN CONTEMPORARY POLITICAL COMMUNICATIONS* (2013); David Marsh, Paul 't Hart & Karen Tindall, *Celebrity Politics: The Politics of the Late Modernity*, 8 *POL. STUD. REV.* 322 (2010).

53. MUDDE & KALTWASSER, *supra* note 6, at 68.

54. BENJAMIN ARDITI, *POLITICS ON THE EDGES OF LIBERALISM: DIFFERENCE, POPULISM, REVOLUTION, AGITATION* 78 (2007) (characterizing the populist leader's role as that of a “drunken dinner guest”); Moffitt, *supra* note 42, at 57–63; see generally Pierre Ostiguy, *Populism: A Socio-Cultural Approach*, in *THE OXFORD HANDBOOK OF POPULISM*, *supra* note 31, at 73, 77–84 (discussing the important tendency of populist leaders to deploy “low” social and political means of address to the public); J. Eric Oliver & Wendy Rahn, *Rise of the Trumpenvolk: Populism in the 2016 Election*, 667 *ANNALS OF THE AM. ACAD. POL. & SOC. SCI.* 189, 192–94 (2016).

55. See Canovan, *supra* note 31, at 4–5 (noting populism's affirmative as well as reactive tendencies); MOFFITT, *supra* note 42, at 50–51.

necessarily correct) understandings of the past, criticisms of present conditions, and visions of the future to form a new political framework built upon issues that dominant parties and institutional politics ignore or fail to acknowledge fully. Their invocation of a “people” is at once affirmative, insofar as it builds a constituency through a collective identity, and oppositional, since in doing so it excludes those outside the group and constructs an enemy that seeks both to protect its status as “elite” and to relegate the people to subservience.<sup>56</sup> At bottom, populist movements intend to redeem and remake the world in the people’s image (as they would define it), under the people’s rule, led by the people’s authentic representative(s).<sup>57</sup> They promise a state that will serve directly, instrumentally, and affectively in the people’s interest—whoever that people is, and whatever that people purportedly wants.

### C. *Populism’s Contingency*

Populism’s Manichean vision and simple narrative—the identifiable people in pitched battle against a power bloc that controls the existing, seemingly democratic institutions—render it so vague as to be seemingly meaningless as a political idea.<sup>58</sup> Individual populist movements can incline left or right, or offer a mix of proposals from different points on the present political spectrum; they can also evolve in directions seemingly opposite from where they started, especially once they find success, while remaining true to the basic storyline they convey.<sup>59</sup> And the narratives they offer appear to pull in opposite directions, driven by an internal tension between populism’s claims to offer radical change or revolutionary transformation and its defense of a nationalist identity or cherished, long-lost political principles. The emergence and development of any movement therefore proves highly contingent on a nation’s or region’s internal political dynamics—including its political system and

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56. LACLAU, *supra* note 33, at 18; Canovan, *supra* note 31, at 4–5.

57. On populism as constituting a strong form of democracy’s “redemptive” face, see Canovan, *supra* note 31, at 9–14.

58. See MÜLLER *supra* note 25, at 8–10.

59. See MOUFFE, *supra* note 31, at 11. Examples in the U.S. of figures who have individually shifted from positions typically recognized as leftist to those understood as right-wing include William Jennings Bryant, Tom Watson, and Father Charles Coughlin. See MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYANT* (2006); KAZIN, *POPULIST PERSUASION*, *supra* note 43, at 40–46, 74–80.

parties—as well as on the current issues to which an individual movement appears to be responding.<sup>60</sup> This is equally true on different continents, as the populism of North and South America differ considerably from that of Europe, reflecting distinctions in political cultures, respective histories as colonialists and colonies, and their relative states of economic development.<sup>61</sup>

As a result, populism does not function as a freestanding political concept in the manner of socialism, fascism, or neoliberalism, each of which at least appear to sit somewhere on the political spectrum and stand for something (even if their boundaries and substance might be contested).<sup>62</sup> Putative populist movements either operate within or find themselves labeled as part of the political institutions and traditions that they criticize. Among conservatives, “right-wing populists” and so-called “authoritarian populists” distinguish themselves from elite or Burkean conservatives.<sup>63</sup> The “populist left” stands in opposition to the drift among leftists and liberals towards neoliberalism and centrism.<sup>64</sup> At the same time that they radically challenge institutional parties, right- and left-wing populists can draw from the same pool of disaffected voters. In the 2016 presidential election, for example, Donald Trump’s populist claims to represent forgotten populations attracted at least some of those who had backed Bernie Sanders in the Democratic primaries, despite the stark

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60. See generally David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482, 1488–94 (2018) (discussing what he terms “unbundled populism,” which is free of the “worldviews” of a particular moment).

61. See OXFORD HANDBOOK OF POPULISM, *supra* note 31 (highlighting the connections and comparative distinctions and departures among the populist governments and movements in different nations and on different continents); see also Carlos de la Torre, *Populism in Latin America*, in OXFORD HANDBOOK OF POPULISM, *supra* note 31, at 195, 196–203 (describing wide variety of populist movements and leaders in Latin America).

62. See Canovan, *supra* note 31, at 4 (noting populism’s contingency and rejecting the notion of a populist “ideology”).

63. See, e.g., CHIP BERLET & MATTHEW LYONS, *RIGHT-WING POPULISM IN AMERICA: TOO CLOSE FOR COMFORT* (2000) (on the rise of right-wing populism in the 1990s); STUART HALL, *THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT* 39-56 (1988) (on the rise of “authoritarian populism” in the 1980s in the US under Ronald Reagan and in the UK under Margaret Thatcher).

64. See, e.g., MOUFFE, *supra* note 31 (arguing that to be relevant and recapture the ground lost to authoritarian populism and neoliberalism, the left should embrace a form of democratic populism); DONATELLA DELLA PORTA, *SOCIAL MOVEMENTS IN TIMES OF AUSTERITY: BRINGING CAPITALISM BACK INTO PROTEST ANALYSIS* 96–102 (2015) (discussing Occupy Wall Street and other recent left populist movements).

divergence in their stances on particularly salient policy issues.<sup>65</sup>

This suggests that populism operates as a performative, rhetorical practice, which allows different populist movements to share common tropes while they articulate distinct political demands tied to the time and place of their emergence.<sup>66</sup> As the British sociologist Peter Worsley explained, populism operates as “a dimension of political culture in general, not simply as a particular kind of overall ideological system or type of organization.”<sup>67</sup> Viewed as a contingent political phenomenon based on a set of vague but powerful binaries, populism is ultimately less a political program than a “style,”<sup>68</sup> a political rhetoric,<sup>69</sup> or a “mode of political representation”<sup>70</sup> that movements can appropriate to fit a given set of concerns that are being ignored and to rally a segment of the population that feels disregarded.

### III. TRANSPARENCIES: A TECHNICAL, POLITICAL, AND POPULIST NORM

Like populism, government transparency is not simply one thing. Everyone on the present political spectrum appears to embrace it as an administrative norm (at least in theory), while its precise political valence has evolved over the past five decades.<sup>71</sup> Most broad historical and theoretical accounts of transparency associate its rise with progressive

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65. PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* 67-68 (2019); Danielle Kurtzleben, *Here's How Many Bernie Sanders Supporters Ultimately Voted For Trump*, NPR (Aug. 24, 2017, 2:53 PM), <https://www.npr.org/2017/08/24/545812242/1-in-10-sanders-primary-voters-ended-up-supporting-trump-survey-finds> (reporting data from the Cooperative Congressional Election Study finding that 12% of those who had voted for Sanders in the Democratic primaries voted for Trump in the general election).

66. See MOFFITT, *supra* note 42, at 104–08 (characterizing populism’s invocation of “the people” as performance); see generally MICHAEL SEWARD, *THE REPRESENTATIVE CLAIM* (2010) (emphasizing the role of aesthetic and cultural components and an ongoing performance engaged in by a representative to gain acceptance by a public).

67. Peter Worsley, *The Concept of Populism*, in *POPULISM: ITS MEANING AND NATIONAL CHARACTERISTICS*, *supra* note 31, at 212, 245.

68. Benjamin Moffit & Simon Tormey, *Rethinking Populism: Politics, Mediatization and Political Style*, 62 *POL. STUD.* 381, 390-92 (2014).

69. KAZIN, *POPULIST PERSUASION*, *supra* note 43, at 192–93.

70. Arditi, *supra* note 46, at 78–87.

71. See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975*, at 4 (2015) (“Right, left, and center, there is broad support for the ideal of transparency.”)

good governance reforms,<sup>72</sup> although specific chronicles of open government legislation in particular jurisdictions note that party politics and interbranch conflicts often motivate new transparency reforms.<sup>73</sup> Taken together, these accounts demonstrate that “transparency” is neither an essentially progressive, partisan, nor libertarian administrative norm—although elements of each have both structured the norm historically and occasionally emerged to dominate advocacy efforts. Nevertheless, the term’s political and symbolic authority allows the transparency ideal to transcend political partisanship and to take on different meanings based on context and on those who claim its mantle.

This Part considers transparency’s multiple meanings and applications. It first identifies transparency’s prescription in the laws and norms that attempt to open a sprawling bureaucracy to view. Open government laws inevitably prove long, complicated, and legalistic, and require continual enhancement and enforcement against the vast complex of government entities that make up the modern state.<sup>74</sup> This legal and normative machinery constitutes transparency’s technocratic arrangement—the means by which the state is made accessible, legitimate, and above all democratic through a set of technical rules.<sup>75</sup> Then this Part turns to transparency as a concept that both needs political support and is part of partisan and institutional conflict. Finally, this Part argues that, in the process of its political use, transparency’s populist elements can predominate and undercut its technocratic implementation.

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72. See David E. Pozen, *Transparency’s Ideological Drift*, 128 *YALE L.J.* 100, 108–15 (2018) [hereinafter Pozen, *Drift*].

73. For monographs that discuss the politics of freedom of information laws in individual countries, see, for example, SCHUDSON, *supra* note 70, at 37–63 (on the U.S.); BEN WORTHY, *THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER* 9–11 (2017) (U.K.); and PRASHANT SHARMA, *DEMOCRACY AND TRANSPARENCY IN THE INDIAN STATE* (2015).

74. On FOIA’s many amendments over the past fifty years, for example, see Sami Kerzel, *FOIA: Then and Now*, DOCUMENTS TO THE PEOPLE, Winter 2016, at 22, available at <https://journals.ala.org/index.php/dtp/article/view/6226/8103>.

75. The distinction I pose here between transparency’s technocratic and populist conception parallels Jack Balkin’s use of progressivism and populism as “ideal” types in constitutional theory. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1944 (1995). My use of the terms is not concerned with theory so much as its application: the technocratic effort to develop and enforce rules and the deployment of populist rhetoric and ideas by historical actors. I situate my account of transparency’s technocratic side within the concept’s development as an administrative norm and my account of populism within its development in U.S. political history.



A. *Technocratic Transparency: Open Government as an Administrative Norm*

Sprawling both organizationally and spatially, modern government resists visibility. Open government laws cannot magically and perfectly unveil the state; rather, they can only address the traces of state operations through legislation that attempts to mitigate bureaucracies' inevitable information hoarding.<sup>76</sup> The disclosure of federal government records in the U.S., for example, is mandated by a variety of laws, including the Freedom of Information Act ("FOIA"), while sub-federal states have their own analogous but also quite distinct and variable laws.<sup>77</sup> Various preservation statutes require that these records are maintained and archived.<sup>78</sup> Open government laws create specific exemptions from disclosure for certain types of records.<sup>79</sup> Federal and state laws require meetings to be open to the public, although the scope of these laws varies widely among the various statutes and state constitutions that establish the mandates.<sup>80</sup> Administrative laws that regulate agency rulemaking and adjudication require the disclosure of some government outputs that have legal effect, as well as some of the inputs government produce and relies upon to produce them.<sup>81</sup> None of these laws are mechanical. Rather, each relies upon broad, ambiguous standards and multi-factor balancing tests established in complex statutes and court decisions.<sup>82</sup>

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76. See DAVID BEETHAM, BUREAUCRACY 101-02 (2d ed. 1996); 2 MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 992 1968).

77. See Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 643–47 (2010) [hereinafter Fenster, *Seeing the State*].

78. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2018); Federal Records Act, 44 U.S.C. § 3301 *et seq.* (2018) (requiring creation, maintenance, and retention of records); FLA. STAT. § 119.01 *et seq.* (2018) (Florida's open records law).

79. See, e.g., 5 U.S.C. § 552(b) (2018) (enumerating exceptions from disclosure requirements to federal FOIA); FLA. STAT. § 119.071 (2019) (enumerating general exemptions from disclosure of public records).

80. See, e.g., Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended in scattered sections of 5 and 39 U.S.C. (1976)) (federal open meetings law); FLA. CONST. art. I, § 24 (providing individual right of access to public records and meetings); CAL. GOV'T CODE § 54950 *et seq.* (Ralph M. Brown Act, California's open meetings law).

81. See, e.g., 5 U.S.C. § 553(b), (c) (2018) (requiring federal agencies conducting informal rulemaking to publish proposed rules in Federal Register and to incorporate in the final rules "a concise general statement of their basis and purpose").

82. For examples of contested, ambiguous language in open government laws, consider two of the most recent FOIA decisions from the U.S. Supreme Court, which settled long-disputed language in FOIA

The federal versions of these laws in the U.S. focus on the executive branch.<sup>83</sup> But the President and White House (which enjoy certain constitutional privileges from disclosure<sup>84</sup>) and federal agencies represent only part of a much broader set of U.S. leviathans. By Constitution and statute, the U.S. Congress<sup>85</sup> and federal Judiciary<sup>86</sup> face their own sets of more limited disclosure requirements. And private entities and individuals interact extensively with U.S. government entities, whether by performing governmental duties or finding themselves subject to regulatory enforcement. Open government laws vary in how they resolve the difficult issue of when the public nature of the work that private entities and public-private partnerships perform and their interactions with the state compels disclosure.<sup>87</sup> State constitutions and statutes handle these same issues distinctly, while the federal constitution establishes only a minimal baseline of disclosure requirements and rights of access.<sup>88</sup>

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exemptions. *See generally* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (settling the meaning of FOIA § 552(b)(4) exempting “commercial or financial information obtained from a person and . . . confidential”); Milner v. Dep’t of Navy, 562 U.S. 562, 572 (2011) (settling the meaning of FOIA § 552(b)(2) exempting material “related solely to the internal personnel rules and practices of an agency”). On the contested definition of the “record” for purposes of litigation under the Administrative Procedure Act, see Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1 (2018). Statutory vagueness often leads courts to defer to agency decisions not to disclose records. *See* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163–68 (2006); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 211 (2013); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 719 (2002).

83. *See* 5 U.S.C. § 552 (2018) (applying FOIA only to “each agency,” which is defined in 5 U.S.C. § 551(1) to exclude, among other entities, Congress and the courts).

84. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 933–41 (2006).

85. *See* Fenster, *Seeing the State*, *supra* note 76, at 637–38 (2010); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410–22 (2004).

86. *See* Fenster, *Seeing the State*, *supra* note 76, at 641–42; Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 289–93 (2003).

87. *See generally* Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 446–49 (2019) (discussing FOIA’s limitations in when government privatizes or works with private actors); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 894–97 (2014) (examining the problem facing efforts to apply the APA and FOIA to hybrid, “boundary” agencies).

88. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (holding that the First Amendment provides no general “right of access to all sources of information within government control”); *see generally* Fenster, *Seeing the State*, *supra* note 76, at 641–43 (identifying limited federal constitutional rights of access to information and the variability of rights created by state constitutions).

In sum, transparency in the U.S. and elsewhere has proven difficult to legislate and enforce.<sup>89</sup> Its imposition has required complex laws that parse fine distinctions in order to balance competing interests. Attorneys and professionals have developed special expertise for those representing the public and government.<sup>90</sup> Officials who oversee government records receive compliance training,<sup>91</sup> and some statutes excuse agencies from fee-shifting provisions if they acted in good faith in implementing a complex, often ambiguous statute.<sup>92</sup> Legislators, officials, attorneys, and courts must resolve the highly technical questions these laws and their interpretations create.<sup>93</sup> Transparency is imposed at a level far removed from the eyes and ears of the public, in government and legal offices and

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89. See generally WORTHY, *supra* note 72, at 12-14 (describing the clash between transparency's symbolic value and the institutions that the implementing laws affect).

