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## Information Mischief under the Trump Administration

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## INFORMATION MISCHIEF UNDER THE TRUMP ADMINISTRATION

NATHAN CORTEZ\*

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### INTRODUCTION

Led by a President with a well-documented disregard for truth,<sup>1</sup> it is not surprising that the Trump administration has adopted a variety of mischievous information policies. The word *policies* might suggest a more cohesive and intentional approach than actually exists in the

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1. This sentence feels bizarre to even write. And yet, see Glenn Kessler et al., *President Trump has made 4,713 false or misleading claims in 592 days*, WASH. POST (Sept. 4, 2018), <https://www.washingtonpost.com/amphtml/politics/2018/09/04/president-trump-has-made-false-or-misleadingclaims-days/> [https://perma.cc/5Q5Y-L49W]. The data is based on analysis by The Fact Checker project at the *Washington Post*. The Fact Checker, initiated in 2007 and situated at the Poynter Institute of Media Studies in St. Petersburg, Florida, is a signatory of the International Fact-Checking Network code of principles, which includes commitments to non-partisanship, transparency of sources, transparency of funding sources, transparency of methodology, and a commitment to making open and honest corrections.

current White House. But the Trump administration has taken sporadic actions, many unrelated to each other, that together signal a shift away from open government—or at least away from information policies based on neutral principles—towards more cynical uses of government information. Examples include removing certain data from the public domain, manipulating data, censoring scientists at various federal departments, scrubbing certain terms and topics from federal web sites, and using transparency initiatives as a pretext to undermine sound science.<sup>2</sup> This article attempts to tease out an emerging “information policy” for the Trump administration, explain how it departs from the information policies set by predecessors, and evaluate the extent to which legal and nonlegal mechanisms can constrain or otherwise deter abuses of executive discretion.

### I. INFORMATION POLICY

“Information policy” reflects the countless decisions that the President and federal agencies make in deciding how—and indeed whether—to generate, collect, publish, and present information.<sup>3</sup> Although some of these decisions are governed by statute,<sup>4</sup> the federal executive generally enjoys wide discretion. These discretionary decisions sometimes are governed by written policies, guidelines, or manuals adopted by individual agencies, or by the Office of Management and Budget (OMB) or its Office of Information and Regulatory Affairs (OIRA).<sup>5</sup> We can thus study federal “information policy” by referring to these documents. But “information policy” also exists in discretionary decisions not governed by statute or by internal agency rules. How agencies exercise their discretion, how they effectuate their internal rules, and how they interpret statutory directives is worth closer examination.

Of course, describing an “information policy” for the vast executive can be daunting. The federal “executive establishment” includes the Executive Office of the President and its ten components, as well as fifteen executive or “cabinet” departments (which themselves include

2. See *infra* Part III.

3. The U.S. Code includes a subchapter titled “Federal Information Policy,” and one stated purpose is to “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.” 44 U.S.C. § 3501(2) (2012). Indeed, Title 44 of the U.S. Code deals with “Public Printing and Documents.” Of course, “information policy” as practiced by the government exceeds the scope of activities addressed in Title 44, and thus the analysis here is broader as well.

4. See *infra* Part IV.

5. See *infra* Parts II, IV.

several significant sub-agencies) and eighty-one independent agencies that together employ around 2.85 million civilians.<sup>6</sup> To say there is a single, coherent “information policy” in the executive obviously oversimplifies.

Moreover, it can be hard to generalize about “information policy” given the sheer volume and variety of information released by the federal executive. The executive publishes information in almost every possible way, from traditional press releases written by traditional press offices, to sprawling web sites with thousands of unique pages, to social media posts, and virtually everything in between. In fact, the executive’s informational function is so vast that the OMB now includes an Office of the Federal Chief Information Officer (OFCIO),<sup>7</sup> and many federal agencies have their own Chief Information Officers (CIOs).<sup>8</sup> Thus, describing how federal agencies and their staff disseminate information—in all its forms—may be a bit presumptuous.

Nevertheless, because information practices can vary considerably from administration to administration,<sup>9</sup> departures from prior administrations can signal important shifts in information policy. Thus, we can study the “information policy” of each administration by reviewing executive orders, centralized instructions from the OMB and OIRA, and other changes in policy articulated in writing. We also can, of course, observe each administration in practice. This Article tries to do both.

Information policy is worth examination because the volume and variety of data generated by the federal government grows hourly. Moreover, as the methods for disseminating that data have proliferated,<sup>10</sup> the federal executive enjoys even more opportunities to influence what information the public receives and how. Information policy is

6. DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 5–6, 11 n.24, 12 (2012), <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies> [<https://perma.cc/2TYK-GRDW>].

7. See Office of the Fed. Chief Info. Officer, Office of Mgmt. & Budget, *Welcome*, CIO.GOV, <https://policy.cio.gov> [<https://perma.cc/XE3X-NFBH>].

8. See *CIO Council: Leadership & Membership*, CIO.GOV, <https://www.cio.gov/about/members-and-leadership/> [<https://perma.cc/6RGD-SQFV>]. The federal Council of Chief Information Officers was established by Executive Order 13011, and then was codified by the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of the U.S. Code). The Council is an “interagency forum for improving agency practices related to the design, acquisition, development, modernization, use, sharing, and performance of Federal information resources.” *About the Council*, CIO.GOV, <https://www.cio.gov/about/> [<https://perma.cc/9EKM-JAHY>].

9. See *infra* Parts II, III.

10. See Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. REV. 1371, 1392 (2011).

also important because the public tends to trust federal sources of information.<sup>11</sup> Facts and data published by agencies carry the imprimatur of the federal government.<sup>12</sup> Thus, government efforts to hide, manipulate, or engage in other information mischief can be particularly pernicious. Facts and data are, of course, prerequisites to sound policymaking. Even when facts are in dispute, our system of government depends on a willingness to engage with facts, data, and “truths” about the world.<sup>13</sup> Thus, information policy critically examines how the federal executive generates, disseminates, presents, and controls information.

Viewed in broader context, for much of our nation’s history, citizens have pushed the federal government to be more transparent—to adopt a more open information policy.<sup>14</sup> Government disclosure is seen as a virtue across the political spectrum because it appeals “to so many of our intuitions about how government, markets, and regulation should work.”<sup>15</sup> Transparency is seen a precondition for government accountability.<sup>16</sup> Today, government transparency sits comfortably “among the pantheon of great political virtues.”<sup>17</sup> But the relative transparency we enjoy now was both hard-won and achieved only gradually, via four separate movements. As I have explained in previous work:

The 1930s brought efforts to publish so-called “secret laws” generated by agencies during the New Deal. The 1940s brought the Administrative Procedure Act’s mandates to give regulated parties advanced notice of agency actions. The 1960s and 1970s introduced FOIA and the era of transparency by request. And the 1990s and 2000s introduced mandates for agencies to post information on the

11. NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 94 (2015).

12. *Id.*; Nathan Cortez, *Regulation by Database*, 89 U. COLO. L. REV. 1, 79 (2018).

13. See Leah Litman & Helen Klein Murillo, *Information Wars Part I: The Challenge to the Census*, TAKE CARE (Apr. 13, 2017), <https://takecareblog.com/blog/information-wars-part-i-the-challenge-to-the-census> [<https://perma.cc/9CN3-V3C3>].

14. See, e.g., U.S. CONST. art. I, § 5, cl. 3 (requiring each chamber of Congress to “keep a Journal of its Proceedings, and from time to time to publish the same,” which may have been a deliberate departure from the practices of the British Parliament); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1218 (2010); Cortez, *Regulation by Database*, *supra* note 12, at 10–20 (tracking the history of open government and transparency laws).

15. Cortez, *Regulation by Database*, *supra* note 12, at 21.

16. *Id.* at 27–28.

17. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006).

Internet, establishing important agency norms of online publication.<sup>18</sup>

Today, of course, information policy is tied inextricably to agency use of web sites and other modern media, through which agencies post voluminous information about their decisions and activities.<sup>19</sup> As agency use of web sites became the norm, Congress enacted laws calling for even more online disclosure, such as the Electronic Freedom of Information Act of 1996 (e-FOIA),<sup>20</sup> the Information Quality Act of 2001,<sup>21</sup> the E-Government Act of 2002,<sup>22</sup> and the Open Government Act of 2007.<sup>23</sup> Part IV examines the extent to which these laws constrain executive discretion, particularly the recent information “mischief” of the Trump administration.