90. Although numerous websites, including the federal government's own FOIA.gov, assist laypersons in filing an initial request, the process becomes increasingly complex when an agency denies a request either in part or whole. A how-to guide produced and posted on the Internet by the National Security Archive (an NGO that extensively uses FOIA) warns that as a requester moves through the administrative appeals process following a full or partial denial from an agency, it will need an increasing amount of legal knowledge and should seek representation if she decides to file suit. NAT'L SEC. ARCHIVE, EFFECTIVE FOIA REQUESTING FOR EVERYONE 29-51 (2008), available at [https://nsarchive2.gwu.edu/nsa/foia/foia\\_guide/foia\\_guide\\_full.pdf](https://nsarchive2.gwu.edu/nsa/foia/foia_guide/foia_guide_full.pdf); see also *id.* at 52 ("Bringing a lawsuit requires a commitment of time and resources. . . . Although you may litigate a case without an attorney, it may be difficult to make an impact on your own if you are not familiar with case law and court procedures."). FOIA litigation requires attorneys themselves to develop special expertise. For example, courts have developed special rules to assist them in ruling on summary judgment motions in FOIA litigation. See *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining rules developed in response to the "peculiar nature of the FOIA"); cf. Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 227 (2011) (noting the difficulty of distinguishing law and fact issues in FOIA litigation and complaining that courts regularly decide FOIA cases on summary judgment, using the procedure they have developed, despite the dominance of contested fact questions in their decision).

91. See, e.g., 5 U.S.C. §§ 552(j), (j)(2)(F) (2018) (requiring federal agencies to create a "Chief FOIA Officer" and mandating that the official "offer training" to personnel regarding their duties under FOIA); ARIZ. REV. STAT. ANN. §§ 41-1376.01(a) (2019) (establishing ombudsman to help train agencies on their responsibilities under state public access law).

92. See Heath Hooper & Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law*, 79 MO. L. REV. 949, 959-63 (2014).

93. Examples of the narrow, highly technical legal issues that consume FOIA practitioners include two of the Supreme Court's most recent FOIA decisions, in which the Court reversed longstanding circuit court interpretations of two different disclosure exemptions. See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (overruling the D.C. Circuit's longstanding, influential interpretation of "privileged or confidential" in 5 U.S.C. § 552(b)(4) from *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767 (1974)); *Milner v. Dep't of Navy*, 562 U.S. 562, 570-71 (2011) (overruling the D.C. Circuit's longstanding, influential interpretation of "personnel" in 5 U.S.C. § 552(b)(2) from *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc)).

in courtrooms, as a specialized, complex, internal project led by specially-trained experts.

The extent of these mandates' impacts proves difficult to judge, given the abstract goals that the norm is intended to meet and the challenge of measuring its benefits and costs. As a public administration scholar who specializes in transparency has recently noted, its impact will at best prove "gradual, indirect, and diffuse."<sup>94</sup> This is especially true given both the difficulty in evaluating the causal effects of a broad administrative norm imposed by narrowly applied, technical legal mandates,<sup>95</sup> and the hazy, uneven relationship between transparency and government accountability.<sup>96</sup> Moreover, some studies have found evidence that transparency can demoralize the public as much as it leads them to participate knowledgeably in democratic elections.<sup>97</sup> Critics have more recently argued that open government laws have been crippled by underfunding and insufficient compliance<sup>98</sup> and that transparency has been turned into a corporatist anti-regulatory tool.<sup>99</sup> One prominent legal academic has even argued that FOIA has come to constitute a fetish object

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94. Gregory Michener, *Gauging the Impact of Transparency Policies*, 79 PUB. ADMIN. REV. 136 (2019) [*hereinafter* Michener, *Gauging the Impact*].

95. See Maria Cuccinello et al., *25 Years of Transparency Research: Evidence and Future Directions*, 77 PUB. ADMIN. REV. 32 (2017); see also Jenny De Fine Licht et al., *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27 GOVERNANCE 111 (2014) (noting the important role that political and administrative context plays in the impact of transparency policies on institutional legitimacy).

96. See Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. IN PRAC. 663, 668-69 (2007).

97. See, e.g., Monika Bauhr & Marcia Grimes, *Indignation or Resignation: The Implications of Transparency for Societal Accountability*, 27 GOVERNANCE 291, 309-11 (2014) (noting that under certain conditions, exposure of corruption can lead the public to despair rather than to hold state actors accountable); see generally BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 67 (2015) (arguing that transparency can undercut trust in electoral democracy).

98. See generally Margaret Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (showing how use of FOIA by for-profit requesters crowds out more traditional and intended requests); Pozen, *Freedom*, *supra* note 2, at 1124-25 (discussing congressional underfunding of agency compliance efforts); Daxton R. "Chip" Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515, 517-18 (2016) (characterizing FOIA as "petrified" and "a tool for preserving secrecy").

99. See Pozen, *Drift*, *supra* note 71, at 123-46; Jeannine E. Rely & Carol B. Schwalbe, *How business lobby networks shaped the U.S. Freedom of Information Act: An examination of 60 years of congressional testimony*, 33 GOV. INFO. Q. 404 (2016).

that clogs rather than assists in executive branch administration.<sup>100</sup> No matter the extent of critique of the general concept and its technocratic mandate, transparency viewed this way attempts to marginally increase the state's visibility through intermittently effective regulations on government behavior.<sup>101</sup>

*B. Political Transparency: Open Government as a Political Norm*

Although an administrative and technocratic norm, transparency is also deployed politically, and in that guise is made to speak in a distinct register. Candidates, parties, and elected officials use both their opponents' alleged secrecy and the threat of exposure to their political advantage.<sup>102</sup> Legislatures enact open government laws for political gain, whether as part of interparty or interbranch competition.<sup>103</sup> Political parties and officials tend to embrace open government laws when out of power (although they resist enforcement or downplay the laws' importance once in office).<sup>104</sup> Thus even the most seemingly neutral good-government laws develop in a partisan context and require political support for their enactment. At the same time, presumptively non-partisan, apolitical civil society groups—including the press and non-governmental organizations—engage in political campaigns on transparency's behalf by promoting and lobbying on

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100. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019). Some question whether transparency should play any significant role in government administration. See FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY* 506-08 (2014).

101. See generally Michener, *Gauging the Impact*, *supra* note 93, at 139 (calling for scholars and funders to concede that, and to develop methodological approaches for evaluation that can better capture transparency's marginal impacts).

102. See, e.g., text accompanying *supra* note 22 (noting Trump's criticism of Hillary Clinton during 2016 campaign); FENSTER, *supra* note 22, at 6-7 (noting Obama's criticism of his predecessor's secrecy practices during 2008 campaign).

103. See Daniel Berliner, *The Political Origins of Transparency*, 76 J. POL. 479 (2014); Gregory Michener, *How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws*, 28 GOVERNANCE 77 (2015); Sabina Schnell, *Cheap talk or incredible commitment? (Mis)calculating Transparency and Anticorruption*, 31 GOVERNANCE 415 (2017).

104. See FENSTER, *supra* note 22, at 72-73. The same political dynamic has played a role in the enactment and amendment of administrative laws more generally. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999).

behalf of open government laws.<sup>105</sup>

Within this political context, open government laws come draped in powerfully symbolic language that make the laws appear to transcend politics. These laws proclaim their importance in titles that promise a tangible, visible state which is directly answerable to its public.<sup>106</sup> Proponents declare the laws will provide “sunshine” or sunlight to an otherwise darkened bureaucracy,<sup>107</sup> “free” government information from official clutches,<sup>108</sup> and grant the public a “right to know” the government and its actions.<sup>109</sup> To make the case for transparency, advocates regularly invoke Louis Brandeis’s famous dictum about sunlight’s power as a disinfectant.<sup>110</sup> In the words of the Sunlight

105. Histories of open government legislation and its implementation highlight the political nature of transparency laws. *See, e.g.*, SAM LBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN THE AMERICA 164-89 (2016) (focusing on the U.S.); SCHUDSON, *supra* note 70, at 4 (same); SHARMA, *supra* note 72 (India); WORTHY, *supra* note 72 (U.K.); Fabrizio Di Mascio et al., *The Political Origins of Transparency Reform: Insights from the Italian Case*, ITALIAN POL. SCI. REV. (forthcoming, published online 2018), <https://www.cambridge.org/core/journals/italian-political-science-review-rivista-italiana-di-scienza-politica/article/political-origins-of-transparency-reform-insights-from-the-italian-case/06B8491B3F62EAAEBD47DA97169293D4>. For descriptions of the role that NGOs have played, see generally Daniel Berliner, *Transnational Advocacy and Domestic Law: International NGOs and the Design of Freedom of Information Laws*, 11 REV. INT. ORGAN. 121 (2016); Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 451-66 (2012); Milton Mueller et al., *Civil Society and the Shaping of Communication-Information Policy: Four Decades of Advocacy*, 20 INFO. SOC’Y 169 (2004).

106. On the recurring use of “sunshine” and “freedom” as metaphors in open government law and the importance of such symbolism to transparency advocacy, see FENSTER, *supra* note 22, at 3-6.

107. *See, e.g.*, Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended in scattered sections of 5 and 39 U.S.C.); *Open Government—The “Sunshine” Law*, OFF. ATT’Y GEN. ASHLEY MOODY, <https://myfloridalegal.com/pages.nsf/Main/DC0B20B7DC22B7418525791B006A54E4> (last visited Aug. 18, 2019) (referring colloquially to Florida’s open government laws as “sunshine laws”); Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10 (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”).

108. *See generally* FENSTER, *supra* note 22, at 27-29 (on the origins of the term “freedom of information” among U.S. advocates); *see, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (2018).

109. *See generally* FENSTER, *supra* note 21, at 28-30 (on the origins of the term “right to know” among U.S. transparency advocates); *see, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (“Everyone has the right to . . . seek, receive and impart information and ideas through any media and regardless of frontiers”); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11,001-50 (1994) (requiring firms and individuals to report to state and local governments the quantities of potentially hazardous chemicals that have been stored or released into the environment).

110. For examples of the many uses of Justice Brandeis’s metaphor, see Fenster, *Seeing the State*, *supra* note 76, at 626 n.28. On Justice Brandeis’s work, see Pozen, *Drift*, *supra* note 71, at 108-10.

Foundation, an influential Washington, D.C.-based NGO focused on transparency that closed in September 2020, “We believe that information is power, or, to put it more finely, disproportionate access to information is power. We are committed to improving public access to public information by making it available to the public, online.”<sup>111</sup> Calaware, an NGO focused on advocating open government in California, describes its mission as helping to enforce “people’s rights to find out what citizens need to know to be truly self-governing” and fighting “excessive official secrecy” and “intimidation or retaliation” against those who inquire about or report government actions.<sup>112</sup> Advocates deploy vivid political arguments about transparency in hopes of persuading others of transparency’s status as an essential democratic norm.

### *C. Transparency Against the State: Open Government as a Populist Norm*

The politics of transparency are rooted in populism’s understanding of state power. Advocates invoke populism’s dualist view of the state and public<sup>113</sup> by promising individual and collective self-rule that would allow the people to act in a responsible and informed manner in order to check a secretive, possibly corrupt state whose officers constitute an elite and secretly act on others’ behalf to advance narrow interests.<sup>114</sup> As an ideal, transparency springs not only from an affirmative embrace of deliberative democratic ideals, but also from a fear of concentrated power and of government venality, as well as from

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111. *Our Mission*, SUNLIGHT FOUND., <https://sunlightfoundation.com/about/> (last visited Aug. 29, 2019).

112. *Our Mission*, CALIFORNIANS AWARE, <https://www.calaware.org/about/our-mission/> (last visited Aug. 29, 2019).

113. *See supra* Part I-A.

114. *See, e.g., Introduction to the Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (last visited Aug. 29, 2019), <https://www.rcfp.org/introduction-to-the-open-government-guide/> (connecting transparency to participatory democracy); *Memorandum for the Establishment of a Freedom of Information Advocates Network*, FOIANET (Sept. 28, 2002), [http://foiadvocates.net/wp-content/uploads/FOIANet\\_Memorandum\\_28\\_09\\_2002\\_EN.doc](http://foiadvocates.net/wp-content/uploads/FOIANet_Memorandum_28_09_2002_EN.doc) (declaring that transparency and the availability of information on issues of public interest are “fundamental pre-conditions for public participation”).

the public distrust that results from secret power's excesses.<sup>115</sup>

In addition, transparency promises to create and mobilize a popular will, guaranteeing a more direct, authentic, and populist relationship between the public and those who would represent and lead it.<sup>116</sup> Like a populist movement or leader, or in conjunction with one, transparency promises to remove the distance between the public (“we”) and the state by putting an informed public back in charge—a public that can truly know its leadership through the flow of information. The National Freedom of Information Coalition, a group of national and state-level NGOs that advocate for journalists and freedom of information laws, has declared that its mission is “to foster transparent state and local government, which in turn leads to increased civic engagement, self-governance, public-affairs journalism and civic information, and ultimately a better-informed and more trustful society and democracy.”<sup>117</sup> This new “society and democracy”—with a more engaged public that is better capable of governing itself—will support a government that is more trustworthy and representative. The state’s visibility will make it known rather than secret, honest rather than corrupt, and authentic rather than deceitful. As Emmanuel Alloa has argued, transparency promises that “only where nothing is withheld can things be genuine and subjects true to themselves.”<sup>118</sup> Like populism, transparency imagines creating a politics of close proximity, where the state communicates directly and fully with the public and furthers the public’s will.<sup>119</sup>

And like populism, transparency appears to have no necessary affiliation with the political left or right. Its roots lay in the progressivism

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115. See generally Pozen, *Drift*, *supra* note 71, at 116–22 (summarizing the arguments made on behalf of the various open government laws enacted from 1966–76).

116. See *supra* Part I-B.

117. NATIONAL FREEDOM OF INFORMATION COALITION, 2020 VISION: VISION, MISSION, STRATEGIES, GOALS, OBJECTIVES FOR 2020 AND BEYOND (Aug. 6, 2019), available at <https://www.nfoic.org/sites/default/files/pages/2019-08/NFOIC%202020%20Vision%20-%20ADOPTED%20080619.pdf>.

118. Emmanuel Alloa, *Transparency: A Magic Concept of Modernity*, in *TRANSPARENCY, SOCIETY AND SUBJECTIVITY* 21, 32 (Emmanuel Alloa & Dieter Thomä eds., 2018); see also Oana Brindusa Albu & Mikkel Flyverbom, *Organizational Transparency: Conceptualizations, Conditions, and Consequences*, 58 *BUS. & SOC’Y* 268, 276 (2019) (transparency allows the public to access “authentic reality that is considered to be pre-existing and independent of the representations produced in the name of transparency”).

119. See *supra* Part I-C.



of the early twentieth century, especially as that tradition developed in support of the midcentury expansion of the administrative state.<sup>120</sup> The promises of transparency advocates have echoed earlier efforts to reform the modern state during the so-called Populist and Progressive eras that sought to expand popular control over the U.S. federal and sub-federal government.<sup>121</sup> Over the past several decades, civil society watchdogs have continued to emphasize transparency as part of more longstanding “good-government battles” to protect and expand the public’s input into elections and government accountability.<sup>122</sup> Nevertheless, as David Pozen has argued, transparency advocacy has not solely been the province of the progressive and populist left, having drifted recently in a more conservative and libertarian direction. Corporate interests have more widely used open government laws and congressional rules as part of their efforts to oppose legislatures and administrative agencies that would regulate them, and as lawmakers and administrators have replaced command and control regulatory programs with disclosure-based regulations.<sup>123</sup> Pozen has critiqued transparency as a “relatively empty concept, normatively, in the absence of a stable political referent”<sup>124</sup> whose meaning and influence is altered by shifts in “culture, technology, demography, political organization, and so on [that] will invariably alter its social and semiotic significance.”<sup>125</sup> Transparency’s vacuity, he argues, leaves the concept vulnerable to use by interests inimical to its progressive roots, and renders it suspect as a political tool on which progressives can confidently rely.

But like populism, transparency does not become an empty concept or

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120. On transparency’s direct and indirect relationship to progressivism, see Pozen, *Drift*, *supra* note 71, at 108–22; see generally Joanna Grisinger, *The (Long) Administrative Century: Progressive Models of Governance*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN ADMINISTRATIVE STATE* 360, 368, 374–75 (Stephen Skowronek et al. eds., 2016) (placing the APA and the open government statutes within the history of progressive governance).

121. On progressivism generally, see MORONE, *supra* note 31, at 5–9; ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920*, at 164–85 (1967).

122. See Pozen, *Drift*, *supra* note 71, at 117–22.

123. *Id.* at 124–41.

124. *Id.* at 151 n.231; see also *id.* at 104 (characterizing transparency as a “protean concept that may be invoked in a wide range of settings for a wide range of ends”).

125. *Id.* at 106; see also *id.* at 104 n.9 (characterizing transparency’s political valence as resulting from “the interactions over time between various legal instantiations of transparency and various political actors seeking to access or control information”).

administrative norm simply because of its uptake and use by a variety of political movements. Transparency also rests on a theory of power and of the state. Indeed, since its beginnings in the Progressive Era,<sup>126</sup> the reaction to the expansion of government secrecy which led the press to initiate its campaign for open government, and popular discontent following the Vietnam War, the Watergate scandal, and President Nixon's resignation,<sup>127</sup> transparency has been defined in part by its roots in populist discontent with the state and with the state's detached relationship to the public. A freer flow of information, along with a concrete right to challenge officials' unwillingness to disclose, promises to restore the state to its position as an instrument of the public's will, capable of accurately furthering the public's interest. This view of state power is constitutive of transparency's understanding of democratic governance and of disclosure's consequences, even as it stands ready for appropriation by political movements of all types. Populism's core claim about a secret power bloc serves as an important source for the charismatic authority that transparency can claim as an administrative norm. This Article discusses the important differences between transparency and populism in Part IV after identifying how their continuities have allowed contemporary populists like Donald Trump to claim—plausibly, to his supporters—that he governed transparently even when he was clearly less transparent than the technocratic rules and norms which implement the concept require.

#### IV. TRANSPARENCY IN THE TRUMP ADMINISTRATION

Nearly midway through his term, President Trump tweeted a complaint about the long-delayed report from the Department of Justice's Inspector General on FBI Director James Comey's handling of the controversy surrounding Hillary Clinton's use of a private email server while she was Secretary of State during the Obama administration:<sup>128</sup> "There are so

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126. *Id.* at 106.

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

128. A general report about the FBI's performance was issued a week after the tweet. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, OVERSIGHT AND REVIEW DIVISION 18-04, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION (June 2018), available at <https://www.justice.gov/file/1071991/download>. On the controversy surrounding Clinton's emails, see

many horrible things to tell, the public has the right to know. Transparency!”<sup>129</sup> This was neither the first nor final time he used “transparency” or “transparent” in a presidential tweet, and he began using both terms before the 2016 presidential campaign.<sup>130</sup> During his time in office, President Trump often characterized himself as the “most transparent” president in history,<sup>131</sup> going so far as to hold open in the interest of “transparency” a high-stakes meeting with congressional leaders over ending a shutdown of the federal government.<sup>132</sup> When asked, Trump supporters tended to agree with his self-assessment.<sup>133</sup>

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Joshua Jacobson, Note, *The Secretary's Emails: The Intersection of Transparency, Security, and Technology*, 68 FLA. L. REV. 1441 (2016).

129. Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2018, 6:38 AM), <https://twitter.com/realdonaldtrump/status/1003949263481696256>.

130. As of late August 2020, Trump’s account had tweeted or re-tweeted the words “transparency” or “transparent” thirty-eight times (twenty-six times since his January 20, 2017, inauguration). See TRUMP TWITTER ARCHIVE, <http://trumptwitterarchive.com/archive> (last visited Aug. 26, 2020). He frequently used the terms as part of his campaign to question President Obama’s birthplace. See, e.g., Donald J. Trump, *Donald Trump Responds*, N.Y. TIMES (Apr. 8, 2011), <https://www.nytimes.com/2011/04/08/opinion/lweb08trump.html> (criticizing President Obama for failing to produce a birth certificate); see generally Michael Barkun, *President Trump and the “Fringe,”* 29 TERRORISM & POL. VIOLENCE 437, 438–39, 442 n.5 (2017).

131. See Louis Jacobson, *Is Donald Trump the Most Transparent President Ever? NO*, POLITIFACT (June 4, 2019), <https://www.politifact.com/factchecks/2019/jun/04/donald-trump/trump-administration-most-transparent-ever-no/> (“Time and again, President Donald Trump has asserted that his administration has achieved championship-level transparency.”). Trump publicly pronounced the claim at least three separate times in April and May 2019. See, e.g., Donald J. Trump, U.S. President, Remarks Before Marine One Departure (May 24, 2019) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-44/>); Doyle McManus, *The Most Transparent President Ever (Not)*, L.A. TIMES (May 1, 2019, 4:00 AM), <https://www.latimes.com/politics/la-na-pol-trump-transparent-accountable-20190501-story.html>; Andrew Restuccia, *Trump's 'Most Transparent President' Claim Looks Cloudy*, POLITICO (May 23, 2019, 6:45 PM), <https://www.politico.com/story/2019/05/23/trumps-transparency-1342875>.

132. See Matt Lewis, *Everybody's Wrong: Donald Trump Won the Chuck-n-Nancy Meeting, and Here's Why*, DAILY BEAST (Dec. 12, 2018), <https://www.thedailybeast.com/everybodys-wrong-donald-trump-won-the-chuck-n-nancy-meeting-and-heres-why>; *Transcript of the Heated Meeting Between Trump, Pelosi and Schumer*, MARKETWATCH (Dec. 11, 2018), <https://www.marketwatch.com/story/transcript-of-the-heated-exchange-between-trump-pelosi-and-schumer-2018-12-11> (quoting Trump to House Speaker Nancy Pelosi characterizing the meeting, “It’s called transparency.”).

133. Dave Taylor, *Pulse of the Voters: ‘Transparency’ Appeals to GOP Fan Bendzsza*, TRIBUNE STAR (Dec. 25, 2018), [https://www.tribstar.com/news/local\\_news/pulse-of-the-voters-transparency-appeals-to-gop-fan-bendzsza/article\\_6f73f8de-6bc6-5955-996b-d9f27213b02a.html](https://www.tribstar.com/news/local_news/pulse-of-the-voters-transparency-appeals-to-gop-fan-bendzsza/article_6f73f8de-6bc6-5955-996b-d9f27213b02a.html) (quoting interviewee’s description of Trump as “the most transparent president ever”); Ian Schwartz, *CNN Focus Group of Trump Voters: “Exactly What I Voted For”*, REALCLEAR POLITICS (Feb. 13, 2018),

This Part evaluates President Trump's and his supporters' claims. The Trump administration did not make the federal bureaucracy more visible in a technical sense. No one should be surprised by this. In his private career, Trump frequently threatened reprisal and litigation against anyone who exposed his business practices,<sup>134</sup> and his apparent distaste for the First Amendment rights of his critics<sup>135</sup> as well as his penchant for controlling information about himself<sup>136</sup> suggested that his administration would not be as compliant with the letter or spirit of open government laws as those that came before. The first section considers how well his administration fulfilled the public's "right to know" and furthered government transparency in a traditional sense: by complying with legal mandates in disclosure and administrative laws, with congressional demands for information, and with the less-formal norms by which elected officials and candidates have released information. It finds that the administration largely, and in some respects completely, failed effectively to do so. The second section considers the alternative understanding that Trump and his supporters have given to the concept of transparency. Given his penchant for lying, Trump's claim to have been a transparent president could simply be dismissed, as could the views of his supporters who seemed not to have noticed or cared about the lack of

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[https://www.realclearpolitics.com/video/2018/02/13/cnn\\_focus\\_group\\_of\\_trump\\_voters\\_exactly\\_what\\_i\\_voted\\_for.html](https://www.realclearpolitics.com/video/2018/02/13/cnn_focus_group_of_trump_voters_exactly_what_i_voted_for.html) (quoting a voter: "He's very transparent. He's open.").

134. See Adam Davidson, *Trump's Business of Corruption*, NEW YORKER (Aug. 14, 2017), <https://www.newyorker.com/magazine/2017/08/21/trumps-business-of-corruption>; Zoe Tillman, *Donald Trump Has Used A Secretive Justice System to Keep Lawsuits Against Him out of Court*, BUZZFEED NEWS (Aug. 8, 2019, 8:36 PM), <https://www.buzzfeednews.com/article/zoetillman/donald-trump-lawsuits-secret-arbitration>.

135. RonNell Andersen Jones & Lisa Grow Sun, *Making an Enemy of the Press*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), available at <https://illinoislawreview.org/symposium/first-100-days/making-an-enemy-of-the-press/>; Neil Richards, *Free Speech and the Twitter Presidency*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), available at <https://illinoislawreview.org/symposium/first-100-days/free-speech-and-the-twitter-presidency/>; Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915, 917–33 (2018).

136. See Josh Dawsey & Ashley Parker, *'Everyone Signed One': Trump Is Aggressive in His Use of Nondisclosure Agreements, Even in Government*, WASH. POST (Aug. 13, 2018), [https://beta.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a\\_story.html](https://beta.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a_story.html); Mark Fenster, *Revealing Secrecy Tools*, HARV. L. REV. BLOG (Mar. 11, 2019), <https://blog.harvardlawreview.org/revealing-secrecy-tools/>; Orly Lobel, *Trump's Extreme NDAs*, ATLANTIC (Mar. 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/>.

empirical support for Trump's claims.<sup>137</sup> But even if justified, dismissing Trump's claim misses the particular idea of transparency that the claim embraces, one that was most clearly on display in the open-ended and seemingly improvisational "real" communication of his voice and perspective via social media and political rallies.

### A. Compliance with Transparency-Related Laws and Norms

#### 1. Documentary Disclosure and Open Data

The most prevalent way that transparency is understood and measured is through documentary disclosure, which U.S. federal law mandates in FOIA.<sup>138</sup> The extent of any administration's compliance with FOIA mandates is difficult to gauge, given the vast number of requests made of hundreds of administrative agencies across the federal government and the disparate response to legislative commands and executive control.<sup>139</sup> Nevertheless, the Trump administration did not fulfill its FOIA obligations as well as its predecessor.<sup>140</sup> One analysis found that the Trump administration censored, withheld, or claimed it could not find

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137. See In 928 Days, President Trump Has Made 12,019 False or Misleading Claims, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-claims-database/> (last visited Aug. 29, 2019) (finding that as of August 5, 2019, President Trump had made 12,019 false or misleading claims in less than three years). He falsely claimed to be the most transparent president in history at least thirteen times. See *id.*

138. See Pozen, *Freedom*, *supra* note 2, at 1105-06 (noting FOIA's centrality as a global model for transparency).

139. See Lauren Harper, Nate Jones & Tom Blanton, *Three out of Five Federal Agencies Flout New FOIA Law*, NAT'L SECURITY ARCHIVE (Mar. 11, 2017), <https://nsarchive.gwu.edu/news-foia-audit/foia/2017-03-11/three-out-five-federal-agencies-flout-new-foia-law> (finding that a majority of federal agencies failed to comply with requirements established in FOIA amendment); NATIONAL SECURITY ARCHIVE, SUNSHINE AND SHADOWS: THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS (Mar. 15, 2010), available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB308/2010FOIAAudit.pdf> (finding disparate agency response to memorandum from Attorney General Eric Holder announcing Obama Administration's more requester-friendly approach to FOIA compliance).

140. See Courtney Buble, *Transparency in the Trump Era*, GOV. EXEC. (Mar. 10, 2020), <https://www.govexec.com/management/2020/03/transparency-trump-era/163574/>; Thomas C. Ellington, *Transparency Under Trump: Policy and Prospects*, 29 PUB. INTEG. 127 (2019); *How Transparent is President Trump? Audit Shows Three-Quarters of His Decisions Have Been Bad for Openness*, NAT'L SECURITY ARCHIVE (Mar. 12, 2020), <https://nsarchive.gwu.edu/foia-audit/foia/2020-03-13> (March 12, 2020).

requested records at a higher rate than the Obama administration.<sup>141</sup> The number of lawsuits filed against the federal government for alleged non-compliance steadily rose after Trump's inauguration, especially against top executive branch agencies like the Department of Justice and the Department of Homeland Security, exceeding the number of suits filed against previous administrations.<sup>142</sup> An increase in lawsuits challenging agencies' failures to respond at all to requests accounts for most of this increase,<sup>143</sup> as FOIA litigation contributes to lengthier legal disputes.<sup>144</sup> The Environmental Protection Agency ("EPA"), which prominently pursued the Trump administration's deregulatory agenda, proved especially resistant to FOIA requests.<sup>145</sup> At the same time, the administration brazenly refused to comply with the record-retention

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141. Associated Press, *Federal Government Sets New Record for Censoring, Withholding Files Under FOIA*, CBS NEWS (Mar. 12, 2018, 2:40 PM), <https://www.cbsnews.com/news/foia-federal-government-sets-new-record-for-censoring-withholding-files-trump-administration/>; see also Michael Morisy, *Under Trump, a Strained FOIA Continues to Show Its Seams*, MUCKROCK (Jan. 25, 2018), <https://www.muckrock.com/news/archives/2018/jan/25/trump-foia-one-year-later/> (complaining about lack of FOIA compliance during first year of Trump Administration); *The Limits of Transparency and FOIA Under Trump*, FIRST AMENDMENT WATCH (Mar. 14, 2018), <https://firstamendmentwatch.org/limits-transparency-foia-trump/> (collecting links and stories complaining about Trump Administration noncompliance).

142. See Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, THE FOIA PROJECT (Nov. 12, 2018), <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/> (finding that the rate of filing lawsuits had more than doubled during Fiscal Years 2017 and 2018 compared to the annual number of suits filed during the Obama Administration); see also FOIA Project Staff, *October 2019 FOIA Litigation with Five-Year Monthly Trends*, THE FOIA PROJECT (Nov. 19, 2019), <http://foiaproject.org/2019/11/19/october-2019-foia-litigation-with-five-year-monthly-trends/> (finding that FOIA lawsuit filings continued to show rise during Trump Administration). Filers included media organizations and nongovernmental organizations. See FOIA Project Staff, *Media Lawsuits Seeking Government Records Jump Under Trump*, THE FOIA PROJECT (Aug. 2, 2018), <http://foiaproject.org/2018/08/02/media-foia-lawsuits-jump-under-trump/>; FOIA Project Staff, *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump*, THE FOIA PROJECT (Oct. 18, 2018), <http://foiaproject.org/2018/10/18/nonprofit-advocacy-groups-foia-suits-double-under-trump/>.

143. See FOIA Project Staff, *FOIA Lawsuits Are Taking Longer To Resolve*, THE FOIA PROJECT (Jan. 23, 2020), <http://foiaproject.org/2020/01/23/lawsuits-annual-2019/>.

144. See FOIA Project Staff, *FOIA Suits Rise Because Agencies Don't Respond Even as Requesters Wait Longer to File Suit*, THE FOIA PROJECT (Dec. 15, 2019), <http://foiaproject.org/2019/12/15/foia-suits-rise-because-agencies-dont-respond-even-as-requesters-wait-longer-to-file-suit/>.

145. See Brie D. Sherwin, *The Upside Down: A New Reality for Science at the EPA and Its Impact on Environmental Justice*, 27 N.Y.U. ENVTL. L.J. 57, 98–99 (2019); Emily Holden, *Anti-Secrecy Lawsuits Soaring Against Pruitt's EPA*, POLITICO (Feb. 26, 2018, 5:01 AM), <https://www.politico.com/story/2018/02/26/pruitt-epa-secrecy-lawsuits-environment-355842>; Bryan Koenig, *Can Courts Handle the Increased FOIA Strain Under Trump?*, LAW360 (Feb. 16, 2018, 8:06 PM), <https://www.law360.com/articles/1013602>.

requirements of the Presidential Records Act (“PRA”):<sup>146</sup> Trump tore up paper documents,<sup>147</sup> avoided whenever possible having notes written before and after meetings with foreign leaders,<sup>148</sup> White House officials communicated with private, encrypted message applications rather than their official government email accounts,<sup>149</sup> and the administration put political appointees rather than civil servants in charge of PRA compliance.<sup>150</sup>

The Trump administration also retreated from its predecessor’s open data initiative, in which federal agencies release to the public “government information that can be universally and readily accessed, used, and redistributed free of charge in digital and machine-readable form.”<sup>151</sup> The initiative’s purpose was to enable the public to access information on agency performance and to allow private entities to make use of and profit from data the government collects.<sup>152</sup> Beginning soon

146. 44 U.S.C. §§ 2201 *et seq.* (2018).

147. See Annie Karnie, *Meet the Guys Who Tape Trump’s Papers Back Together*, POLITICO (June 10, 2018), <https://www.politico.com/story/2018/06/10/trump-papers-filing-system-635164>.