More normatively, when considering an optimal information policy for the federal executive, I suggest there is a meaningful distinction between information and messaging—that is, between *information* that purports to be truthful and objective, and *messaging* that we expect to be more subjective.<sup>24</sup> Of course, many communications are hybrids—a stew of opinion and fact together, or opinions based on facts, or opinions presented as facts. Differentiating the two can be difficult, although I maintain it remains worthwhile when trying to articulate potential constraints on often unbounded executive discretion.

A recent case illustrates the difficulty. In 2017, the Sierra Club asked the EPA’s Inspector General to investigate remarks made by then-EPA Administrator Scott Pruitt expressing doubt that human activity contributed to climate change.<sup>25</sup> The Sierra Club alleged that

18. Cortez, *Regulation by Database*, *supra* note 12, at 10–11. For a wonderful evaluation of FOIA on its 50th anniversary, see TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION (David E. Pozen & Michael Schudson eds., 2018).

19. Peter L. Strauss, *Implications of the Internet for Quasi-Legislative Instruments of Regulation*, 28 WINDSOR Y.B. ACCESS TO JUST. 377, 377–78 (2010); James O’Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507, 508 (2003).

20. Pub. L. No. 104-231, 110 Stat. 3048 (1996) (amending 5 U.S.C. § 552(a)(2)).

21. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516 (2012). This law is sometimes referred to as the “Data Quality Act.”

22. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of the U.S. Code).

23. Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified in scattered sections of 5 U.S.C. § 552).

24. CORTEZ, *supra* note 11, at 7.

25. U.S. EPA SCI. INTEGRITY PROGRAM, DETERMINATION REGARDING ALLEGATIONS OF A LOSS OF SCIENTIFIC INTEGRITY CONCERNING REMARKS BY ADMINISTRATOR PRUITT (2017), <https://>

Pruitt violated the EPA's own scientific integrity policy, which ensures that EPA officials adhere to principles of scientific integrity "in the use, conduct, and communication of science."<sup>26</sup> Pruitt was asked during a television interview:

*Do you believe it's been proven that carbon dioxide is the primary control knob for climate?*

Pruitt responded:

*No. I think that measuring with precision human activity on the climate is something very challenging to do, and there's tremendous disagreement about the degree of impact. So no, I would not agree that it's a primary contributor to the global warming that we see.*<sup>27</sup>

Although the statement appears to contradict scientific consensus on climate change, the EPA's Scientific Integrity Review Panel determined that his statement qualified as mere opinion and was not made in a "decisional context."<sup>28</sup> The panel found that the EPA's policy explicitly protects differing opinions, and "is designed to encourage [an employee] to express his or her opinion if he or she disagrees with the scientific data, scientific interpretations, or scientific conclusions that will be relied upon for said Agency decision."<sup>29</sup>

Although Pruitt's statements may be objectionable—factually, normatively, and ethically—this distinction between *messaging* and *information*, between *fact* and *opinion*, is crucial for creating an optimal, workable information policy for the executive. This very crude matrix offers some key distinctions:

	<b>Messaging</b>	<b>Information</b>
<b>Fact or opinion?</b>	Presumed subjective	Presumed objective
<b>Statutory authority?</b>	Largely Permissive	Both permissive and mandatory

[www.eenews.net/assets/2017/08/02/document\\_pm\\_04.pdf](http://www.eenews.net/assets/2017/08/02/document_pm_04.pdf) [https://perma.cc/6RB3-NT6K] [hereinafter EPA SCIENTIFIC INTEGRITY DETERMINATION].

26. U.S. ENVTL. PROT. AGENCY, SCIENTIFIC INTEGRITY POLICY (2012), [https://www.epa.gov/sites/production/files/2014-02/documents/scientific\\_integrity\\_policy\\_2012.pdf](https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf) [https://perma.cc/7CBP-YYWP] [hereinafter EPA SCIENTIFIC INTEGRITY POLICY].

27. EPA SCIENTIFIC INTEGRITY DETERMINATION, *supra* note 25, at 2.

28. *Id.* at 4.

29. *Id.* (internal quotations of the EPA's Scientific Integrity Policy omitted).

Information policy, then, should properly focus on *information* rather than *messaging*—on *facts* rather than *opinions*. Information that purports to be objective and truthful should endeavor to be both. It is not to say that false or manipulative messaging from the executive is not problematic; rather, there is less legal basis for objecting to it, it is more tolerated traditionally, and it is less problematic for democratic ideals where the “marketplace of ideas” operates, at least in theory.

Some federal information policies already reflect this distinction. For example, OMB guidelines implementing the Information Quality Act define “information” as “any communication or representation of knowledge such as facts or data, in any medium or form.”<sup>30</sup> In contrast, the OMB’s guidelines do not reach “opinions, where the agency’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or the agency’s views.”<sup>31</sup>

Of course, if we do focus so-called “information policy” on information rather than messaging, can we develop a reliable epistemology for government information? What is the nature of government information? Is it possible to achieve true neutrality? Can the government ever release purely factual information, and would the release ever convey pure information without reflecting at least subtle policy or ideological biases? The question arises, for example, in the context of Internet search engines: can search engines ever be neutral and not biased?<sup>32</sup> Although the debate is a fascinating one, and probably worth examining in future work, I do not attempt to answer it here.

Given the proper focus of information policy, then, how have the last two administrations fared? First, I describe the Obama administration’s approach to information policy. Then, I evaluate how the Trump administration has retreated from prior policies based on relatively neutral, pre-established principles, exercising its discretion in more unpredictable and cynical ways.

30. 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

31. 67 Fed. Reg. 369, 377 (Jan. 3, 2002).

32. See, e.g., Oren Bracha & Frank Pasquale, *Federal Search Commission: Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008) (pushing for regulation toward less biased search engines). But see James Grimmelman, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 435 (Berin Szoka & Adam Marcus eds., 2010) (critiquing the ideal of search neutrality). For a broader consideration of algorithmic decisionmaking, see Jane Bambauer & Tal Zarsky, *The Algorithm Game*, 94 NOTRE DAME L. REV. 1 (2018).



## II. OPEN GOVERNMENT UNDER OBAMA

President Obama came to office with a relatively well-formed information policy. On his first day in office, the Obama administration published an *Open Government Memorandum* calling for agencies to “take prompt steps to expand access to information by making it available online in open formats.”<sup>33</sup> Within forty-five days, each agency was directed to “identify and publish online in an open format at least three high-value data sets . . . on Data.gov,” and within sixty days, create a dedicated “Open Government” web page.<sup>34</sup> By the end of his administration, there were nearly 200,000 data sets published on Data.gov from 166 different agencies.<sup>35</sup>

Also on his first day in office, the Obama administration published a *FOIA Memorandum* directing agencies to “adopt a presumption in favor of disclosure,” emphasizing that, “[i]n the face of doubt, openness prevails.”<sup>36</sup> The memorandum continues:

The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.<sup>37</sup>

In 2011, in response to the memorandum, the Justice Department created FOIA.gov to publicize how individual agencies are handling FOIA requests, with a searchable database showing the number of requests made to each agency and the current backlog.<sup>38</sup> Although both the Clinton and George W. Bush administrations pushed online transparency initiatives, these two Obama memoranda were seen as a symbolic turn from the secrecy of the Bush administration.<sup>39</sup> Still, comparisons with the Bush administration were not always favorable,

33. Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

34. *Id.*

35. Cortez, *Regulation by Database*, *supra* note 12, at 4 n.3.

36. Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

37. *Id.*

38. Office of Info. Policy, U.S. Dep't of Justice, *What is FOIA?*, FOIA.GOV, <http://www.foia.gov> [<http://perma.cc/VL6C-WLNF>].