148. See Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters with Putin from Senior Officials in Administration*, WASH. POST (Jan. 13, 2019), [https://www.washingtonpost.com/world/national-security/trump-has-concealed-details-of-his-face-to-face-encounters-with-putin-from-senior-officials-in-administration/2019/01/12/65f6686c-1434-11e9-b6ad-9cfd62dbb0a8\\_story.html](https://www.washingtonpost.com/world/national-security/trump-has-concealed-details-of-his-face-to-face-encounters-with-putin-from-senior-officials-in-administration/2019/01/12/65f6686c-1434-11e9-b6ad-9cfd62dbb0a8_story.html); Annie Karnie, *Meet the Guys Who Tape Trump’s Papers Back Together*, POLITICO (June 10, 2018), <https://www.politico.com/story/2018/06/10/trump-papers-filing-system-635164>.

149. See *Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 609 (D.C. Cir. 2019) (holding that the Presidential Records Act does not authorize issue of writ of mandamus to challenge White House officials’ use of encrypted message app that automatically deleted messages once read in order to avoid creating records); Kel McClanahan, *Trump and the Demise of the Presidential Records Honor System*, JUST SECURITY BLOG (Mar. 22, 2019), <https://www.justsecurity.org/63348/trump-and-the-demise-of-the-presidential-records-honor-system/>.

150. See Alexi McCammond, *Scoop: Cyber memo warns of new risks to White House network*, AXIOS (Oct. 23, 2019), <https://www.axios.com/exclusive-white-house-cyber-memo-warns-of-new-network-risks-9aa19c6c-77a3-485b-919b-1dd9bd691514.html>; Marcy Wheeler, *White House Putting Political Employees in Charge of Presidential Records Act Compliance*, EMPTYWHEEL (Oct. 23, 2019), <https://www.emptywheel.net/2019/10/23/white-house-putting-political-employees-in-charge-of-presidential-records-act-compliance/>.

151. Beth Simone Noveck, *Open Data: The Future of Transparency in the Age of Big Data*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 206, 208 (David E. Pozen & Michael Schudson eds., 2018); see also Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) (issued immediately following Obama’s inauguration and committing to release on a public website “high-value data sets” in an “open format”).

152. See Cass R. Sunstein, *Output Transparency vs. Input Transparency*, in *TROUBLING TRANSPARENCY*, *supra* note 150, at 187, 190–92.

after Trump's inauguration, the administration removed, manipulated, and censored data that had been available on agency websites and the data.gov portal that the Obama administration initiated.<sup>153</sup> By reducing the quantity and availability of this data, as well as efforts to develop innovative programs and policies,<sup>154</sup> the Trump administration did not meet the standard of transparency set by the previous administration.

Although significant, the Trump administration's departure appeared incremental rather than radical or disruptive.<sup>155</sup> The Obama administration may have met its FOIA obligations more effectively than its successor, but transparency advocates frequently complained about its failure to respond to FOIA requests from journalists and public interest organizations,<sup>156</sup> and argued that it had prioritized the release of open data

153. See Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 CHI.-KENT L. REV. 315, 324–35 (2019); see generally *Web Integrity Project*, SUNLIGHT FOUND., <https://sunlightfoundation.com/web-integrity-project/> (last visited July 10, 2019) (publicizing efforts to “monitor changes to government websites, holding our government accountable by revealing shifts in public information and access to Web resources, as well as changes in stated policies and priorities”).

154. For example, the Trump administration's National Action Plan for Open Government, which was delayed prior to release, merely compiled and listed existing open data programs rather than announced new ones, as had previous reports. See Jessie Bur, *New open government plan doubles down on old priorities*, FED. TIMES (Feb. 25, 2019), <https://www.federaltimes.com/management/2019/02/25/new-open-government-plan-doubles-down-on-old-priorities/>; Tajha Chappellet-Lanier, *U.S. finally submits fourth National Action Plan for Open Government*, FEDSCOOP (Feb. 22, 2019), <https://www.fedscoop.com/national-action-plan-open-government-2019/>.

155. See generally Koenig, *supra* note 144 (describing increase in FOIA requests and litigation since Trump's inauguration, noting that his administration had been less responsive and open than its predecessor, but not characterizing Trump Administration as uniquely or radically disruptive).

156. Transparency advocates were disappointed in the failure of Obama's administration to live up to the President's stated commitment to transparency. See, e.g., Jameel Jaffer, *Government Secrecy in the Age of Information Overload*, SHORENSTEIN CENTER ON MEDIA, POL. & PUB. POL'Y (Nov. 6, 2017, 10:40 AM), <https://shorensteincenter.org/jameel-jaffer-salant-lecture-2017/>; Daniel J. Metcalfe, *From FOIA Service to Lip Service: The Unexpected Story of White House Visitor Logs*, 36 ADMIN. & REG. L. NEWS 3, 3 (Spring 2011) (expressing disappointment at Obama Administration's resistance to releasing White House visitor logs); John Wonderlich, *Obama's DOJ Seeks to Weaken the FOIA*, SUNLIGHT FOUND. (Oct. 28, 2011, 5:36 PM), <https://sunlightfoundation.com/2011/10/28/obamas-doj-seeks-to-weaken-the-foia/>. Scholars shared advocates' disappointment. See Derek E. Bambauer, *Chutzpah*, 6 J. NAT'L SECURITY L. & POL'Y 549, 561 (2013); Heidi Kitrosser, *“Trust Me” and Transparency Do Not Mix*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), available at <https://illinoislawreview.org/symposium/first-100-days/trust-me-and-transparency-do-not-mix/>; Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 467 (2011); Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 90 (2012).



over responding to FOIA record requests.<sup>157</sup> While the increase in recent legal challenges under FOIA to Trump administration agencies' disclosure denials likely suggests agencies' willingness to delay and oppose disclosure, it may also have reflected ideological opposition on the part of private litigants<sup>158</sup> to the administration's efforts to remove federal regulations imposed under the previous administration.<sup>159</sup> The Trump administration's higher degree of non-compliance and the increased levels of litigation it faced were not so high as to reflect a universal, coordinated effort to flout FOIA and were not inconsistent with the tendency among Republican administrations to take a less disclosure-friendly approach to FOIA than Democratic ones.<sup>160</sup>

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157. See Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE 529, 534–35, 539–41 (2009); J.B. Wogan, *Obama's transparency record: lots of data, not as much sunlight*, POLITIFACT (July 16, 2012), <https://www.politifact.com/truth-o-meter/article/2012/jul/16/obama-report-card-transparency-sunlight/>. Key members of the Obama administration considered the open data initiative to be more significant for open government than FOIA compliance. See, e.g., Sunstein, *supra* note 151, at 188 (former director of the Office of Information and Regulatory Affairs under Obama arguing that the “output transparency” released under the open data initiative has a stronger justification than the “input transparency” established by FOIA); Beth Simone Noveck, *Is Open Data the Death of FOIA?*, YALE L.J. FORUM 273, 274 (Nov. 21, 2016), [https://www.yalelawjournal.org/pdf/NoveckFinal\\_xjaur4gj.pdf](https://www.yalelawjournal.org/pdf/NoveckFinal_xjaur4gj.pdf) (former United States deputy chief technology officer for open government who led Obama Administration's Open Government Initiative arguing that “open data's more systematic and collaborative approach represents a radical and welcome departure from FOIA because open data concentrates on information as a means to solve problems to the end of improving government effectiveness”).

158. See Ethan Barton, *Liberal Activists Are Bombarding Trump with New FOIA Lawsuits*, DAILY CALLER (May 31, 2017, 9:08 PM), <http://dailycaller.com/2017/05/31/liberal-activists-are-bombarding-trump-with-new-foia-lawsuits>.

159. KEITH H. BELTON & JOHN D. GRAHAM, AM. COUNCIL FOR CAPITAL FOUND. CENTER. FOR POL'Y RES., TRUMP'S DEREGULATORY RECORD: AN ASSESSMENT AT THE TWO-YEAR MARK 5 (Mar. 2019), available at [http://accf.org/wp-content/uploads/2019/03/ACCF-Report\\_Trump-Deregulatory-Record-FINAL.pdf](http://accf.org/wp-content/uploads/2019/03/ACCF-Report_Trump-Deregulatory-Record-FINAL.pdf); (characterizing Trump's campaign for office as promising “widespread deregulation of the US economy” and concluding that after two years he had “followed through with an aggressive program of deregulation”); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1358, 1376 (2018) (“As of mid-2018, policy change orders, directives, proposals, or actions have overwhelmingly been in a deregulatory direction.”).

160. Compare, e.g., Memorandum from John Ashcroft, Att'y Gen., to Heads of All Federal Departments and Agencies on the Freedom of Information Act (Oct. 12, 2001), available at <https://www.justice.gov/archive/oip/011012.htm> (George W. Bush Administration Attorney General advising that, “When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis”), with Memorandum from Eric Holder, Att'y Gen., to Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> (Obama

## 2. Administrative Procedures

In their efforts to remove or reduce existing regulatory mandates while creating new mandates relating to immigration, the Trump administration often circumvented the legally-required processes that, at least in theory, make agencies' quasi-legislative, administrative rulemaking transparent to the public—one of the key rationales for the Administrative Procedure Act (“APA”).<sup>161</sup> During Trump's term, courts often reversed many of these agencies' efforts.<sup>162</sup> One academic otherwise sympathetic to at least some of the administration's substantive deregulatory goals characterized the Trump EPA's record as “poor” and “unenviable,” and the product of a staff that lacked “experienced policy hands with the knowledge and expertise to navigate the administrative process.”<sup>163</sup> Less sympathetic scholars characterized the administration's process (or lack thereof) as “regulatory slop”—reflecting purposeful disregard for well-established requirements to engage with the public in the rulemaking process, insufficient care about whether their efforts are procedurally permissible, and a generalized failure to execute laws faithfully to statutes and the Constitution.<sup>164</sup>

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Administration Attorney General withdrawing Ashcroft memorandum and announcing “a clear presumption: In the face of doubt, openness prevails”).

161. See generally RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 429 (7th ed. 2015) (characterizing administrative rulemaking as “the most visible mode of agency policymaking”); Martin Shapiro, *A Golden Anniversary? The Administrative Procedures Act of 1946*, 19 REG. 40, 42–43 (1996) (describing “transparency and participation” as purposes at the APA's core).

162. According to one organization that tracked relevant litigation, when challenged, the Trump Administration's major deregulatory efforts had been reversed or withdrawn at a rate of more than 85% as of August 2020. See *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, (Aug. 24, 2020), <https://policyintegrity.org/deregulation-roundup>; see also Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 850-59 (2019) (finding that that Trump's deregulatory agenda was blocked or delayed by federal courts due to flaws in rulemaking process). Typically, agencies win the majority of such challenges. See Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html?login=email&auth=login-email>.

163. See Jonathan Adler, *Hostile Environment*, NAT'L REV. (Sept. 27, 2018, 10:33 AM), <https://www.nationalreview.com/magazine/2018/10/15/hostile-environment/>; see also James P Pfiffner, *The Contemporary Presidency: Organizing the Trump Presidency*, 48 PRESIDENTIAL STUD. Q. 153, 153 (2018) (describing the dysfunction and absence of regular policy development process in Trump Administration).

164. Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1655 (2019); Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL'Y 405, 465-66 (2019) see also Lisa Heinzerling, *Unreasonable Delays: The Legal Problems*

The Trump administration repeated a particular pattern of disregard for administrative process several times. It attempted to establish a so-called “Muslim Ban,” for example, with a rushed Executive Order from the White House<sup>165</sup> following numerous presidential pronouncements suggesting religious animus as its motivation.<sup>166</sup> After the administration reissued different iterations of the “ban” in response to serial lower court reversals,<sup>167</sup> the Supreme Court finally upheld the third version of the order on the grounds that the relevant statutory authority “exudes deference”<sup>168</sup> and the executive action fell squarely within a sphere that the Constitution delegated to presidential action.<sup>169</sup> The Court’s majority did not consider the troubling process and public pronouncements upon which the President and his administration relied,<sup>170</sup> granting deference that the four dissenting justices, in two separate opinions, would not have given due to the manner in which the ban was put into place.<sup>171</sup> More

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(*So Far*) of Trump’s Deregulatory Binge, 12 HARV. L. & POL’Y REV. 13, 15 (2018) (excoriating Trump administration agencies for displaying “autocracy, impulsivity, and jerry-rigged reasoning”).

165. See Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017).

166. See *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017) (noting presidential statements characterizing his intent to impose a Muslim ban); *State v. Trump*, 265 F. Supp. 3d 1140, 1148 n.9 (D. Haw. 2017), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018), *rev’d and remanded*, 138 S. Ct. 2392 (2018) (noting presidential tweets characterizing his intent to impose a Muslim ban).

167. See *Hawaii v. Trump*, 859 F.3d 741, 756 (9th Cir. 2017) (*per curiam*), *vacated by Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.) (explaining that the President’s actions “must be scrutinized with caution” because they were “incompatible” with the processes and mandates set out by Congress in statutes (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)); *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 267 (4th Cir. 2018), *cert. granted, vacated*, 138 S. Ct. 2710 (2018), *vacated*, 138 S. Ct. 2710 (2018) (noting public statements from the President and administration figures that would allow “an objective observer [to] conclude that the primary purpose of the Proclamation [was] to exclude Muslims from the United States”).

168. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that the Immigration and Nationality Act, 8 U.S.C. § 1182(f), “exudes deference to the President in every clause”).

169. *Id.* at 2409.

170. *Id.* at 2418, 2423.

171. See *id.* at 2437–38 (Sotomayor, J., dissenting) (asserting that the entire context of the Executive Order’s issuance and development should be considered in evaluating its validity); *Id.* at 2433 (Breyer, J., dissenting) (agreeing with Justice Sotomayor regarding the existing record of bias). In his separate concurrence, Justice Kennedy expressed disquiet about statements made by government officials during the process of issuing the third Executive Order. See *id.* at 2424 (Kennedy, J., concurring) (noting that officials, in their unreviewable statements and actions, should take care not to disregard the Constitution); see also William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 170 (2019) (noting lower

recently, the Court held that the Department of Commerce failed to employ “[r]easoned decisionmaking” under the APA to explain its inclusion of a question about citizenship in the 2020 Census.<sup>172</sup> Multiple agencies repeatedly sought to deny the statutory authority that prior administrations claimed in promulgating regulatory rules without meeting the substantive and procedural requirements in both the APA and enabling acts.<sup>173</sup> Agencies also splintered the steps involved in rolling back regulations in order to avoid the APA’s requirements to engage in a new notice and comment rulemaking.<sup>174</sup> And the EPA lost a number of lawsuits as it sought to stay, delay, and ultimately revoke regulations promulgated by the Obama administration—deregulatory efforts that were frustrated or deferred because of the agency’s failure to follow required procedures.<sup>175</sup>

### 3. Congressional Investigations

After reclaiming a majority in the 2018 midterm elections, Democrats in the House of Representatives began to use their control over House committees to initiate multiple investigations of President Trump and Executive Branch agencies and officers. Committees issued subpoenas when the administration and current and former personnel resisted demands for documents and testimony.<sup>176</sup> The disputes that created the

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courts’ willingness to probe the government’s motivations to some appreciable degree on the basis of Trump’s public statements).

172. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

173. See William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1591 (2019).

174. See William W. Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L. REV. 439, 442 (2019).

175. See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1358, 1378 (2018); Heinzerling, *supra* note 163, at 14; Bethany Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1 (2019) (noting Trump Administration’s poor record in attempting to suspend enforcement prior to repealing or promulgating a new rule). The administration’s tendency to skirt statutory obligations, if not ignore them altogether, was not limited just to APA rulemaking compliance. See, e.g., *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 655, 856-57 (W.D. Tex. 2019) (finding that the President’s proclamation of a national emergency that required funding support for a U.S.-Mexico border wall was in violation of the 2019 Consolidated Appropriations Act, Pub. L. No. 116-6 (2019) (to be printed at 133 Stat. 13)).

176. See generally Kerry W. Kircher, *Trump’s Unprecedented Fight to Withhold Information*, ATLANTIC (Aug. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/house-needs-its-subpoena-power-against-trump/596857/> (listing instances of administration resistance to congressional

most conflict included the President's resistance to submit financial information and tax returns,<sup>177</sup> and the White House's refusal to allow current and former officials to testify before House committees.<sup>178</sup>

Such conflicts between a President and Congress are longstanding and occurred during the Obama administration as well.<sup>179</sup> Congress has long been forced to rely upon its inherent subpoena power to obtain information from a recalcitrant White House and presidential administration,<sup>180</sup> and it is difficult, if not impossible, to compare the extent of the Trump administration's defiance of congressional demands for information to that of its immediate predecessors.<sup>181</sup> Trump, however, portrayed this interbranch dispute in absolute terms, declaring to reporters on the White House lawn that, "We're fighting all the subpoenas,"<sup>182</sup> while his White House counsel declared to House leaders that the President would not participate in the "constitutionally illegitimate" 2019

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efforts to obtain information and characterizing such resistance as the equivalent of "declar[ing] war on the House's investigation of the executive branch").

177. See Andrew Desiderio, *Trump Sues to Block House Subpoena of Financial Records*, POLITICO (Apr. 22, 2019), <https://www.politico.com/story/2019/04/22/trump-sues-oversight-committee-chairman-finance-records-1284995> (House Oversight and Reform Committee subpoena of Trump's accounting firm); Maggie Haberman, William K. Rashbaum & David Enrich, *Trump Sues Deutsche Bank and Capital One to Block Compliance With Subpoenas*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/trump-lawsuit-deutsche-bank.html> (suit to block financial institutions' compliance with House Intelligence and Financial Services Committees subpoena for financial records).

178. See David A. Graham, *Don McGahn's Testimony Would Be the Main Event*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/white-house-blocks-mcghahn-testifying-congress/589873/>.

179. See *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (denying Obama administration Attorney General's motion to dismiss subpoena from Republican-led congressional committee in "Fast and Furious" scandal).

180. On the long history of Congress's power to investigate, see *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029-31 (2020); Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

181. Compare, e.g., Kircher, *supra* note 175 (asserting that the Trump administration resisted congressional oversight to an "unprecedented degree") with Michael W. McConnell, *The Way Trump Is Asserting the Rights of His Office Is Not Impeachable*, WASH. POST (May 1, 2019), <https://www.washingtonpost.com/opinions/2019/05/01/trump-resists-congressional-subpoenas-thats-what-presidents-do/> (characterizing Trump administration's response to congressional investigation as "unremarkable" and akin to those of his recent predecessors).

182. *Trump: We're Fighting All the Subpoenas*, WASH. POST (Apr. 24, 2019), [https://www.washingtonpost.com/video/politics/trump-were-fighting-all-of-the-subpoenas/2019/04/24/aed13859-e411-4686-9d1d-a535b8d958bd\\_video.html](https://www.washingtonpost.com/video/politics/trump-were-fighting-all-of-the-subpoenas/2019/04/24/aed13859-e411-4686-9d1d-a535b8d958bd_video.html)

impeachment inquiry.<sup>183</sup> Courts have increasingly served as the sole means to resolve such disputes in recent decades, weakening Congress's power to obtain information from the Executive<sup>184</sup> without a clear exercise of legislative will.<sup>185</sup> Facing the Trump administration's expansive view of its constitutional privilege to withhold information and its dismissal of congressional authority, House Democrats moved forward with impeachment rather than face the delays attendant to high-stakes constitutional litigation.<sup>186</sup> The Trump administration's defiance of a Democratic House majority<sup>187</sup> was neither unique nor remarkable, but it appeared exceptionally public and absolute— part of an unequivocal resistance to information disclosure to any adverse congressional investigation of the President and White House.

#### 4. Informal Disclosure Norms

President Trump's reluctance to disclose information about his previous and ongoing business concerns further distinguished him from his predecessors.<sup>188</sup> Constitutional structure and some common law

183. See Letter from Pat A. Cippollone, White House Counsel, to the Honorable Nancy Pelosi et al. (Oct. 8, 2019), at 8, available at <https://www.documentcloud.org/documents/6459905-White-House-Letter-to-Pelosi-Impeachment.html>; see also Frank O. Bowman III, *White House Letter Distorts Both Law and History on Impeachment*, JUST SECURITY (Oct. 10, 2019), <https://www.justsecurity.org/66534/white-house-letter-distorts-both-law-and-history-on-impeachment/> (Cippollone letter's legal arguments "are without foundation."); Keith E. Whittington, *Must the House Vote to Authorize an Impeachment Inquiry?*, LAWFARE (Oct. 9, 2019), <https://www.lawfareblog.com/must-house-vote-authorize-impeachment-inquiry> (rejecting Cippollone letter's legal arguments).

184. See JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 181-89 (2017).

185. See Louis Fisher, *Congressional Access to Information: Using Will and Leverage*, 52 DUKE L.J. 323 (2002).

186. See Charlie Savage, *Judge Dismisses Lawsuit by Ex-Trump Aide Subpoenaed in Impeachment Inquiry*, N.Y. TIMES (Dec. 30, 2019), <https://www.nytimes.com/2019/12/30/us/kupperman-lawsuit-dismissed.html>.

187. This dispute is ongoing as of this writing. See *Trump v. Mazars USA, L.L.P.*, 140 S. Ct. 2019, 2035-36 (holding that Congressional subpoenas of presidential information can be enforced, but remanding to lower courts the application of a four-part test to balance the competing congressional and executive branch interests); cf. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (rejecting presidential claims for absolute immunity from subpoenas in a state criminal proceeding and remanding to lower courts for consideration of other challenges).

188. See Jonathan Adler, *All the President's Papers*, 2020 CATO SUP. CT. REV. (forthcoming 2020) (Draft at 1) ("No President has so thoroughly resisted transparency and disentanglement with potential conflicts of interest.").

doctrines—most notably executive privilege—shield the presidency from the formal openness and ethical requirements that apply more broadly to the executive branch.<sup>189</sup> The same is true of certain statutory and regulatory disclosure requirements, including exemptions from federal conflict of interest rules that prohibit officials from participating in government matters where they have a financial interest.<sup>190</sup> But the President is required to make certain limited disclosures on an annual basis about his financial and ownership interests.<sup>191</sup> Former presidents and presidential candidates have typically disclosed a fuller picture of their private holdings than the law requires to comply with informal expectations and norms.<sup>192</sup> Commonly understood as “unwritten or informal rules of political behavior,”<sup>193</sup> “shared codes of conduct that become common knowledge within a particular community,”<sup>194</sup> or conventions that suggest what one should do while describing what is generally done,<sup>195</sup> norms have long shaped and constrained presidential behavior, even as they have evolved over time. Less directly related to transparency than formal administrative law, such norms concern the public-facing nature of the presidential office.

Consistent with his willingness to challenge a full range of norms that cover presidential behavior and statements,<sup>196</sup> President Trump refused to

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189. On constitutional structure and information access, see Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 932–56 (2006); on the executive privilege doctrine, see Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007); on the “state secrets” doctrine, see generally Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

190. 18 U.S.C. § 202(c) (2018).

191. 5 U.S.C. app. § 101(d), (f)(1) (2018).

192. See *infra* note 197–207 and accompanying text.

193. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189 (2018).

194. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 101 (2018).

195. See, e.g., MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 2–5 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

196. President Trump may not have begun the current erosion of prevailing political norms, a process that Congress seems to have initiated, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 9 (2014), but his presidency suggested that norms no longer apply. See Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 192–98 (2018); Renan, *supra* note 192, at 2214; W. Bradley Wendel, *Law and Nonlegal Norms in Government Lawyers' Ethics: Discretion Meets Legitimacy*, 87 FORDHAM L. REV. 1995, 2007–08 (2019); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1451 (2018); Emily Bazelon, *How Do We Contend with Trump's Defiance of Norms?*, N.Y. TIMES MAG. (July 11, 2017), <https://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of->

disclose information about the relationship between his administration and his notoriously complex personal finances and family business enterprises.<sup>197</sup> A president's resistance to financial disclosures is difficult to subject to judicial review and congressional investigation,<sup>198</sup> and concerns a subject that Trump considered privileged well before he entered politics.<sup>199</sup> Most famously, he departed from longstanding precedent among presidents and presidential candidates by resisting calls to release his tax returns.<sup>200</sup> The annual financial disclosure forms he filed with the Office of Government Ethics provided only a bare outline of his income and complex business holdings.<sup>201</sup> He fought a congressional

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norms.html?partner=bloomberg ("Trump's flouting of norms was the siren song of his candidacy, and it has become a defining feature of his presidency."). For a sustained account of the norm-based presidency, including President Trump's breach of those norms, see Renan, *supra* note 192.

197. See, e.g., Michael A. Memoli, *Trump's Financial Disclosure Form: It's Complicated*, L.A. TIMES (June 16, 2017), <https://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-releases-financial-disclosure-1497653636-htmlstory.html> (reporting on the release of President Trump's financial disclosure form, which listed "565 separate roles that Trump holds in his vast business empire, largely LLCs and corporations established to manage his hotels, apartments and golf courses"); Ryan Lizza, *How Trump Broke the Office of Government Ethics*, THE NEW YORKER (July 14, 2017), <https://www.newyorker.com/news/ryan-lizza/how-trump-broke-the-office-of-government-ethics> (explaining how Trump departed from ethical norms regarding conflicts of financial interest and disclosure of personal holdings); David A. Fahrenthold & Jonathan O'Connell, *Nine Questions About President Trump's Businesses and Possible Conflicts of Interest*, WASH. POST (Jan. 30, 2018), [http://www.washingtonpost.com/politics/nine-questions-about-president-trumps-businesses-and-possible-conflicts-of-interest/2018/01/29/f8b2a3a8-014f-11e8-9d31-d72cf78dbee\\_story.html](http://www.washingtonpost.com/politics/nine-questions-about-president-trumps-businesses-and-possible-conflicts-of-interest/2018/01/29/f8b2a3a8-014f-11e8-9d31-d72cf78dbee_story.html) (attempting, based on publicly available information, to answer questions about Trump's businesses, the revocable trust he created upon taking office, and the extent of his indebtedness).

198. Challenges to the President's ongoing business interests under the Emoluments Clause failed. See, e.g., *In re Trump*, 928 F.3d 360, 379 (4th Cir. 2019) (holding that plaintiffs lacked standing to sue under Emoluments Clause). Efforts to secure his tax returns through congressional investigations and state legislation did not bear fruit during his presidency. See Jeff Stein et al., *'It's Going to Be Tough': House Democrats Appear Less Likely to Get Trump's Tax Returns Before 2020 Election*, WASH. POST (Aug. 22, 2019), <https://beta.washingtonpost.com/politics/2019/08/22/its-going-be-tough-house-democrats-appear-less-likely-get-trumps-tax-returns-before-election/>.

199. See DAVID CAY JOHNSON, *THE MAKING OF DONALD TRUMP* 77–83, 147–53 (2016) (describing Trump's longstanding effort to obfuscate and keep secrets about his net worth and his public image).

200. See Siegel, *supra* note 195, at 201–02; Daniel Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J. FORUM 62, 63 (2017); see generally George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013 (2017); Jill Disis, *Presidential Tax Returns: It Started with Nixon. Will It End with Trump?*, CNN (Jan. 26, 2017, 2:06 PM), <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html>.

201. See Anna Massoglia & Karl Evers-Hillstrom, *World of Influence: A Guide to Trump's Foreign Business Interests*, OPENSECRETS.ORG (June 4, 2019), <https://www.opensecrets.org/news/2019/06/trump-foreign-business-interests/> (noting that "Annual



committee's subpoena of his accounting firm to review his financial records,<sup>202</sup> while his Treasury Secretary refused to comply with a congressional subpoena to release his tax returns.<sup>203</sup>

Trump also declined either to establish a blind trust to hold his investments or to limit his investments to assets like diversified mutual funds over which he would have no control.<sup>204</sup> Blind trusts and mutual funds would protect against corruption from within the White House by either forcing the public disclosure of a President's assets or shielding the information from the President and those who would seek his favor or do his bidding. Instead, Trump placed his assets into a revocable trust managed by two of his children and a longtime business associate, of which he is the sole beneficiary and over which he appears to retain significant authority.<sup>205</sup> He pledged that any profits from foreign governments would be donated to the United States Treasury, but that promise was unenforceable and its fulfillment was impossible to review without full disclosure of his business and financial interests.<sup>206</sup> This hints

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disclosure forms only require assets held at the end of the reporting period to be disclosed and require only minimal documentation of transactions. Income and property values are also often listed in wide ranges so the total amount may, in actuality, be much higher or lower.”); *see also* Decca Muldowney et al., *A Guide for Digging Through Trump's Financial Disclosures*, PROPUBLICA (May 23, 2018, 5:00 AM), <https://www.propublica.org/article/a-guide-for-digging-through-trumps-financial-disclosures> (attempting to piece together Trump's finances and business interests from his financial disclosure form).

202. *See* Trump v. Mazars USA, LLP, No. 19-5142, 2019 WL 5089748 (D.C. Cir. Oct. 11, 2019) (upholding congressional authority to issue a subpoena to investigate the President's finances).

203. Alan Rappoport & Nicholas Fandos, *Steven Mnuchin Refuses to Comply with Subpoena for Trump's Tax Returns*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/mnuchin-trump-tax-returns-subpoena.html>.

204. Walter M. Shaub, Jr., Dir., Office of Gov't Ethics, Remarks at the Brookings Institution (Jan. 11, 2017), *available at* [https://www.brookings.edu/wp-content/uploads/2017/01/20170111\\_oge\\_shaub\\_remarks.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf).

205. *See* Derek Kravitz & Al Shaw, *Trump Lawyer Confirms President Can Pull Money from His Businesses Whenever He Wants*, PROPUBLICA (Apr. 4, 2017, 5:53 PM), <https://www.propublica.org/article/trump-pull-money-his-businesses-when-ever-he-wants-without-telling-us>; Steve Reilly et al., *Did Trump Keep His 19 Promises to Insulate Himself from His Business? Only He Knows*, USA TODAY (Mar. 18, 2019, 9:08 PM), <https://www.usatoday.com/in-depth/news/politics/2019/03/18/president-donald-trumps-promises-didnt-end-business-entanglements/3030377002/>; Massoglia & Evers-Hillstrom, *supra* note 200.

206. *See* Bernard Condon, *Trump Org Donates Nearly \$200k to Cover Foreign Profits*, ASSOCIATED PRESS (Feb. 25, 2019), <https://www.apnews.com/a4349ac80a7048bdb61f017fffd9623f>; David A. Fahrenthold & Jonathan O'Connell, *Trump Organization Says It Has Donated Foreign Profits to U.S. Treasury, but Declines to Share Details*, WASH. POST (Feb. 26, 2018), <https://www.washingtonpost.com/politics/trump-organization-says-it-has-donated-foreign-profits-to-us->

not simply at opacity, but at corruption. As two Trump critics have written, “In ways large and small, he has put the power of the presidency to work for his friends, his family, and himself.”<sup>207</sup>

Despite the efforts of President Trump and his administration, information about his administration and finances leaked. The press vigorously covered the administration, relying on documentary leaks and anonymous sources<sup>208</sup>—coverage and leaks that Trump frequently assailed, dismissed, and occasionally sought to prevent.<sup>209</sup> Transparency laws and norms, however, demand more of an administration than leaks to the press, and the Trump administration was neither transparent in an absolute sense nor when compared to its predecessor. Courts imposed

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treasury-but-declines-to-share-details/2018/02/26/747522e0-1b22-11e8-ae5a-16e60e4605f3\_story.html?noredirect=on.

207. BENJAMIN WITTES & SUSAN HENNESSEY, UNMAKING THE PRESIDENCY: DONALD TRUMP'S WAR ON THE WORLD'S MOST POWERFUL OFFICE 138 (2020).