39. PETER STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 441 (11th ed. 2011).

particularly in responding to FOIA requests, which became a black eye for the Obama administration's record on transparency.<sup>40</sup>

Separately, within months of taking office, the Obama administration published a *Scientific Integrity Memorandum*, directing executive agencies to adopt scientific integrity policies.<sup>41</sup> In particular, the memorandum called for agencies to make scientific data publicly available:

Political officials should not suppress or alter scientific or technological findings and conclusions. If scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public. To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policy-making.<sup>42</sup>

The memorandum called for agency policies to focus on four subjects: (i) agency culture; (ii) public communications; (iii) peer review and the use of advisory committees; and (iv) professional development.<sup>43</sup> For example, the EPA's scientific integrity policy prohibits EPA staff from "impeding the timely release of scientific findings and conclusions" and bars EPA officials "from intimidating or coercing scientists to alter scientific data, findings, or professional opinions."<sup>44</sup> Likewise, the policy calls for the EPA's public communications arm to

40. The Obama Administration "set a record again for censoring government files or outright denying access to them" under FOIA. See Ted Bridis, *Obama administration sets new record for withholding FOIA requests*, PBS: NEWSHOUR (Mar. 18, 2015), <https://www.pbs.org/newshour/nation/obama-administration-sets-new-record-withholding-foia-requests> [https://perma.cc/K6J9-FW22] (noting that the backlog of FOIA requests had grown by 55% in fiscal year 2014, to more than 200,000 outstanding requests by year's end); Julie Moos, *Obama administration's FOIA record worse than Bush's*, POYNTER (Sept. 28, 2012), <https://www.poynter.org/reporting-editing/2012/obama-administrations-foia-record-worse-than-bushs/> [https://perma.cc/N9J4-MRRZ]. Moreover, the Obama administration was criticized for not being sufficiently transparent in matters of national security. See, e.g., Jeff Kahn, *Terrorist Watchlists*, in CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW (David Gray & Stephen E. Henderson eds., 2017); Conor Friedersdorf, *The Obama Administration's Abject Failure on Transparency*, THE ATLANTIC (Feb. 2, 2012), <https://www.theatlantic.com/politics/archive/2012/02/the-obama-administrations-bject-failure-on-transparency/252387/> [https://perma.cc/V6XC-7H8S].

41. Office of the Press Sec., *Presidential Memorandum for the Heads of Executive Departments and Agencies re: Scientific Integrity*, WHITEHOUSE.GOV (Mar. 9, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09> [https://perma.cc/9WMM-TZDB] [hereinafter *Presidential Memorandum re: Scientific Integrity*]; Kei Koizumi & Jerry Sheehan, *Scientific Integrity Policies: An Update*, WHITEHOUSE.GOV (Dec. 19, 2016), <https://obamawhitehouse.archives.gov/blog/2016/12/19/scientific-integrity-policies-update> [https://perma.cc/HB3B-P8RU].

42. *Presidential Memorandum re: Scientific Integrity*, *supra* note 41.

43. *Id.*

44. EPA SCIENTIFIC INTEGRITY POLICY, *supra* note 26, at 4–5; Office of the Sci. Advisor, U.S. Evtl. Prot. Agency, *Basic Information About Scientific Integrity*, EPA.GOV, <https://www.epa.gov/osa/basic-information-about-scientific-integrity> [https://perma.cc/KS99-6V62].

“ensur[e] that scientific research and results are presented openly and with integrity.”<sup>45</sup>

Thus, from the outset, the Obama administration adopted open government policies based on neutral principles that would result in even inconvenient data being published. Notwithstanding the Obama administration’s poor record responding to FOIA requests, written policies are pre-commitment devices against which later practices can be measured. (Indeed, the Obama administration was critiqued for not living up to its written proclamations on FOIA.) Moreover, the memoranda published very early in the Obama administration led to sites like Data.gov and FOIA.gov that, together, collect and publish vast amounts of information possessed by federal agencies. Even if the Obama administration was not perfectly transparent<sup>46</sup>—something that may be neither wise nor possible<sup>47</sup>—it made important strides toward a more open government.

### III. INFORMATION MISCHIEF UNDER TRUMP

The Obama administration entered with relatively well-formed information policies. The Trump administration did not. The Obama administration entered by sending a message to federal agencies that “[s]unlight is the best disinfectant.”<sup>48</sup> The Trump administration entered with a blackout of sorts. When the Trump administration’s information mischief first came to light, it was criticized for undermining “the public’s ability to hold the federal government accountable,” akin to using “Harry Potter’s cloak of invisibility to cover the entire administration.”<sup>49</sup> For example, in February 2017, the Trump administration

45. EPA SCIENTIFIC INTEGRITY POLICY, *supra* note 26, at 5.

46. See, e.g., Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, VICE NEWS (Mar. 9, 2016), [https://news.vice.com/en\\_us/article/7xamnz/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform](https://news.vice.com/en_us/article/7xamnz/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform) [<https://perma.cc/3Q7P-2695>]. The Freedom of the Press Foundation sued the Department of Justice under FOIA to obtain documents showing that the Obama administration had undermined FOIA reform bills that had passed both houses unanimously in 2014 (H.R. 1211, the FOIA Oversight and Implementation Act of 2014, and S. 2520, the FOIA Improvement Act of 2014). VICE News then obtained separate documents showing that the FTC and SEC “also tried to disrupt Congress’s FOIA reform efforts, which would have required those agencies to be far more transparent when responding to records requests.” *Id.* In particular, the records show how significant the Justice Department’s opposition to FOIA reforms was under President Obama.

47. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006).

48. Memorandum For the Heads of Executive Departments and Agencies re: Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

49. Juliet Eilperin, *Under Trump, inconvenient data is being sidelined*, WASH. POST (May 14, 2017), <https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being->

shuttered the site Open.gov created by the Obama administration and removed all data sets published by the administration on Open.WhiteHouse.gov.<sup>50</sup> As of late 2018, the former still no longer exists, and the latter redirects to a meek site titled “Disclosures,” displaying only a form that executive branch personnel should use to make required financial disclosures.<sup>51</sup> The site Data.gov remains online, though the number of data sets available fluctuates without much explanation.<sup>52</sup> Moreover, President Trump held only one press conference his first year in office.<sup>53</sup> Key White House web sites such as the OMB site were missing at launch.<sup>54</sup>

Obviously, incoming administrations change policies from their predecessors and take care to articulate their new policies through official channels. But no administration starts from scratch. Each inherits from its predecessor a vast, complex federal infrastructure for collecting and disseminating information.<sup>55</sup> In this spirit, scholars have called for the federal agencies to take more seriously their role as data “stewards,” which requires agencies to think carefully about how they gather, process, and publish information.<sup>56</sup> The executive apparatus in

sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e\_story.html [https://perma.cc/5PNL-GUZ4].

50. Terrence O'Brien, *Trump's quiet war on data begins*, ENGADGET (Mar. 20, 2017), https://www.engadget.com/2017/03/20/trumps-quiet-war-on-data-begins [https://perma.cc/5M6T-9PM2].

51. *2018 Financial Disclosures*, WHITEHOUSE.GOV, https://www.whitehouse.gov/disclosures/ [https://perma.cc/G9FD-48ZX].

52. At the end of the Obama administration, the site claimed roughly 195,000 data sets. But on May 3, 2017, it claimed only 155,998 data sets, with no clear explanation why. *See Data Catalog*, DATA.GOV, https://catalog.data.gov/dataset [http://perma.cc/A9ZZ-PTVT ] (listing 155,999 data sets). *See also* Eilperin, *supra* note 49. Later reports suggest the difference was how Data.gov itself tallied the number of data sets. *See* Danny Vinik, *What happened to Trump's war on data?*, POLITICO (June 25, 2017), https://www.politico.com/agenda/story/2017/07/25/what-happened-trump-war-data-000481 [https://perma.cc/9484-CYPK].

53. Jessica Estepa, *Trump held only one press conference this year. His predecessors had way more*, USA TODAY (Dec. 22, 2017), https://www.usatoday.com/story/news/politics/2017/12/22/trump-held-only-one-press-conference-year-his-predecessors-had-way-more/976675001/ [https://perma.cc/8VUZ-QZST]; Gerhard Peters, *The American Presidency Project: Presidential News Conferences*, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/statistics/data/presidential-news-conferences [https://perma.cc/E7E2-MT88].

54. Andrea Peterson, *White House Office of Management and Budget missing from Trump WhiteHouse.gov*, SUNLIGHT FOUND. (Jan. 26, 2017), https://sunlightfoundation.com/2017/01/26/want-information-about-the-office-of-management-and-budget-you-wont-find-it-on-the-new-whitehouse-gov/ [https://perma.cc/5SLZ-RPFL].

55. Helen Klien Murillo & Leah Litman, *Information Wars Part III: Climate Changing the Facts*, TAKE CARE (Apr. 18, 2017), https://takecareblog.com/blog/information-wars-part-iii-climate-changing-the-facts [https://perma.cc/S3U6-RQP9].

56. Kristin Madison, *Legal and Policy Issues in Measuring and Improving Quality*, in THE OXFORD HANDBOOK OF U.S. HEALTH LAW 680 (I. Glenn Cohen et al. eds., 2016); Cortez, *Regulation by Database*, *supra* note 12, at 70.

many ways has built-in systems for disseminating both messaging and information.

Although the Trump administration did not completely undo these systems, it used the systems in more cynical, mischievous ways. There are many ways a new administration can undermine open data policy. First, the administration can simply not collect data to begin with, which can be accomplished through executive orders or legal mandates that reverse open government directives, or via budget requests that undermine data collection and publication efforts.<sup>57</sup> For example, the journal *Science* lamented that the Trump administration's 2018 budget request represented "a grim budget day for U.S. science" due to major cuts to research funding.<sup>58</sup> Revoking funds for research that generate data effectively strangles information in its crib.<sup>59</sup> The federal gag order that prevents federal agencies like the CDC from conducting gun violence research—something that predated the Trump administration—demonstrates the effectiveness of this approach.<sup>60</sup>

But the Trump administration engaged in a variety of other types of information mischief, including removing online data, manipulating data, censoring science, scrubbing web sites of key information, and using "transparency" as pretext to achieve other ends.

### A. Removing Data

In 2017, the Trump administration began removing from agency web sites records of enforcement actions taken by various agencies, including the Occupational Safety and Health Administration (OSHA), the U.S. Department of Agriculture (USDA), and the EPA.<sup>61</sup> Some removals were justified as moving away from the "naming and shaming"

57. The Information Wars series on the Take Care blog notes that the Trump administration refused to add LGBTQ questions to the census and to HHS surveys. See Litman & Murillo, *supra* note 13.

58. Sci. News Staff, *A grim budget day for U.S. science: analysis and reaction to Trump's plan*, SCI. MAG. (Mar. 16, 2017), <http://www.sciencemag.org/news/2017/03/grim-budget-day-us-science-analysis-and-reaction-trumps-plan> [https://perma.cc/29R9-M6CU].

59. For example, the Trump administration's 2018 budget request would have slashed the EPA's budget by 30 percent. See Office of Mgmt. & Budget, *America First: A Budget Blueprint to Make America Great Again* (Mar. 16, 2017), <https://www.govinfo.gov/features/FY2018-Budget-Blueprint> [https://perma.cc/ZP23-LBXB]; Sci. News Staff, *supra* note 58.

60. See Department of Health and Human Services Appropriation Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-244 (Sept. 30, 1996); Leah Litman & Helen Klein Murillo, *Information Wars Part IV: Doing Violence To Sensible Policy on Guns*, TAKE CARE (Apr. 19, 2017), <https://takecareblog.com/blog/information-wars-part-iv-doing-violence-to-sensible-policy-on-guns> [https://perma.cc/9KT7-EZQ3].

61. Eilperin, *supra* note 49.

used by previous administrations to pressure regulated firms into compliance.<sup>62</sup> Others were given no justification.

Federal agencies publish voluminous enforcement data on their web sites.<sup>63</sup> The rationale in many cases follows Jeremy Bentham's logic that "the more strictly we are watched, the better we behave."<sup>64</sup> Publishing enforcement and compliance data can help counter "agency slack,"<sup>65</sup> or general under-enforcement by regulatory agencies.<sup>66</sup> Publication also can encourage more optimal rates of regulatory compliance.<sup>67</sup> In fact, some scholars have called for publication of more centralized and comprehensive enforcement data. David Vladeck suggests Congress should require the OMB to publish a searchable database of enforcement actions across federal agencies to allow the public to "track repeat-offender corporations."<sup>68</sup> Already, more narrow (but still ambitious) efforts in this vein include the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which publishes enforcement data obtained via FOIA requests from a variety of agencies,<sup>69</sup> and the FTC's Consumer Sentinel Network, a database of over 20 million enforcement records, though the latter is non-public.<sup>70</sup>

Rather than follow these trends, the Trump administration has retreated. First, under the Trump administration, OSHA has stopped publicizing its enforcement actions against companies. Under previous administrations, OSHA issued a news release whenever sanctions for workplace health or safety violations reached \$40,000 or more.<sup>71</sup> Although OSHA under the Trump administration had issued more than 200 such citations as of May 2017, it had issued only two such news

62. *Id.* For an account of these practices, see Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1382–1416 (1973); Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, *supra* note 10, at 1371; CORTEZ, *supra* note 11, at 8–9.

63. Cortez, *Regulation by Database*, *supra* note 12, at 24.

64. JEREMY BENTHAM, *FARMING DEFENDED* (1796), *reprinted in* 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001).

65. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 110 (2005).

66. See, e.g., Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 473–74 (2011).

67. Cortez, *Regulation by Database*, *supra* note 12, at 25.

68. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1830–31 (2008).

69. Transactional Records Access Clearinghouse, *About Us*, SYRACUSE U., <http://trac.syr.edu/aboutTRACgeneral.html> [<https://perma.cc/82ZJ-VF2S>].

70. Fed. Trade Comm'n, *Consumer Sentinel Network*, FTC.GOV, <https://www.ftc.gov/consumer-sentinel-network> [<https://perma.cc/8EAN-49PQ>].

71. Eilperin, *supra* note 49.

releases.<sup>72</sup> The underlying enforcement records are still available on the Labor Department's web site, but they fail "to constantly alert and catch employers' attention."<sup>73</sup>

Second, a few weeks into the Trump administration, the USDA abruptly "removed public access to tens of thousands of reports" documenting inspections and potential violations of the Animal Welfare Act,<sup>74</sup> including inspection reports, facility reports, regulatory correspondence, lists of regulated entities, and enforcement records.<sup>75</sup> The USDA explained that it revoked public access "based on our commitment to . . . maintaining the privacy rights of individuals."<sup>76</sup> Congress itself flagged the USDA's removal of data in a March 2018 report, noting that "heavily redacted inspection reports . . . make it difficult in certain cases for the public to understand the subject of the inspection, assess USDA's subsequent actions, and to evaluate the effectiveness of its enforcement."<sup>77</sup> The congressional report directed the USDA to restore the data, noting that its removal had violated previous directions from Congress.<sup>78</sup>

Ten days after the records were removed, the USDA was sued by PETA (People for the Ethical Treatment of Animals) and other animal rights' groups, arguing that removing the documents violated FOIA, particularly its electronic reading room provisions.<sup>79</sup> While the case was pending, the USDA reposted the majority of documents previously posted online, except for certain regulatory correspondence and enforcement letters that were nevertheless available on other govern-

72. *Id.*

73. *Id.* (quoting Howard Mavity, a lawyer who represents management in OSHA matters but critiqued OSHA's new policy of not publicizing enforcement actions).

74. Meredith Wadman, *USDA blacks out animal welfare information*, SCI. MAG. (Feb. 3, 2017), <https://www.sciencemag.org/news/2017/02/usda-blacks-out-animal-welfare-information> [<https://perma.cc/SR7K-7X62>].

75. *Web Integrity Project*, SUNLIGHT FOUND., <https://sunlightfoundation.com/tracking-u-s-government-data-removed-from-the-internet-during-the-trump-administration/> [<http://perma.cc/HEU9-Q2PH>]; Meredith Wadman, *Courts Ponder How Public Animal Reports Must Be*, 356 SCIENCE 790, 790 (2017).

76. *Web Integrity Project*, *supra* note 75. See also Animal & Plant Health Inspection Serv., U.S. Dep't of Agric., *Animal Welfare Enforcement Actions* (Feb. 7, 2017), [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_ac\\_enforcement\\_actions](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_ac_enforcement_actions) [<https://perma.cc/23AQ-A7FV>].

77. *Web Integrity Project*, *supra* note 75; H. COMM. ON APPROPRIATIONS, 115TH CONG., DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2018: CONGRESSIONAL DIRECTIVES 4 (2018), <https://docs.house.gov/billsthisweek/20180319/DIV%20A%20AG%20SOM%20FY18%20OMNI.OCR.pdf> [<http://perma.cc/T9FB-EHPN>].

78. H. COMM. ON APPROPRIATIONS, 115TH CONG., *supra* note 77.

79. *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 285 F. Supp. 3d 307 (D.D.C. 2018).

ment web sites, and records involving ongoing adjudications that had not yet been finalized.<sup>80</sup> The D.C. District Court thus dismissed the complaint as moot, rejecting PETA's claim that the USDA's action was capable of repetition yet evading review because the USDA claimed it was removing records temporarily to redact personal information.<sup>81</sup> The court found that "[g]iven the temporary, one-time nature of the Department's removal of records, it is reasonably certain that the Department will not remove these records again."<sup>82</sup> The USDA may have been sensitive about the privacy implications of posting enforcement records online due to prior litigation.<sup>83</sup> Nevertheless, information on research facilities has been re-posted by the USDA.<sup>84</sup>

Third, observers also reported that the Trump administration removed from the EPA and Interior Department web sites various scientific information about climate change.<sup>85</sup> Likewise, within a week of taking office, the Trump administration removed a site called the Federal Supplier Greenhouse Gas Management Scorecard that ranked major federal suppliers' carbon output and whether they had goals to cut it.<sup>86</sup> The site was seen as creating "a powerful incentive for private companies to improve their environmental practices."<sup>87</sup> That lever has been removed.