208. Leaks out of the Trump White House regularly occurred. See Steven Aftergood, *Leaks of Classified Info Surge Under Trump*, SECRECY NEWS BLOG (Apr. 8, 2019), <https://fas.org/blogs/secrecy/2019/04/leaks-surge/>; Ken Dilanian, *Under Trump, More Leaks — and More Leak Investigations*, NBC NEWS (Apr. 8, 2019, 3:14 PM), <https://www.nbcnews.com/politics/justice-department/under-trump-more-leaks-more-leak-investigations-n992121>; Jordan Fabian, *Leaks continue to plague Trump White House despite crackdown*, THE HILL (June 9, 2018, 6:17 A.M.), <https://thehill.com/homenews/administration/391430-leaks-plague-trump-white-house-with-no-end-in-sight>. Financial information too became public. See Jonathan Swan, *Mary Trump book: How she leaked Trump financials to NYT*, AXIOS (July 7, 2020), <https://www.axios.com/mary-trump-book-donald-trump-financials-c1635cb1-d1b0-48e0-b816-72d270170796.html>. Indeed, the Trump administration leaked not simply despite its failed efforts to hold information, see, e.g., Mark Fenster, *Revealing Secrecy Tools*, HARV. L. REV. BLOG (Mar. 11, 2019), <https://blog.harvardlawreview.org/revealing-secrecy-tools/> (discussing Trump's use of non-disclosure agreements and noting their limitations and failures during his presidency), but as part of its everyday operations. See Daniel Froomkin, *Press Watch: Donald Trump says not to trust anonymous sources — for once, he's not lying*, SALON (Dec. 7, 2019), <https://www.salon.com/2019/12/07/press-watch-donald-trump-says-not-to-trust-anonymous-sources-for-once-hes-not-lying/> (distinguishing between leaks and the ubiquity of “spin” from individuals within the Trump administration, who speak anonymously to the press for their own purposes); Margaret Sullivan, *Trump's tough talk on leaks is one thing. His actions tell another tale*, WASH. POST (Feb. 28, 2017), [https://www.washingtonpost.com/lifestyle/style/dont-use-my-name-but-heres-a-scoop-trump-loves-leaks-some-of-them/2017/02/28/dcab5338-fd06-11e6-8ebe-6e0dbe4f2bca\\_story.html](https://www.washingtonpost.com/lifestyle/style/dont-use-my-name-but-heres-a-scoop-trump-loves-leaks-some-of-them/2017/02/28/dcab5338-fd06-11e6-8ebe-6e0dbe4f2bca_story.html) (describing the administration's propensity to leak strategically).

209. On the Trump administration's efforts to clamp down on leaks, see Katie Benner, *Pentagon Analyst Is Charged in Leaks of Classified Reports*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/us/politics/kyle-frese-classified-leaks.html>; Mike Allen, *Trump's Risky Leak War*, AXIOS (Aug. 5, 2017), <https://www.axios.com/trumps-risky-leak-war-1513304673-da66b4fb-35a5-46dc-9cd5-d134d1dbabd4.html>. On the omnipresence and complexity of leaking from the executive branch, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

some constraints upon his administration,<sup>210</sup> but its transparency record ranged from troubling—in terms of the administration’s legal compliance—to poor in its dealings with Congress and its flouting of ethical norms regarding the opaque and uniquely tangled web of Trump’s wealth.<sup>211</sup>

### B. President Trump’s Populist Transparency

This section presumes that Donald Trump campaigned as a right-wing populist and continued to present himself as such after the 2020 election—a presumption that seems to be the general consensus among experts in the study of populism and conservatism.<sup>212</sup> For purposes of this Article, the fact that he did not govern as a traditional populist, especially on economic and regulatory policy,<sup>213</sup> is less important than his reliance on a populist style in his self-presentation, communication with his followers, and understanding of transparency.

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210. See *supra* Part III.A.ii.

211. The record of his administration’s senior cabinet members and high-level administrators and advisors was little better. Many of them resigned after revelations about their activities both while in office and prior to entering the administration. See Paul Waldman, *New Revelations Show the Trump Administration Is Making the Swamp Even Swampier*, WASH. POST (June 10, 2019), <https://www.washingtonpost.com/opinions/2019/06/10/new-revelations-show-trump-administration-is-making-swamp-even-swampier/>; David Leonhardt & Ian Prasad Philbrick, *Trump’s Corruption: The Definitive List*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/opinion/trump-administration-corruption-conflicts.html>. The turnover rate at the top levels of the Trump Administration through mid-2019 was far higher than those of all of his predecessors. See Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS (August 2019), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/> (showing that the Trump Administration’s turnover rate of senior advisers was as high in his third year in office as his predecessors’ full-term records).

212. See JUDIS, *supra* note 6, at 66–74; COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP* 242–44 (2d ed. 2017); Uri Friedman, *What Is a Populist? And Is Donald Trump One?*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/international/archive/2017/02/what-is-populist-trump/516525/>; Oliver & Rahn, *supra* note 53, at 202.

213. See William E. Scheuerman, *Donald Trump meets Carl Schmitt*, 45 PHIL. & SOC. CRIT. 1170, 1176–78 (2019); Matthew Yglesias, *The Trump-Era Threat to Democracy Is the Opposite of Populism*, VOX (Dec. 10, 2018, 8:00 AM), <https://www.vox.com/policy-and-politics/2018/12/10/18126132/trump-populism-democracy-threat-minority-rule>.

### 1. Transparency, Live: Trump Rallies

Trump's rally speeches, delivered in his highly performative, spontaneous style before thousands of attendees and often simulcast by television networks and cable news channels, served as his signature form of direct address to his base. He continued using the basic format of his campaign rallies immediately after the election, and he held more such political events than any recent sitting president, including forty-six in 2018 in the lead-up to that year's midterm elections, twenty-one in 2019, and ten in early-2020, prior to the COVID-19 pandemic.<sup>214</sup> The rallies did not focus on policy in any traditional sense, and he did not use them primarily to announce new initiatives or the nomination or departure of a member of his administration.<sup>215</sup> By rarely unveiling or divulging information that his followers and the broader public do not already know, they did not at all resemble the disclosure of records, data, or information that have come to constitute transparency as a legal concept. Instead, the rallies served as a means to extend his campaign and reach his base in a live, telecast performance that focused political and popular attention on Trump and his presidency.

The pre-pandemic rally speeches' content resumed the narrative he began upon announcing his campaign. They replayed, for the pleasure of Trump supporters and to the anger and dismay of those who opposed him, what was already known: that he based his presidency on a nationalism

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214. See *List of Post-Election Donald Trump Rallies*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_post-election\\_Donald\\_Trump\\_rallies](https://en.wikipedia.org/wiki/List_of_post-election_Donald_Trump_rallies) (last visited Aug. 27, 2020). By mid-October 2018, Axios reported, President Trump had held thirty-three "#MAGA campaign rallies" compared to President Obama's nine political rallies and one rally for what became known as Obamacare. See Mike Allen, *Trump vs. Obama: The Midterm Rallies Edition*, AXIOS (Oct. 14, 2018), <https://www.axios.com/2018-midterm-elections-donald-trump-barack-obama-rallies-e83bf5af-9fc2-444a-b56a-d974b20df3da.html>; see also Jill Colvin, *Trump Has Held More than 2 Dozen Rallies as He Kicks into High Gear Ahead of the High-Stakes Midterms*, BUS. INSIDER (Oct. 14, 2018, 11:36 AM), <https://www.businessinsider.com/trump-rallies-increase-ahead-of-midterms-2018-10>; Dave Levinthal, *Donald Trump Created a Permanent Presidential Campaign. Here's How*, CENTER. FOR PUB. INTEGRITY (Feb. 18, 2019), <https://publicintegrity.org/federal-politics/donald-trump-president-campaign-money-fundraising/>. On Trump's embrace of his rallies and endless campaign, see Charles Homans, *The Post-Campaign Campaign of Donald Trump*, N.Y. TIMES MAG. (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/magazine/donald-trump-rallies-campaigning-president.html>; Gabby Orr, *Advisers Urge Trump to Defer 2020 Rallies*, POLITICO (Mar. 8, 2019, 5:02 AM), <https://www.politico.com/story/2019/03/08/trump-2020-rallies-1211799>.

215. He did, however, make policy announcements on Twitter just prior to rallies. See, e.g., Aaron Rupar, *Trump Blindsides ICE with Mass Deportation Announcement on Eve of Reelection Rally*, VOX (June 18, 2019, 3:30 PM), <https://www.vox.com/2019/6/18/18683600/trump-mass-deportation-tweet-ice>.

that drew moral and racial boundaries around the groups to which his supporters presumptively belong in order to exclude others whom he cast as representing social and political threats to his vision of the nation.<sup>216</sup> His post-election speeches adapted his campaign narrative in light of his victory, the story of which he regularly retold as a combination of stupendous upset and inevitability. America regained its status due to the unprecedented and unsurpassed successes President Trump had achieved: economic growth, as evidenced by the number of jobs created and rising stock indexes; widespread deregulation; tax cuts he signed into law; and the imminent completion of “The Wall” at the U.S.-Mexico border and the forthcoming replacement of “Obamacare” with a far superior health finance system, neither of which occurred during his presidency.<sup>217</sup> His speeches were most specific in the insults he directed at the enemies that stood in his way. These included opposition Democrats, the “fake news,” “Crooked Hillary,” and the special counsel investigation’s “Witch Hunt” and the “Russia Hoax” that caused the special counsel’s appointment. Both within and across performances, his speeches rambled and repeated little that would enlighten or educate the public about his administration, and often misstated or blatantly lied about easily confirmable facts.<sup>218</sup>

But the speeches’ content was secondary to their form and context.

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216. See JENNIFER SCLAFANI, TALKING DONALD TRUMP: A SOCIOLINGUISTIC STUDY OF STYLE, METADISOURSE, AND POLITICAL IDENTITY 81 (2018); Kathleen Hall Jamieson & Doron Taussig, *Disruption, Demonization, Deliverance, and Norm Destruction: The Rhetorical Signature of Donald J. Trump*, 132 POL. SCI. Q. 619, 619 (2017); Michèle Lamont, Bo Yun Park & Elena Ayala-Hurtado, *Trump’s Electoral Speeches and His Appeal to the American White Working Class*, 68 BRIT. J. SOC. S153, S173 (2017); Alexandra Homolar & Ronny Scholz, *The Power of Trump-Speak: Populist Crisis Narratives and Ontological Security*, 32 CAMBRIDGE REV. INT’L AFF. 344, 347–51 (2019).

217. A database of Trump speeches appears at *Donald Trump Speech Transcripts*, FACTBASE, <https://factba.se/transcripts/speeches> (last visited July 30, 2019). Various sources publish speech transcripts. See, e.g., Abbey Doyle, *ICYMI: Here’s a Transcript of President Trump’s Speech at the Evansville Rally*, COURIER & PRESS (Sept. 4, 2016, 11:06 AM), <https://www.courierpress.com/story/news/local/2018/09/04/heres-transcript-president-trumps-speech-evansville-rally/1191281002/>; Times Staff Writer, *Here’s a Full Transcript of President Trump’s Speech from His Tampa Rally*, TAMPA BAY TIMES (Aug. 1, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/08/01/heres-a-full-transcript-of-president-trumps-speech-from-his-tampa-rally>.

218. See Salvador Rizzo, *Anatomy of a Trump rally: 67 percent of claims are false or lacking evidence*, WASH. POST (Jan. 7, 2020), <https://www.washingtonpost.com/politics/2020/01/07/anatomy-trump-rally-percent-claims-are-false-or-lacking-evidence>. For a more comprehensive effort to track President Trump’s false claims, see *Trump Claims Database*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-claims-database> (last visited July 31, 2019) (tracking thousands of his false and misleading claims).

They were raucous spectacles akin to a rock concert<sup>219</sup> and served as a communal, sometimes even joyful experience for those in attendance,<sup>220</sup> allowing them to solidify and proclaim their position as Trump supporters.<sup>221</sup> Attendees laughed at Trump's jokes and familiar talking points, and they participated by chanting phrases that demonized his enemies. Crowds became as much an element of the televised events as Trump's own speech—even, at times, engaging in physical altercations against anti-Trump protestors and the press.<sup>222</sup> Although they already knew in advance how Trump's speech would proceed, either from attending previous ones or watching them on television, audience members claimed to feel renewed by his repertoire and mix of repetition

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219. Commentators most frequently analogized Trump rallies to Grateful Dead shows. *See, e.g.*, Noah Bierman, *Anatomy of a Trump Rally: The Hero (That's Him), a Jester (Also Him), Villains, Damsels, Dystopia and Lots of Grievances*, L.A. TIMES (Oct. 10, 2018, 3:00 AM), <https://www.latimes.com/politics/la-na-pol-trump-rally-anatomy-20181010-story.html>; Katie Rogers, *The Trump Rally: A Play in Three Acts*, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/interactive/2018/10/12/us/politics/trump-maga-rally-play.html>; *Tamara Keith and Amy Walter on Trump campaign kickoff, Democratic debates*, PBS NEWS HOUR (June 17, 2019), <https://www.pbs.org/newshour/show/tamara-keith-and-amy-walter-on-trump-campaign-kickoff-democratic-debates>. Given the audience's demographic and likely aversion to hallucinogens, Jimmy Buffett concerts seem more analogous.

220. Ryan Lizza, *The Unexpected Joy at a Trump Rally in Iowa*, POLITICO (Jan. 31, 2020), <https://www.politico.com/amp/news/2020/01/31/unexpected-joy-trump-rally-iowa-109864>.

221. *See* Sam Altman, *I'm a Silicon Valley Liberal, and I Traveled Across the Country to Interview 100 Trump Supporters—Here's What I Learned*, BUS. INSIDER (Feb. 23, 2017, 11:34 AM), <https://www.businessinsider.com/sam-altman-interview-trump-supporters-2017-2> [<https://perma.cc/PDL9-N4XV>]; Bierman, *supra* note 219; Dave Osborn, *Trump Supporters Line Up early for Front-Row Seat to Tuesday's Rally in Orlando*, NAPLES DAILY NEWS (June 18, 2019, 11:37 AM), <https://www.naplesnews.com/story/news/politics/2019/06/17/donald-trump-rally-orlando-supporters-arrive-early-front-row-seat/1476155001/>.

222. Jamelle Bouie, *The Joy of Hatred*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/opinion/trump-rally.html>; Kathleen Hunter, *"Send Her Back" Is Trump's New "Lock Her Up": Campaign Update*, BLOOMBERG NEWS (July 18, 2019, 2:28 PM), <https://www.bloomberg.com/news/articles/2019-07-18/-send-her-back-is-trump-s-new-lock-her-up-campaign-update>; Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), [https://www.axios.com/violence-against-media-bombs-shootings-trump-a59584cb-ac2c-4813-bfef-7b3a4233690d.html](https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on&utm_term=.9096859b2711#click=https://t.co/bYXsN60xzH; Bodyslams, Bombs and Shoves: Anti-media Violence in Trump's America</i>, AXIOS (Feb. 12, 2019), <a href=); William Saletan, *Trump Is Celebrating Violence and Nationalism at His Rallies*, SLATE (Oct. 23, 2018, 6:41 PM), <https://slate.com/news-and-politics/2018/10/trump-nationalist-gop-violence.html>; *see also* Nwanguma v. Trump, 903 F.3d 604, 605 (6th Cir. 2018) (dismissing, on First Amendment grounds, plaintiff's claim that Trump statements at campaign rally had incited crowd to beat protestors).

and structured improvisation as well as by their own collective response.<sup>223</sup> Some traveled long distances to attend rallies, arriving hours before scheduled start times to mingle and stand in line for seats while wearing or purchasing branded merchandise to announce their loyalty.<sup>224</sup> The rallies reached their tragic apotheosis on January 6, 2021, with the “Stop the Steal” rally at the Ellipse to protest Congress’s certification of the electoral college vote, which inspired his supporters to march to the Capitol and a mob of them to invade it.

The rallies’ performative, repetitive, nearly ritualistic qualities may not have revealed the state and its actions in any formal legal sense, but they served as a key form of communication from Trump to his supporters. They displayed his emotions and personal beliefs as they demonstrated his willingness to speak his mind (and his followers’ feelings) even at the risk of giving offense. His followers viewed his willingness to speak bluntly, humorously, and offensively as a form of truth-telling.<sup>225</sup> As president, Trump seemed “authentic”—a term his supporters used to refer to his unrehearsed, plain-spoken, and ultimately transparent rhetoric and style of address.<sup>226</sup> Indeed, the performative nature of his speeches and

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223. Ed Pilkington, *Feel the Love, Feel the Hate – My Week in the Cauldron of Trump’s Wild Rallies*, GUARDIAN (Nov. 1, 2018), <https://www.theguardian.com/us-news/2018/nov/01/trump-rallies-america-midterms-white-house>; Rogers, *supra* note 219; Matthew Stolle, *Trump’s Vanguard Sees Rallies as a Lovefest*, POST-BULLETIN (Oct. 3, 2018), [https://www.postbulletin.com/news/local/trump-s-vanguard-sees-rallies-as-a-lovefest/article\\_50649644-c75a-11e8-a0d0-f773c3159bfe.html](https://www.postbulletin.com/news/local/trump-s-vanguard-sees-rallies-as-a-lovefest/article_50649644-c75a-11e8-a0d0-f773c3159bfe.html).