Finally, observers have been troubled that the Trump administration has shielded from public scrutiny various records that might shine a light on potential conflicts of interest in the White House. For example, the administration stopped publishing the ethics waivers it had granted for appointees who had engaged in lobbying activities over the previous two years that would normally bar them from working on the

80. *Id.* at 311–12.

81. *Id.* at 313.

82. *Id.*

83. *See Show, Inc. v. U.S. Dep't of Agric.*, No. 4:12-CV-429-Y, 2013 WL 11309349 (N.D. Tex. July 29, 2013); Plaintiffs' Third Amended Complaint (on file with author) (alleging violations of FOIA and the Privacy Act, 5 U.S.C. § 552a). *See also* *Am. Farm Bur. Fed'n v. U.S. Env'tl. Prot. Agency*, 836 F.3d 963 (8th Cir. 2016) (holding the EPA may be liable for Privacy Act violations for releasing too much data about farming operations, which might be used by activists to harass the farmers).

84. Andrew Bergman & Toly Rinberg, *In its first year, the Trump administration has reduced public information online*, SUNLIGHT FOUND. (Jan. 4 2018), <https://sunlightfoundation.com/2018/01/04/in-its-first-year-the-trump-administration-has-reduced-public-information-online/> [http://perma.cc/WAT4-VD6L].

85. Eilperin, *supra* note 49.

86. *Id.*

87. *Id.* (quoting Jason Pearson, executive director, Sustainable Purchasing Leadership Council).



same issue for the government.<sup>88</sup> The Trump administration also stopped publishing the White House's visitor log, which prevents the public from seeing who visits and when.<sup>89</sup>

Thankfully, despite concerns that the Trump administration would remove vast amounts of data from federal web sites,<sup>90</sup> that has not come to pass, as tracked by the Sunlight Foundation's *Web Integrity Project*.<sup>91</sup> Removing data from web sites can be time-consuming and costly. Perhaps the Trump administration has not truly discovered this tool yet,<sup>92</sup> or perhaps it is deterred by widespread archiving of information posted online by the Obama administration.<sup>93</sup> Either way, the potential for more widespread and intentional data mischief remains.

### B. Manipulating Data

Short of removing data, the executive can try to manipulate them. For example, the Trump transition team tried to manipulate economic data by ordering the Council of Economic Advisors (CEA) to adjust their models to predict sustained economic growth of three to three and a half percent—roughly twice the rate predicted by the Federal Reserve and the Congressional Budget Office (CBO).<sup>94</sup> Ironically, after inauguration, the Trump administration then accused the Obama administration of trying to artificially depress previous unemployment rates, which experts said “would require a conspiracy theory of massive proportions, involving hundreds if not thousands of people.”<sup>95</sup>

88. *Id.*; Alex Howard, *Secrecy on White House visitor logs shows Trump administration allergic to transparency*, SUNLIGHT FOUND. (Apr. 14, 2017), <https://sunlightfoundation.com/2017/04/14/secrecy-on-white-house-visitor-logs-shows-trump-administration-allergic-to-transparency/> [<https://perma.cc/T3PJ-GY2B>].

89. Eilperin, *supra* note 49.

90. Clare Malone, *How Trump's White House Could Mess With Government Data*, FIVETHIRTYEIGHT (Dec. 15, 2016), <https://fivethirtyeight.com/features/how-trumps-white-house-could-mess-with-government-data/> [<https://perma.cc/EBR4-TEEF>]; Josh Gerstein, *Fears rise of Trump-era 'memory hole' in federal data*, POLITICO (Dec. 13, 2016), <https://www.politico.com/story/2016/12/trump-federal-data-fears-232591> [<https://perma.cc/W3U8-SNJ3>].

91. *Web Integrity Project*, *supra* note 75.

92. Vinik, *supra* note 52.

93. *See infra* Part IV.

94. Catherine Rampell, *The Trump White House is already cooking the books*, WASH. POST (Feb. 20, 2017), [https://www.washingtonpost.com/opinions/the-trump-team-is-already-cooking-the-books/2017/02/20/a793961e-f7b2-11e6-be05-1a3817ac21a5\\_story.html](https://www.washingtonpost.com/opinions/the-trump-team-is-already-cooking-the-books/2017/02/20/a793961e-f7b2-11e6-be05-1a3817ac21a5_story.html) [<http://perma.cc/56RK-5S4F>].

95. Ben Casselman, *The White House Takes Its Attacks on Jobs Data To a New (And Dangerous) Level*, FIVETHIRTYEIGHT (Mar. 13, 2017), <https://fivethirtyeight.com/features/the-white-house-takes-its-attacks-on-jobs-data-to-a-new-and-dangerous-level/> [<https://perma.cc/R94S-T8NF>].

Continuing the pattern, during the debate to repeal the Affordable Care Act (ACA), the Trump administration attacked the credibility and accuracy of the non-partisan CBO in an unprecedented effort to pass the bill before the CBO was able to “score” it (forecast its budgetary impact).<sup>96</sup>

The executive also has significant power to manipulate data by deciding how to collect it, and indeed whether to collect it in the first place. For example, in March 2017, the Trump administration reversed a Census Bureau proposal that may have led to additional questions on the U.S. census regarding gender identity and sexual orientation for the first time ever—a longtime goal for LGBTQ advocates.<sup>97</sup> The decennial census, required by the Constitution,<sup>98</sup> is used not only to apportion the House of Representatives, but to set statistical baselines that inform countless policy decisions.<sup>99</sup> For example, census data are essential for enforcing equality-enhancing laws. The Census Bureau itself explains that “laws promoting equal employment opportunity for women require census data on sex.”<sup>100</sup>

In that spirit, LGBTQ groups hoped that better census data about their communities could help reduce discrimination and improve access to and the operation of government programs.<sup>101</sup> Instead, the Census Bureau’s brief hint that it was considering adding gender identity and sexual orientation questions to the census questionnaire quickly disappeared.<sup>102</sup> Around the same time, the Trump administration removed questions about gender identity and sexual orientation from two surveys sponsored by the U.S. Department of Health and Human Services (HHS).<sup>103</sup> Leah Litman and Helen Klein Murillo called the

96. Ben Casselman et al., *TrumpBeat: How to Judge Trump*, FIVETHIRTYEIGHT (Mar. 10, 2017), <https://fivethirtyeight.com/features/trumpbeat-how-to-judge-trump/> [https://perma.cc/XG3V-8B7F].

97. Chris Johnson, *Trump’s U.S. Census proposes, immediately cuts LGBT survey questions*, WASH. BLADE (Mar. 28, 2017), <https://www.washingtonblade.com/2017/03/28/u-s-census-proposes-immediately-cuts-lgbt-questions/> [https://perma.cc/7LMY-DD66]; Litman & Murillo, *supra* note 13; U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, SUBJECTS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY (2017), <https://www2.census.gov/library/publications/decennial/2020/operations/planned-subjects-2020-acs.pdf> [http://perma.cc/Z47S-WGK9].

98. U.S. CONST. art. I, § 2, cl. 1.

99. Litman & Murillo, *supra* note 13.

100. U.S. Census Bureau, *2010 Census: Explore the Form*, CENSUS.GOV, <https://www.census.gov/2010census/about/interactive-form.php> [https://perma.cc/7KX8-UEPE]; Litman & Murillo, *supra* note 13.

101. Johnson, *supra* note 97.

102. Ben Casselman, *Why Won’t the Census Ask About Sexual Orientation?*, FIVETHIRTYEIGHT (Mar. 30, 2017), <https://fivethirtyeight.com/features/why-wont-the-census-ask-about-sexual-orientation/> [https://perma.cc/YN4G-YWU9].

103. *Id.* (The surveys are the National Survey of Older Americans Act Participants and the Annual Program Performance Report for the Centers for Independent Living.).

moves “nothing less than a war on information” and an effort “to deny the existence of problems by disappearing the facts,”<sup>104</sup> noting that openness and visibility are core to many LGBTQ rights.<sup>105</sup>

More fundamentally, observers are suspicious that the Trump administration is trying to undermine the 2020 census by requesting \$135 million less for the Census Bureau than the agency requested the previous year.<sup>106</sup> Again, such actions raise suspicions that the administration is undermining essential data collection in order to manipulate the statistical picture.

### C. Censoring Climate Science

A separate category of data manipulation occurs when the executive tries to censor science. And the Trump administration has been particularly antagonistic towards scientific evidence of climate change. President Trump is a longstanding climate change denier.<sup>107</sup> Shortly after inauguration, his administration scrubbed references to “climate change” on various federal web sites and made it harder to access climate data from agencies like the EPA and the Department of the Interior. For example, days after taking office, the Trump administration scrubbed from the EPA’s web site many uses of the terms “fossil fuels,” “greenhouse gases,” “global warming,” and even, remarkably, the word “science.”<sup>108</sup> A comparison showed that the old EPA.gov web site included the term “climate change” on more than 12,000 pages; after edits by the Trump administration, it appears on just over 5,000 pages.<sup>109</sup> Likewise, in April 2017, after the EPA had published an “update” to its web site, observers noticed that the agency had removed a vast section on “Climate Change” that had existed in some form since 1997,

104. Litman & Murillo, *supra* note 13.

105. *Id.*

106. *Trump Administration Budget Update*, CENSUS PROJECT, <https://thecensusproject.org/updates/trump-administration-budget-update/> [<https://perma.cc/T6ZU-VHQA>].

107. Michael Finnegan, *Hoax. Con Job. Chinese Plot. Trump tweets have bashed climate science for years*, L.A. TIMES (Mar. 28, 2017), <http://www.latimes.com/politics/la-na-pol-trump-climate-tweets-20170328-story.html> [<http://perma.cc/DC75-GKJZ>] (showing tweets where Trump called climate change a “hoax” and twice called it “bullshit”).

108. Laignee Barron, *Here’s What the EPA’s Website Looks Like After a Year of Climate Change Censorship*, TIME (Mar. 1, 2018), <http://time.com/5075265/epa-website-climate-change-censorship/> [<https://perma.cc/DL5R-HDHV>].

109. *Id.*

including important scientific background on human contributions to climate change.<sup>110</sup>

These moves were a significant departure from the usual types of changes made by incoming administrations.<sup>111</sup> Instead of editing web sites for appearance and presentation, or to reflect shifting policy priorities, the edits were seen as “an unprecedented attempt to delete or bury credible scientific information” that might be “politically inconvenient.”<sup>112</sup> An anonymous source explained that EPA Administrator Scott Pruitt approved the web site changes to bring it in line with Trump administration policies and avoid open contradictions.<sup>113</sup> But as one observer quipped, “It’s hard to understand why facts require revision.”<sup>114</sup> This is not particularly new, of course. When George W. Bush took office, his administration froze updates to the EPA web site pending White House review.<sup>115</sup> And there were allegations that his administration both distorted and suppressed certain climate change research.<sup>116</sup> However, those changes did not target “scientific content.”<sup>117</sup>

The Trump administration also has taken more formal actions to undermine climate science. In 2013, President Obama published an executive order directing several agencies—the Department of Defense, EPA, HHS, and the Department of Homeland Security—to “work together to develop and provide authoritative, easily accessible, usable, and timely data . . . on climate preparedness and resilience.”<sup>118</sup> However, in March 2017, the Trump administration issued its own order revoking the Obama executive order and other prior presidential actions

110. *Id.* Many links in the “Climate Change” subdomain are still accessible but are no longer organized or easy to locate. Chris Mooney & Juliet Eilperin, *EPA website removes climate science site from public view after two decades*, WASH. POST (Apr. 29, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/04/28/epa-website-removes-climate-science-site-from-public-view-after-two-decades/?utm\\_term=.d8b8a4c886f1](https://www.washingtonpost.com/news/energy-environment/wp/2017/04/28/epa-website-removes-climate-science-site-from-public-view-after-two-decades/?utm_term=.d8b8a4c886f1) [<https://perma.cc/Q2XH-VCUF>].

111. Barron, *supra* note 108 (quoting Heather Zichal, senior fellow, Atlantic Council’s Global Energy Center).

112. *Id.*

113. Mooney & Eilperin, *supra* note 110.

114. *Id.* (quoting Katherine Hayhoe, a climate scientist at Texas Tech University).

115. *Id.*

116. *Allegations of Political Interference with Government Climate Change Science: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 110th Cong. 198 (2007); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55 (2007); CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005).

117. Mooney & Eilperin, *supra* note 110.

118. Exec. Order No. 13,653 (Nov. 1, 2013).

calling for climate data collection and sharing.<sup>119</sup> It also formally rescinded two prior climate change reports issued by President Obama.<sup>120</sup>

Still, in a surprising act of transparency from the Trump EPA, the agency posted an exact replica of the EPA.gov web site as it existed on January 19, 2017, President Obama's last day in office.<sup>121</sup> Some, in fact, speculated that the link was an act of rebellion by EPA career staff or may have been a response to a flood of FOIA requests for the materials.<sup>122</sup>

Nevertheless, the Trump administration's censorship of climate science reached even public appearances by staff. In 2017, the EPA barred two agency scientists and a contractor from presenting at a conference addressing climate change.<sup>123</sup> When the move sparked outrage—and a letter from Sen. Sheldon Whitehouse (D-R.I.)—EPA Administrator Scott Pruitt promised that new procedures would prevent a recurrence.<sup>124</sup> Likewise, despite concerns to the contrary, the Trump administration did publish the legally-mandated *National Climate Assessment*, which states clearly that climate change is driven almost entirely by human influence, a sharp contradiction from the Trump administration's positions.<sup>125</sup>

Still, efforts to censor climate science are troubling, not only due to increasingly dire reports on both the pace and severity of climate change,<sup>126</sup> but because censoring underlying data precludes informed

119. Exec. Order No. 13,783 (Mar. 28, 2017).

120. *Id.* (rescinding the Report of the Executive Office of the President of June 2013 (*The President's Climate Action Plan*) and the Report of the Executive Office of the President of March 2014 (*Climate Action Plan Strategy to Reduce Methane Emissions*)).

121. Vinik, *supra* note 52.

122. *Id.*

123. Lisa Friedman, *EPA Cancels Talk on Climate Change by Agency Scientists*, N.Y. TIMES (Oct. 22, 2017), <http://www.nytimes.com/2017/10/22/climate/epa-scientists.html> [<https://perma.cc/GR28-WUAZ>].

124. Lisa Friedman, *Scott Pruitt, EPA Chief, Says Agency Scientists Are Free to Discuss Their Work*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/climate/scott-pruitt-epa.html> [<https://perma.cc/24HS-PUKU>].

125. Brady Dennis et al., *Trump administration releases report finding 'no convincing alternative explanation' for climate change*, WASH. POST (Nov. 3, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/11/03/trump-administration-releases-report-finds-no-convincing-alternative-explanation-for-climate-change/?utm\\_term=.7faf02f38048](https://www.washingtonpost.com/news/energy-environment/wp/2017/11/03/trump-administration-releases-report-finds-no-convincing-alternative-explanation-for-climate-change/?utm_term=.7faf02f38048) [<https://perma.cc/7CZV-8RJG>]. For the full report, see U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I (2017), [https://science2017.globalchange.gov/downloads/CSSR2017\\_FullReport.pdf](https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf) [<https://perma.cc/J8L3-DBKL>].

126. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 5 (2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15\\_SPM\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf) [<https://perma.cc/X6YG-K927>].

policymaking. As Murillo and Litman argue, “Burying information doesn’t get us to reasoned policy; instead, it subverts public debate.”<sup>127</sup>

#### *D. Scrubbing Terminology*

In addition to scrubbing “climate change” from various federal web sites, the Trump administration has rendered other terms taboo. In late 2017, federal agencies were advised to avoid using certain words in their budget requests.<sup>128</sup> For example, HHS officials distributed a one-page “style guide” instructing budget officials at various sub-agencies (the CDC, NIH, and FDA) to avoid using the words “vulnerable,” “diversity,” and “entitlement.”<sup>129</sup> Similarly, officials at a budget meeting advised federal employees to avoid the phrases “evidence-based” and “science-based,” drawing fierce criticism from Senate Democrats and public health organizations.<sup>130</sup>

Likewise, the Trump administration scrubbed several instances of the word “gender” from the HHS Office of Civil Rights web site titled “Discrimination on the Basis of Sex,”<sup>131</sup> perhaps foreshadowing an effort to define “gender” more narrowly in order to remove federal protections for transgender populations.<sup>132</sup>

Again, every new administration brings with it a shift in policy priorities. And every new administration engages not only in selective messaging, but emphasizes some information rather than others. But erasing certain terminology from official documents is a particularly cynical use of the federal executive’s information platform.