224. Altman, *supra* note 221; Rogers, *supra* note 219; Jeremy Diamond & Jeff Zeleny, *Trump Rallies: Campaign-funded, for a Reason*, CNN (Mar. 26, 2017, 2:43 PM), <https://www.cnn.com/2017/03/15/politics/donald-trump-campaign-rallies/index.html>; Sally Persons, *Trump Campaign Sees Potential for New 2020 Supporters, in Rally Turnout*, FOX NEWS (Mar. 1, 2019), <https://www.foxnews.com/politics/trump-campaign-sees-potential-for-new-2020-supporters-in-rally-turnout>.

225. Matthew J. Dickinson, *Explaining Trump’s Support: What We Saw and Heard at His Campaign Rallies*, 16 FORUM: J. APPLIED RES. CONTEMP. POL. 171, 178 (2018); Jamieson & Taussig, *supra* note 216, at 621–22; Lamont et al., *supra* note 216, at S165; Robin Tolmach Lakoff, *The Hollow Man: Donald Trump, Populism, and Post-Truth Politics*, 16 J. LANGUAGE & POL. 595, 604 (2017).

226. See Nancy Cook, *Trump’s Race Playbook: Excoriate the Left and Enthrall His Base*, POLITICO (July 29, 2019, 5:58 PM), <https://www.politico.com/story/2019/07/29/trump-race-2020-1440436>; Dickinson, *supra* note 225, at 178; Dahlia Lithwick, *In 2020, Voters Should Abandon Their Obsession with “Authenticity.”* SLATE (Feb. 13, 2019, 6:20 PM), <https://slate.com/news-and-politics/2019/02/2020-candidates-authenticity-trump-democratic-field.html>; John Zogby, *Clinton, Trump and the Battle for Authenticity*, FORBES (Sept. 24, 2016, 9:36 AM), <https://www.forbes.com/sites/johnzogby/2016/09/24/clinton-trump-and-the-battle-for-authenticity/#3a50e2664de1>. During the 2016 presidential campaign, commentators frequently contrasted Trump’s seeming surplus of “authenticity” with Hillary Clinton’s alleged lack of it. See Shawn Parry-Giles & David Kaufer, *Why Do So Many Believe Hillary Clinton Is Inauthentic?*, THE CONVERSATION

their knowing untruth paradoxically appeared to establish that he hid nothing and that he was more accessible and public than previous presidents.<sup>227</sup> His diction relied on simple, informal, and short nouns and action verbs that he repeated frequently, enabling his speeches to seem comprehensible and direct.<sup>228</sup> His hand and body gestures, often mocking and comical in ways that more careful and studied politicians avoid, further accentuated his bond with his followers (who understood his jokes and found them funny) and his differences from those whom he mocked.<sup>229</sup>

Given regularly in a mass, live setting among devoted followers, and then broadcast live semi-regularly on Fox News,<sup>230</sup> Trump's speeches offered a collective experience that felt authentic—even to those who opposed him, who viewed his speeches as accurately reflecting his beliefs and prejudices. In his rallies, Trump stood and spoke as a singular leader in front of thousands, claiming to represent millions of like-minded citizens and to reveal their shared concerns and identity.

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(Oct. 30, 2016, 10:09 PM), <https://theconversation.com/why-do-so-many-believe-hillary-clinton-is-inauthentic-67302>.

227. See Oliver Hahl, Minjae Kim & Ezra W. Zuckerman Sivan, *The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth about Political Illegitimacy*, 83 AM. SOC. REV. 1, 25–26 (2018).

228. See Jacques Savoy, *Trump's and Clinton's Style and Rhetoric During the 2016 Presidential Election*, 25 J. QUANTITATIVE LINGUISTICS 168, 168 (2017); Orly Kayam, *The Readability and Simplicity of Donald Trump's Language*, 16 POL. STUD. REV. 73, 81–86 (2018); Yaqin Wang & Haitao Liu, *Is Trump Always Rambling Like a Fourth-Grade Student? An Analysis of Stylistic Features of Donald Trump's Political Discourse During the 2016 Election*, 29 DISCOURSE & SOC'Y 299, 299 (2018); Sara Ahmadian, Sara Azarshahi & Delroy L. Paulhus, *Explaining Donald Trump via Communication Style: Grandiosity, Informality, and Dynamism*, 107 PERSONALITY & INDIVIDUAL DIFFERENCES 49, 52 (2017); Marta Degani, *Endangered Intellect: A Case Study of Clinton vs Trump Campaign Discourse*, 8 IPERSTORIA 131, 133–34 (2016); Homolar & Scholz, *supra* note 216, at 348. Trump thus represented a broader trend in presidential rhetoric towards conversational, anti-intellectual discourse. See generally ELVIN T. LIM, *THE ANTI-INTELLECTUAL PRESIDENCY: THE DECLINE OF PRESIDENTIAL RHETORIC FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2018).

229. Kira Hall, Donna M. Goldstein & Matthew Bruce Ingram, *The Hands of Donald Trump: Entertainment, Gesture, Spectacle*, 6 HAU: J. ETHNOGRAPHIC THEORY 71, 74–75 (2016).

230. On how television networks' decisions about whether to telecast Trump rallies evolved, see Todd Shields & Emma Kinery, *Trump Can't Rely on Cable News Running His Rallies In Full Anymore*, BLOOMBERG (Oct. 11, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-10-11/trump-rallies-no-longer-assured-airtime-as-tv-networks-reassess>.



## 2. Transparency in 240 Characters: @realDonaldTrump

President Trump's Twitter account pursued a similar mode of address as his speeches. He created the @realDonaldTrump account in 2009 to spread his opinion and extend his brand,<sup>231</sup> and he credits Twitter with helping him secure the 2016 election by giving him a platform "to bypass . . . unfair media coverage and speak directly to voters."<sup>232</sup> In a stipulation as part of litigation over whether the Constitution allowed him to block users from his Twitter account, President Trump stated that since his inauguration in 2016 and with the assistance of White House Social Media Director Daniel Scavino, he used the @realDonaldTrump account "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair."<sup>233</sup> His first press secretary declared that tweets from the @realDonaldTrump account should be considered "official statements by the President of the United States,"<sup>234</sup> and his tweets were often posted from both his personal account and the official presidential account (@POTUS) within minutes of each other.<sup>235</sup>

Despite their official nature and his Twitter account's status as a public forum,<sup>236</sup> President Trump's tweets appeared spontaneous, unfiltered,

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231. Douglas B. McKechnie, *From Secret White House Recordings to @realDonaldTrump: The Democratic Value of Presidential Tweets*, 40 CAMPBELL L. REV. 611, 632 (2018); Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Adolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 97–98 (2017).

232. Chris Baynes, *Donald Trump Says He Would Not Be President Without Twitter*, INDEPENDENT (Oct. 22, 2017, 9:00 AM), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-tweets-twitter-social-media-facebook-instagram-fox-business-network-would-not-be-a8013491.html>; Shontavia J. Johnson, *Donald Trump, Disruptive Technologies, and Twitter's Role in the 2016 American Presidential Election*, 27 WIDENER COMMONWEALTH L. REV. 39, 77, 79 (2018).

233. *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019).

234. *Id.* Notably, the government stipulated in *Knight First Amendment* that the President's tweets are "official records" that must be preserved under the Presidential Records Act, 44 U.S.C. § 2202. *Id.* at 232.

235. McKechnie, *supra* note 231, at 632. In terms of overall activity, the President appeared to favor using his own @realDonaldTrump account for the majority of his Twitter activity. The @realDonaldTrump handle posted over 34,000 tweets, while the @POTUS account posted about 4,000. See Donald Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realdonaldtrump>; Donald Trump (@POTUS), TWITTER, <https://twitter.com/potus>.

236. *Knight First Amendment Inst.*, 928 F.3d at 237.

honest, and, above all, authentically Trumpian—the product of whatever was on his mind at the moment of its sending.<sup>237</sup> They revealed his thoughts, they invoked his supporters as “Americans” and “the people” (and called out his opponents as neither), and they very occasionally announced administration policy as well as political appointments and resignations.<sup>238</sup> They were “punchy,” timely, and ephemeral—and thereby newsworthy and attention-grabbing.<sup>239</sup> Their misspellings, typographical errors, and dramatic use of all-caps further accentuated the account’s authenticity, distinguishing his voice from that of the polished, professional campaigners who allow their accounts to be managed by paid professionals.<sup>240</sup> They also made his account appear similar to those of his base of supporters.<sup>241</sup> Indeed, his tweets both previewing and during the “Stop the Steal” rally that preceded the Capitol riot and insurrection

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237. See generally BRIAN L. OTT & GREG DICKINSON, *THE TWITTER PRESIDENCY: DONALD J. TRUMP AND THE POLITICS OF WHITE RAGE* 59 (2019) (noting the “homology,” or structural similarity, between Trump’s “natural style of speaking and Twitter’s underlying logic”); Galen Stolee & Steve Caton, *Twitter, Trump, and the Base: A Shift to a New Form of Presidential Talk?*, 6 *SIGNS & SOC’Y* 147, 161 (2018) (noting how the tweets’ form and syntax confirm Trump’s “‘authenticity’ to his supporters”); see also Gunn Enli, *Twitter as Arena for the Authentic Outsider: Exploring the Social Media Campaigns of Trump and Clinton in the 2016 US Presidential Election*, 32 *EUR. J. COMM.* 50, 50 (2017) (noting use of “authenticity markers,” tweets that “expressed impoliteness and political incorrectness, often using capital letters,” marking Trump as an “authentic outsider”); Ramona Kreis, *The “Tweet” Politics of Donald Trump*, *J. LANG. & POL.* 607, 615 (2017) (characterizing Trump’s Twitter account as employing “an ‘authentic style’ which corroborates his constructed position of an outsider and legitimate representative of the people distancing himself from the establishment”); Paromita Pain & Gina Masullo Chen, *The President Is In: Public Opinion and the Presidential Use of Twitter*, *SOC. MEDIA & SOC’Y*, Apr.–June 2019, at 9, available at <https://doi.org/10.1177/2056305119855143> (“He uses a colloquial, conversational style of language that seems to illustrate his attempts to be authentic and unfiltered, which underscores his populist message.”).

238. According to an online archive of his tweets, the Twitter accounts he most frequently mentioned were his own and those of his family and Fox News and its hosts; as of August 1, 2019, his presidential tweets have invoked “Fake News” (362 times), Russia and “collusion” (452 times), and “Clinton” (212 times). During the 2016 presidential campaign, Trump’s account was far less likely to take a position on a particular issue than Clinton’s account, but much more likely to attract attention in the news media. See Heather K. Evans, Kayla J. Brown & Tiffany Wimberly, “Delete Your Account”: *The 2016 Presidential Race on Twitter*, 36 *SOC. SCI. COMP. REV.* 500, 503–07 (2017).

239. Stolee & Caton, *supra* note 237, at 161–63.

240. Enli, *supra* note 237, at 59.

241. See generally Thomas Gallagher, *The Outsider on the Inside: Donald Trump’s Twitter Activity and the Rhetoric of Separation from Washington Culture*, 27 *ATLANTIC J. COMM.* 183 (2019) (noting prevalence of Trump’s presidential tweets that present him as independent of party and government); see also Stolee & Caton, *supra* note 237, at 164; Pain & Chen, *supra* note 237, at 9; Andrea McDonnell & Mark Wheeler, *@realDonaldTrump: Political Celebrity, Authenticity, and Para-social Engagement on Twitter*, 10 *CELEBRITY STUD.* 427 (2019).

were read by many of his followers as direct invitations to disrupt the peaceful transfer of power—and ultimately led Twitter to ban him from its platform.<sup>242</sup> By relying more heavily on Twitter than on press releases and formal and official statements, Trump’s campaign and presidency intimated that his sentiments exclusively constituted the direction of the White House, executive branch, and nation.<sup>243</sup>

### C. Conclusion

The Trump administration did not make the federal bureaucracy more visible in a technical sense (although he shrunk parts of it, most notably the State Department<sup>244</sup> and National Security Council<sup>245</sup>), and his administration’s compliance with administrative laws including FOIA were marginally worse than that of his immediate predecessor.<sup>246</sup> He explicitly refused to follow presidential norms regarding information disclosure about his personal finances—types of documents over which courts and Congress failed to exercise clear authority<sup>247</sup> and to which

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242. *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html).

243. Corina Lacatus, *Populism and the 2016 American Election: Evidence from Official Press Releases and Twitter*, 52 PS: POL. SCI. & POL. 223, 226 (2019).

244. See Jack Corrigan & Government Executive, *The Hollowing Out of the State Department Continues*, ATLANTIC (Feb. 11, 2018), <https://www.theatlantic.com/international/archive/2018/02/tillerson-trump-state-foreign-service/553034/> (identifying drop in State Department’s civilian workforce); Robbie Gramer & Colum Lynch, *Despite Pompeo’s Call for ‘Swagger,’ Trump Slashes Diplomatic Budget*, FOREIGN POL’Y (Mar. 11, 2019), <https://foreignpolicy.com/2019/03/11/trump-federal-budget-steep-cuts-to-state-department-foreign-aid-development-diplomacy-pompeo/> (noting “steep cuts to the State Department and U.S. Agency for International Development” in Trump Administration’s proposed 2020 budget); Erich Wagner, *These Agencies Have Lost the Most Workers Under Trump*, GOV. EXEC. (Aug. 15, 2018), <https://www.govexec.com/management/2018/08/these-agencies-have-lost-most-workers-under-trump/150577/> (twelve of fifteen Cabinet-level agencies have shrunk in size under President Trump).

245. See Jennifer Jacobs & Justin Sink, *Trump Orders Cut to National Security Staff After Whistle-Blower*, BLOOMBERG (Oct. 4, 2019), <https://www.bloomberg.com/news/articles/2019-10-05/trump-orders-cut-to-national-security-staff-after-whistle-blower>.

246. On challenges under the Emoluments Clause and efforts to require release of his tax forms, see *supra* note 198.

247. Challenges to the President’s ongoing business interests under the Emoluments Clause failed. See, e.g., *In re Trump*, 928 F.3d 360, 379 (4th Cir. 2019) (holding that plaintiffs lacked standing to sue under Emoluments Clause). Efforts to secure his tax returns through congressional investigations and state legislation did not bear fruit during his presidency. See Jeff Stein, Rachael Bade & Jacqueline Aleman, *‘It’s Going to Be Tough’: House Democrats Appear Less Likely to Get Trump’s Tax Returns Before 2020*

Trump held fast as a private citizen.<sup>248</sup> Transparency advocates and corruption foes like Citizens for Responsibility and Ethics justifiably claimed that President Trump had done “exactly the opposite” of draining the swamp, leading public venality “into uncharted territory, innovating forms of corruption.”<sup>249</sup>

But President Trump and his Twitter account were the “real” Donald Trump, at least to his followers.<sup>250</sup> The public could know and understand his administration simply by paying attention to him rather than to the documents and statements issued by the White House and his surrogates. What you saw in his direct public address was what you got: he spoke for his followers, pronouncing their truth bravely, humorously, and offensively. He appeared transparent. And those in the press and among his political opposition who challenged him and his presentation of the truth surely must lie and keep secrets of their own. They were simultaneously at least as bad as Trump and unable to pass authoritative judgment on him.<sup>251</sup> His mode of communication—lacking in specifics, full of hyperbole and often downright lies—thus constituted a transparency that deemphasized the technocratic in favor of the personal, populist, and, ultimately, political.

#### V. TRANSPARENCY BETWEEN POPULIST POLITICS AND TECHNOCRATIC ADMINISTRATION

Donald Trump’s claims of transparency are one part of the broader populist style that he exemplified as president. Like other nationalist, right-wing populists who have won recent elections, Trump claimed to uphold transparency as one among numerous of the “general signifiers”

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*Election*, WASH. POST (Aug. 22, 2019), <https://beta.washingtonpost.com/politics/2019/08/22/its-going-be-tough-house-democrats-appear-less-likely-get-trumps-tax-returns-before-election/>.

248. See DAVID CAY JOHNSON, *THE MAKING OF DONALD TRUMP* 77–83, 147–53 (2016) (describing Trump’s longstanding effort to obfuscate and keep secrets about his net worth and his public image).

249. That is his Twitter handle. See Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> (last visited Nov. 2, 2020).

250. Citizens for Responsibility and Ethics in Washington, *Trump’s 2,000 Conflicts of Interest (and Counting)*, <https://www.citizensforethics.org/2000-trump-conflicts-of-interest-counting/> (last visited Aug. 30, 2019).