#### *E. Weaponizing Transparency*

A final class of information mischief includes the Trump administration using transparency as a weapon or pretext to achieve other

127. Murillo & Litman, *supra* note 55.

128. Juliet Eilperin & Lena H. Sun, *As Trump administration targets certain words, ‘a hostile bureaucracy’ pushes back*, CHI. TRIB. (Dec. 21, 2017), <https://www.chicagotribune.com/news/nationworld/politics/ct-trump-administration-forbidden-words-20171221-story.html> [<https://perma.cc/QCE7-PY5X>].

129. *Id.*

130. *Id.*

131. RACHEL BERGMAN, REMOVAL OF MENTIONS OF THE TERM “GENDER” FROM HHS’S OFFICE FOR CIVIL RIGHTS “DISCRIMINATION ON THE BASIS OF SEX” WEBPAGE (2018), <http://sunlightfoundation.com/wp-content/uploads/2018/10/MR-2-HHS-OCR-Removal-of-Gender-Mentions-181022.pdf> [<https://perma.cc/DN8N-S72S>].

132. Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/2YTU-CXDZ>].

ends. The most significant action here is the EPA's so-called "secret science" rule. In April 2018, the EPA proposed a rule that would prohibit the agency from issuing rules based on studies that use non-public data.<sup>133</sup> Under the guise of promoting transparency and countering so-called "secret science," the rule would require EPA to "clearly identify all studies (or other regulatory science) relied upon when it takes any final agency action."<sup>134</sup> For example, the EPA would have to "ensure that dose response data and models underlying pivotal regulatory science are publicly available in a manner sufficient for independent validation."<sup>135</sup>

The proposal assumes that scientific validity depends on data transparency, a notion that might sound obviously correct to lay audiences.<sup>136</sup> But the lodestar of scientific validity is study design, reproducibility, and peer-review, not necessarily data transparency. Of course, data transparency is a laudable goal. Agencies have long been encouraged to disclose research study data "to the extent practicable and permitted by law."<sup>137</sup> But for the "secret science" rule, transparency is mere pretext. Other federal laws dictate that privacy, trade secrets, and other types of confidential information should remain so.<sup>138</sup> And, contrary to assertions by some EPA officials, promises to "de-identify" personal information in order to make data sets public are often empty gestures, as subjects are relatively easy to "re-identify."<sup>139</sup>

Importantly, the proposed "secret science" rule runs afoul of decisions by the D.C. Circuit, which has rejected previous challenges to EPA rules arguing that the agency did not disclose the underlying data that formed the basis for the rule.<sup>140</sup> The D.C. Circuit noted in those cases that data disclosure can be "impracticable and unnecessary" and would result in the agency disregarding "much plainly relevant scientific information."<sup>141</sup>

133. Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (Apr. 30, 2018).

134. *Id.* at 18,773.

135. *Id.* (emphasis from original removed).

136. Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENVTL. L. REV. (forthcoming 2019) (manuscript at 6), <http://ssrn.com/abstract=3248058> [<https://perma.cc/C9BH-694A>].

137. Adoption of Recommendations, 78 Fed. Reg. 41,352, 41,358 (July 10, 2013).

138. *Id.* at 41,358 n.12.

139. Joel Schwartz, "Transparency" as Mask? *The EPA's Proposed Rule on Scientific Data*, 379 NEW ENG. J. MED. 1496, 1496-97 (2018).

140. See *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 372 (D.C. Cir. 2002); *Coalition of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613, 623 (D.C. Cir. 2010).

141. *Am. Trucking Ass'ns*, 283 F.3d at 372.

The pretext behind the EPA's "secret science" proposal is apparent when viewed together with an effort to exclude from the EPA's scientific advisory panels, "academic scientists who receive research grants from the agency," only to be replaced by "industry-funded scientists."<sup>142</sup> Taken in tandem, some find it "difficult not to conclude that the real purpose of the proposal is to eliminate a vast body of highly relevant data from consideration, resulting in a weakening of standards that are no longer supported by 'sufficient scientific evidence,'" an approach used by tobacco companies to fight off regulation in the 1990s.<sup>143</sup>

Weaponized transparency has also found traction in Congress, where the House passed the Honest and Open EPA Science Treatment (HONEST) Act of 2017.<sup>144</sup> Like the EPA's proposed rule, the HONEST Act would prohibit the agency from using studies to make decisions "unless raw data, computer codes, and virtually everything used by scientists to conduct the study are provided to the agency and made publicly available online."<sup>145</sup> The scientific community was quick to see the bill for what it was: "an attempt by politicians to override scientific judgment and dictate narrow standards by which science is deemed valuable for policy."<sup>146</sup> The HONEST Act is not the effort's first iteration. In 2015, Rep. Lamar Smith (R-TX), himself a climate change denier,<sup>147</sup> sponsored the Secret Science Reform Act, which would have operated substantially the same way.<sup>148</sup> Although neither bill passed the Senate, the idea found a vehicle in the Trump administration's EPA, where the proposed rule is currently pending after receiving public comments.<sup>149</sup>

142. Schwartz, *supra* note 139, at 1496.

143. *Id.* at 1497.

144. H.R. 1430, 115th Cong. (2017).

145. David Michaels & Thomas Burke, *The Dishonest HONEST Act*, 356 SCIENCE 989, 989 (2017).

146. *Id.*

147. See, e.g., Lisa Rein, *Meet the House science chairman who's trying to put global warming research on ice*, WASH. POST (Dec. 22, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/12/22/meet-the-house-science-committee-chairman-whos-trying-to-put-global-warming-research-on-ice/> [https://perma.cc/PR9F-Q7DP]; Jeffrey Mervis, *Lamar Smith, unbound, lays out political strategy at climate doubters' conference*, SCI. MAG. (Mar. 24, 2017), <http://www.sciencemag.org/news/2017/03/lamar-smith-unbound-lays-out-political-strategy-climate-doubters-conference> [https://perma.cc/TVF7-ZVMA].

148. H.R. 1030, 114th Cong. (2015).

149. Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30).



Transparency has also been used as a cudgel against political opponents. In January 2018, the Trump administration agreed to selectively declassify a controversial memorandum prepared by Republicans on the House Intelligence Committee that was critical of the Federal Bureau of Investigation (FBI) and its investigation of Russian interference in the 2016 presidential election.<sup>150</sup> The move was seen as an attempt to cast doubt on the legitimacy of the investigation.<sup>151</sup> The House committee released the memo by invoking House rules, never before used, that allow the committee to publish classified information if it serves the public interest, and after notice and an opportunity for objection by the President.<sup>152</sup> But the refusal to also disclose a counterpoint memo prepared by Democrats on the committee raised allegations of “selective declassification” and “weaponized disclosure.”<sup>153</sup>

The Trump administration has also used selective disclosure to target immigrants. Through two executive orders, the Trump administration directed agencies to collect and publish data highlighting crimes committed by immigrants. The first order in January 2017, in a section titled “Transparency,” directed the Attorney General and Department of Homeland Security to gather data on the “immigrant status of all [incarcerated] aliens.”<sup>154</sup> The second order in March 2017, under a section titled “Transparency and Data Collection,” directed the Attorney General and Department of Homeland Security to publish data on the number of foreign nationals in the United States that have been radicalized or were charged with terrorism-related crimes.<sup>155</sup> A group of open government advocacy organizations objected that publication of such information would violate federal privacy laws and in-

150. Devlin Barrett et al., *Release of disputed GOP memo on FBI surveillance unleashes waves of recrimination*, WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/world/national-security/president-approves-release-of-gop-memo-criticizing-fbi-surveillance/2018/02/02/699eb988-06cf-11e8-b48c-b07fea957bd5\\_story.html](https://www.washingtonpost.com/world/national-security/president-approves-release-of-gop-memo-criticizing-fbi-surveillance/2018/02/02/699eb988-06cf-11e8-b48c-b07fea957bd5_story.html) [http://perma.cc/8GDE-XWUT].