251. See Clare Birchall, *Interrupting Transparency*, in TRANSPARENCY, SOCIETY, AND SUBJECTIVITY, *supra* note 117, at 343, 359–60.

of democracy.<sup>252</sup> Like other populists, he used (and is likely to continue to use) new communications platforms to speak directly to his followers and to present them with at least a veneer of an authentic voice.<sup>253</sup> As the political theorist Nadia Urbinati has argued:

A populist government relies on, but also reinforces and amplifies, a strongly opinionated audience that clamors for the direct translation of its opinions into decisions. This audience becomes intolerant of dissent and disparaging of pluralism; and, in addition it claims full transparency, a “virtue” that is supposed to expunge the “hypocrisy” of pragmatic politics.<sup>254</sup>

This is a different understanding of transparency than the one that the Freedom of Information movement has developed. Deeply partisan and political, Trump’s transparency was subject not only to his agenda and whims, but also to his false statements and outright lies.

Trump frustrated his opponents with his failure to meet transparency’s technocratic rules and normative expectations that at least in theory are subject to the neutral rule of law and to widely-held and generally-applicable norms. But his supporters not only found those rules and expectations irrelevant, they may have even enjoyed the degree to which his administration frustrated laws enforced by his opponents and the bureaucratic “deep state” and that were utilized by the mainstream press to criticize him.<sup>255</sup> This is clear hypocrisy. Trump and his supporters

252. Giuseppe Zaccaria, *The People and Populism*, 31 *RATIO JURIS* 33, 42 (2018). Trump was like other contemporary populists in this regard, even if he governed somewhat differently. Compare, for example, Philippines president Rodrigo Duterte, who shares Trump’s communicative style but who governs more violently, see Nicole Curato, *Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism*, 47 *J. CONTEMP. ASIA* 142 (2017); and Hungary’s Victor Orbán, who shares Trump’s tendency to warn of secret conspiracies that threaten the people and his party’s rule but who governs more paternalistically (and corruptly), see Zsolt Enyedi, *Paternalist populism and illiberal elitism in Central Europe*, 21 *J. POL. IDEOLOGIES* 9 (2016).

253. See MOFFITT, *supra* note 42, at 91–92 (noting the relationship between contemporary populism and social media); see generally ANGELA NAGLE, *KILL ALL NORMIES: ONLINE CULTURE WARS FROM 4CHAN AND TUMBLR TO TRUMP AND THE ALT-RIGHT* (2017) (chronicling the rise of the online alt-right and its relationship to the 2016 election and Trump’s racial and gender politics).

254. URBINATI, *supra* note 21, at 16. On the role of the relationship among transparency, trust, and a public’s personal connection to leadership, see Portia Roelofs, *Transparency and Mistrust: Who or What Should Be Made Transparent?*, 32 *GOVERNANCE* 565, 576–77 (2019).

255. This enjoyment in transgression, engaged by trolling the righteous norms of elites, is an example of what David Karpf identified as Trump’s supporters’ tendency to act as a weaponized, automated affective public—a networked public formation mobilized through sentiment. See David Karpf, *Digital politics after Trump*, *ANNALS OF THE INT’L COMM. ASS’N*, DOI:

continued to express outrage over Barack Obama's "missing" birth certificate and Secretary of State Clinton's private email server, but were at most apathetic about Trump's refusal to issue his tax returns and about his and his administration's efforts to control his personal and presidential information. His followers and most of his fellow Republicans either ignored the administration's efforts to resist disclosure or affirmatively applauded them.

President Trump's embrace of a populist approach to transparency allows several important insights: first, about transparency's relationship to populism and the resulting tensions within transparency as an administrative norm; and second, about the long-term effects that a populist leader might have on transparency's role in a democracy.

#### *A. Transparency, Between Populism and Technocracy*

Transparency has always registered in a populist, moralistic voice, from the Progressive Era and Justice Louis Brandeis' use of sunlight as a metaphor to the post-Watergate efforts to establish new open government mandates and strengthen existing ones.<sup>256</sup> Its advocates promise that transparency can transform a distant state apart from and in opposition to the public into an authentically democratic one. This populist promise sits at the core of all manifestations of transparency as a concept. It provides a utopian basis for believing in the transformative potential of an administrative norm to enhance democracy,<sup>257</sup> and it explains why even the most mainstream politicians who oppose many of populism's manifestations must nevertheless embrace parts of its program.<sup>258</sup> Transparency and populism envision a more authentic relationship between the state and public, and both have no essential relationship with a specific political party or set of substantive ideological or policy commitments.

Just as transparency incorporates populist politics, populism—even in

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10.1080/23808985.2017.1316675, at 4-5 (2017) (borrowing the concept of "affective publics" from ZIZI PAPACHARISSI, *AFFECTIVE PUBLICS: SENTIMENT, TECHNOLOGY, AND POLITICS* (2014)); *see also* Stolee & Caton, *supra* note 237, at 155-56, 163 (discussing trolling as a practice of provocation engaged in by alt-right members, Trump supporters, and Trump himself against their opposition).

256. *See supra* Part II-C.

257. *See* FENSTER, *supra* note 22, at 192.

258. *See* Giorgos Katsambekis, *The Populist Surge in Post-Democratic Times: Theoretical and Political Challenges*, 88 *POL. Q.* 202, 209 (2017).

its right-wing variety—includes an ideal of transparency. The latter relies on the direct personal connection felt between followers and leadership and on the ability of the leader, acting on behalf of his public, to use the instruments of the state to the public’s advantage.<sup>259</sup> The people need to know the leader as their representative who maintains their sovereignty—to view him and experience his presentation of an authentic self that represents their beliefs and their sense of the nation without mediation. This was the basis of Trump’s understanding of transparency as a populist norm. By seeing him, the people could see the state.

But transparency, both as a concept and administrative norm, is not entirely a populist project, notwithstanding the historical and conceptual relationship between them. Administrative laws and their advocates do not reject or even question institutional and political pluralism; rather, they would require the state to inform all members of the public, majority and minority alike, of its operations in order to enable political contest among competing voices and institutional accountability. By contrast, populists in power view government institutions, legal mandates, and established, competing political parties as a hinderance to truly popular self-rule.<sup>260</sup> Nor does transparency make identity claims by limiting or favoring its use and benefits to members by party, race, or nationality. Most open government laws allow anyone to request and review information or to attend meetings.<sup>261</sup> Even a citizenship requirement to request information, which exists in some U.S. sub-federal state laws, draws no distinction among citizens and is easy to circumvent.<sup>262</sup> Whereas

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259. See URBINATI *supra* note 21, at 61. The literature on populism offers multiple characterizations of how populist movements view and use existing state and civil society institutions. Compare, e.g., Taggart, *supra* note 42, at 106 (“Populism has problems with institutions. At the best of times populists regard institutions with distaste, but at times of crisis they begin to view them as malignant.”), with MÜLLER, *supra* note 6, at 39, 44–46 (arguing that populism does not hate all institutions, so long as the populist leader and movement can exclusively colonize it).

260. See Colin Crouch, *Post-Democracy and Populism*, 90 POL. Q. 124, 125 (2019).

261. See, e.g., 5 U.S.C. § 552(a)(3)(A) (2018) (giving access rights to “any person”).

262. See *McBurney v. Young*, 569 U.S. 221, 237 (2013) (upholding against constitutional challenge Virginia’s law restricting the right to seek government documents to citizens of the state); Gavin Aronsen, *This Website Will Help You Outsmart the Supreme Court’s Anti-Transparency Ruling*, MOTHER JONES (May 1, 2013), <https://www.motherjones.com/politics/2013/05/supreme-court-cracks-down-public-records-access/> (reporting on efforts to pair out-of-state requesters with citizens to cosign requests); see also *Questions Linger over Impact of McBurney v. Young Decision*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/questions-linger-over-impac/> (last visited Aug. 29, 2019), (noting that the decision’s impact would likely be mixed, as states might either underenforce citizenship requirement or remove it altogether).

transparency advocates promote laws and norms as the means for the public to protect itself, populist movements offer themselves as the force that can protect the public from the elites who currently control the state. Populism thus simultaneously includes and is in tension with transparency ideals; and transparency advocates speak in a populist register without necessarily viewing the state as the instrument of an organized elite.

This tension is most apparent in the conflict between the concept's populist tendencies and the technical, bureaucratic tasks advocates face in making the state more visible<sup>263</sup>—the constitutional provisions, statutes, and regulations that establish the laws that impose transparency.<sup>264</sup> Populist understandings of transparency and technocratic efforts to impose the concept conflict in their theories of governance.<sup>265</sup> Although both seek to establish a more accountable, representative state,<sup>266</sup> the populist view embraces the personal and political while the technocratic view emphasizes neutrality and administration.<sup>267</sup> To be imposed, the simple, visible government that a populist understanding of transparency holds requires a complex, technocratic set of legal and regulatory solutions; but the complex solutions required for visibility obscure the state's simplicity and prove difficult to understand and enforce. Freedom of Information laws cannot simply reveal the state and

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263. See Huq, *supra* note 25, at 1134-40 (contrasting the populist desire for a simple government and constitutional order with the complex nature of contemporary governance). This tension is not dissimilar from what Louis Michael Seidman has characterized as the “contradiction” that contemporary liberal constitutionalists face between their progressive embrace of government and their populist suspicions of it. LOUIS MICHAEL SEIDMAN, WHY BERNIE IS CONFUSED: POPULIST AND PROGRESSIVE STRANDS IN LIBERAL CONSTITUTIONALISM 71-72 (SSRN working paper, June 24, 2019), available at <https://ssrn.com/abstract=3409375>. I consider this a tension rather than a contradiction because transparency laws and their advocates further technical mandates even as they might require or utilize populist political arguments. Technocratic laws and populist politics can co-exist in transparency, in other words, but they undercut each other and reveal the improbability of achieving one of them fully, because it would likely come at expense of the other.

264. See *supra* Part II-A.

265. See Miguel A. Centeno, *The New Leviathan: the dynamics and limits of technocracy*, 22 THEORY & SOC. 307, 331 (1993).

266. See Christopher Bickerton & Carlo Invernizzi Accetti, *Populism and Technocracy*, in KALTWASSER ET AL (eds.), *supra* note 26, at 326, 329–32.

267. See *id.* For a discussion of the deterioration of administration as an ideal over the past several decades (and the attendant ascendancy of political powers and “governance as a concept), long predating the current populist wave, see PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY 66-69 (2011).



its leader without more complex rules and an additional layer of bureaucracy to establish and enforce administrative procedures. Transparency includes both populist and technocratic strains that pull in opposite directions and unravel each other, rendering each impossible to fully achieve.

In his work on the complex role of disclosure in the relationship between Paraguayan *campesinos* and the state, the anthropologist Gregg Hetherington concludes, “[t]ransparency is a technocratic language built on the exclusion of the political from governance, which paradoxically requires excluded political actors to make it work.”<sup>268</sup> This paradox demonstrates both the need for balancing competing conceptions of transparency and the implausibility of doing so. If a deeply populist form of transparency—whether in the Trumpian style or otherwise—is defined as nothing but politics and personality, then it can prove worthless, even obfuscatory. But if an obsession with technocratic rules and norms overtakes the understanding and enforcement of democratic obligations, then transparency serves only as a fetish object for specialists and is divorced from the democratic public it is intended ultimately to assist and serve.<sup>269</sup>

Transparency is ultimately a “protean” concept, as David Pozen has characterized it,<sup>270</sup> and for much if not most of the public constitutes an administrative norm of at best secondary political importance (if it is important at all).<sup>271</sup> It can be articulated in some combination of technical, political, or populist ways at particular historical moments.<sup>272</sup>

268. See HETHERINGTON, *supra* note 21, at 189.

269. See Gregg Hetherington, *Populist Transparency: The Documentation of Reality in Rural Paraguay*, 1 J. LEGAL ANTHROPOLOGY 45, 47 (2008) (noting that Paraguayan populists effectively “couch their appeal to the masses through an appeal to experiential reality which is at odds with the technocratic uses of the term in transparency reforms”).

270. Pozen, *Drift*, *supra* note 71, at 104.

271. Cf. Balkin, *supra* note 74, at 1985-89 (criticizing progressives’ tendency to overestimate how much the public is interested in and follows highly technical, complex political debates).

272. I use the term articulation in the sense in which Stuart Hall initially developed it:

By the term ‘articulation’, I mean a connection or link which is not necessarily given in all cases, as a law or a fact of life, but which requires particular conditions of existence to appear at all, which has to be positively sustained by specific processes, which is not ‘eternal’ but has to be constantly renewed, which can under some circumstances disappear or be overthrown, leading to the old linkages being dissolved and new connections—re-articulations—being forged. It is also important that an articulation between different practices does not mean that they become identical or that one is dissolved into the other. Each retains its distinct determinations and conditions of existence.

Transparency advocates and President Trump's political opponents contest the extent of the administration's compliance with rules and norms in courts, public debates, and political campaigns—in the process combining a technocratic critique of Trump and his administration's failure to meet legal standards with a populist critique of his administration's penchant for information control as a symptom of his corruption. Advocates who focus on expanding and enforcing technocratic transparency rules rightly protested when President Trump violated governing norms as part of the political contest over democratic governance. But they should not dismiss Trump and his supporters' moral and populist understanding of transparency without recognizing that transparency's operation and legitimacy rest on a populist politics, and that an emphasis on technocratic rules at the expense of populism may alienate or bore the public and thereby render the norm powerless.

*B. Populism and the Potential Disfigurement of Transparency*

President Trump's departure from existing transparency rules and norms—incremental differences in some respects, more brazen refusals to conform in others—not only represented a variance in compliance with open government mandates, but risked the weakening of an important, if second-order, democratic value. This is not a problem unique to populism, however. Given current levels of political partisanship in the U.S., transparency's significance depends upon how it is used against a particular individual, party, or bureaucracy.<sup>273</sup> Contrast, for example, the outrage that Republican members of Congress expressed about the Obama administration's refusal to disclose documents to the investigative committees their party chaired to their vocal support of the Trump administration's similar refusal to committees controlled by

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Stuart Hall, *Signification, representation, ideology: Althusser and the post-structuralist debate*, 2 CRIT. STUD. MASS COMM. 91, 113-14 n.2 (1985); see also Jennifer Daryl Slack, *The theory and method of articulation in cultural studies*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 112 (Kuan-Hsing Chen & David Morley eds., 1996).

273. See *supra* Part II-B (describing the role of politics in transparency's rise and the norm's use as a weapon against political opponents).

Democrats<sup>274</sup>—as well as the Democrats’ parallel reversal.<sup>275</sup> Voters and the broader public support a particular elected official, candidate, or party based more on substantive, symbolic, or partisan concerns than for fealty to transparency as an abstract administrative norm enforced by technocratic rules. Transparency is politically imposed on a political system; it is not surprising, therefore, that compliance with Freedom of Information laws matters more to the party out of power than for the executive against whom it is used, and that interest in compliance also reverses in partisan fashion when political fortunes shift. President Trump’s distinct relationship to transparency accentuated a phenomenon that has existed since the very beginning of the open government movement.

The danger that all populist movements represent upon winning elections and assuming power is that their skepticism of pluralistic norms and democratic institutions ultimately disfigures those norms and institutions and subverts democracy.<sup>276</sup> A purely populist understanding of transparency, divorced from the technocratic rules and institutional machinery required to force disclosure, will harm democracy and accountability. Notwithstanding his flaunting of disclosure norms regarding his financial interests, President Trump and his administration did not successfully destroy or abandon transparency as an administrative norm. They were challenged by other branches of government and the press in their efforts to staunch the flow of government information. At the same time, his emphasis on a more personal, affective notion of transparency via public rallies and social media threatens rebalancing transparency towards a populist, more explicitly political mode of transparency. This shift may have long-term, disfiguring effects on open government law and norms, and especially on executive branch compliance with it.

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274. See JM Rieger, *Then and Now: How Republicans Downplay Subpoenas When They Target Trump*, WASH. POST (Oct. 22, 2019), <https://www.washingtonpost.com/politics/2019/10/22/then-now-how-republicans-downplay-subpoenas-when-they-target-trump/> (noting Republican hypocrisy).

275. See Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, POLITICO (May 9, 2019), <https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120> (reporting on settlement of lawsuit between the House and Department of Justice over subpoenas in “Fast and Furious” gunrunning case).

276. Nadia Urbinati developed the argument that populism disfigures rather than destroys democracy. See URBINATI, *ME THE PEOPLE*, *supra* note 21, at 22; URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 128-31 (2014).