151. *Tracking the Trump Administration's Record on Transparency*, SUNLIGHT FOUND., <https://sunlightfoundation.com/tracking-trumps-attacks-on-transparency/> [http://perma.cc/MEM6-D4BY].

152. H.R. RULE X § 11(g)(1), 114th Cong. (2015).

153. *What Trump's release of the memo tells us about transparency in D.C.*, SUNLIGHT FOUND. (Feb. 2, 2018), <https://sunlightfoundation.com/2018/02/02/what-trumps-release-of-the-memo-tells-us-about-transparency-in-dc/> [http://perma.cc/2PPD-BNBX]; Steven Aftergood, *Bad Faith at the House Intelligence Committee*, FED'N OF AM. SCIENTISTS (Jan. 30, 2018), <https://fas.org/blogs/secretcy/2018/01/hpsci-bad-faith/> [https://perma.cc/3FWM-KNTZ].

154. Exec. Order No. 13,768 (Jan. 25, 2017).

155. *Id.*

formation quality guidelines.<sup>156</sup> In fact, the letter objected that the orders would disclose sensitive information about immigrants who are not U.S. citizens or lawful permanent residents, removing Privacy Act protections for those populations, in reversal of policy followed by both the Obama and George W. Bush administrations.<sup>157</sup> The Sunlight Foundation called the selective disclosures “a tool for division and public intimidation, rather than a means for achieving transparency and accountability,” emphasizing that “[i]n the 21st century, information disclosures hold immense potential to harm individuals when government use public data irresponsibly.”<sup>158</sup>

#### IV. WHAT CONSTRAINS INFORMATION MISCHIEF?

Given the federal executive’s wide discretion, what if anything can constrain information mischief? Some constraints are legal in nature: various statutes require the executive to gather certain information, publish it, or present it a certain way. However, the scope of these laws is limited, and they still leave significant room for executive discretion. Non-legal constraints exist in the form of internal agency policies, norms, and practical constraints, such as third-party archiving and monitoring, that might help deter information mischief. Articulating an epistemology for executive information requires understanding both the legal and non-legal constraints. But the question remains—are these constraints meaningful?

##### *A. Legal Constraints*

Various statutes specify the information agencies must collect and whether (and how) they publish it. Here, I examine the extent to which they provide meaningful constraints on executive discretion.

*The Administrative Procedure Act (APA)*. Section 552 of the APA requires agencies to publish in the *Federal Register* information regarding their internal organization and functions, as well as rules of

156. Letter from Lisa Rosenberg of OpenTheGovernment to Hon. John F. Kelly, Sec’y of Homeland Security and Hon. Jeff Sessions, U.S. Att’y General (Mar. 21, 2017), [https://www.openthegovernment.org/sites/default/files/Letter%20to%20DHS%20&%20%20DOJ\\_Data%20Pr-ovisions%20in%20Executive%20Orders.pdf](https://www.openthegovernment.org/sites/default/files/Letter%20to%20DHS%20&%20%20DOJ_Data%20Pr-ovisions%20in%20Executive%20Orders.pdf) [https://perma.cc/VX3J-4YXN].

157. *Id.*

158. Alex Howard & John Wonderlich, *Weaponized disclosure must not erode public trust in government*, SUNLIGHT FOUND. (Mar. 22, 2017), <https://sunlightfoundation.com/2017/03/22/weaponized-disclosure-must-not-erode-public-trust-in-government/> [https://perma.cc/68FJ-H9KP].

procedure, substantive rules, interpretive rules, and policy statements.<sup>159</sup> It also requires agencies to post in electronic format all final opinions and orders, any policy statements not in the *Federal Register*, internal agency manuals that affect the public, and documents frequently requested under FOIA.<sup>160</sup> Section 552(b) includes various exemptions from these requirements,<sup>161</sup> although section 552(d) clarifies that nothing in that section authorizes agencies to withhold records from the public or from Congress.<sup>162</sup>

Section 552 also creates an Office of Government Information Services within the National Archives and Records Administration, and charges it with reviewing agency compliance with FOIA and mediating disputes with requesters.<sup>163</sup> Likewise, it directs the GAO to audit agency performance under FOIA and publish its findings,<sup>164</sup> and calls for each agency to designate a Chief FOIA Officer.<sup>165</sup> Thus, the APA creates a relatively well-defined system for agencies to satisfy their FOIA obligations.

Otherwise, the APA leaves the vast majority of agency information practices unspecified. Press releases, social media posts, web site publication, and database practices exist largely outside the APA. Moreover, the APA's judicial review provisions do not provide much grounds to challenge the vast majority of agency information activities. Although the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court,"<sup>166</sup> it is very unlikely that most information activities would constitute final agency action. For example, an analysis of the Trump administration's "war on regulatory science" finds that its efforts "are governed only loosely by law or may escape judicial review completely."<sup>167</sup> Likewise, my previous research found that when agencies publish information adverse to regulated parties, their actions are largely not reviewable under the APA.<sup>168</sup>

*The Federal Tort Claims Act (FTCA)*. Although the FTCA authorizes certain suits against the federal government, it specifically excludes

159. Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (2012).

160. *Id.* § 552(a)(2).

161. *Id.* § 552(b).

162. *Id.* § 552(d).

163. *Id.* § 552(h).

164. *Id.* § 552(i).

165. *Id.* § 552(k).

166. *Id.* § 704.

167. Lin, *supra* note 136 (manuscript at 46).

168. Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, *supra* note 10, at 1441.

libel, slander, and other statements that might qualify as intentional torts.<sup>169</sup> Thus, the damaging agency press release or misleading enforcement report probably would not give rise to damages under the FTCA. Similarly, the FTCA includes a broad exemption for discretionary functions, which courts have read as including the release of information and even the underlying data supporting the communication.<sup>170</sup> Thus, as James O'Reilly has observed, "the consistent view of courts, commentators, and career FTCA defenders is that any intentionally-caused federal agency disclosure, which causes a reputational injury, is not actionable under the FTCA."<sup>171</sup>

*The Information Quality Act (IQA).* The Information Quality Act of 2001, sometimes called the Data Quality Act (DQA),<sup>172</sup> required the OMB to issue guidelines for federal agencies for "ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by the government."<sup>173</sup> Although some see the Act as somewhat anti-regulatory in nature,<sup>174</sup> it can be used to enhance trust in government information. In particular, the Act includes procedural features that "allow[] affected persons to seek and obtain correction of information maintained and disseminated by the agency."<sup>175</sup>

The IQA is broad but probably underutilized. It applies to agency "dissemination of public information, regardless of the form or format."<sup>176</sup> Moreover, OMB guidelines define "information" as "any communication or representation of knowledge such as facts or data, in any medium or form."<sup>177</sup> However, as noted above, the definition excludes "opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the

169. 28 U.S.C. § 2680(h) (2012); Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, *supra* note 10, at 1448.

170. See, e.g., *Banfi Prods. Corp. v. United States*, 40 Fed. Cl. 107, 125–26 (1997); *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 282 (3d Cir. 1995); *Doe v. United States*, 83 F. Supp. 2d 833, 837–38 (S.D. Tex. 2000).

171. O'Reilly, *supra* note 19, at 522. Likewise, my research finds that procedural due process, First Amendment, and Takings Clause claims also routinely fail. See Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, *supra* note 10, at 1449–50.

172. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516 (2012).

173. 44 U.S.C. § 3516. The Information Quality Act builds on requirements from the Paperwork Reduction Act regarding information dissemination. See Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 3504, 109 Stat. 163, 168 (1995).

174. Karen E.C. Levy & David Merritt Johns, *When Open Data Is a Trojan Horse: The Weaponization of Transparency in Science and Governance*, *BIG DATA & SOC'Y*, Jan.–June 2016, at 1, 1.

175. *Id.*

176. 44 U.S.C. § 3504(d)(1) (2012).

177. 67 Fed. Reg. 8451, 8458–59 (Feb. 22, 2002).

agency's views."<sup>178</sup> Another limitation of the IQA is that it does not create judicially enforceable rights,<sup>179</sup> although some continue to argue otherwise.<sup>180</sup> Thus, most agree that parties cannot sue if an agency violates its own information quality guidelines or rejects a request to correct or retract information published by the agency.<sup>181</sup>

*Paperwork Reduction Act (PRA).* The Paperwork Reduction Act also creates a framework that establishes federal agencies as stewards of federal information and data.<sup>182</sup> For example, it requires the head of each agency to manage agency information resources,<sup>183</sup> with a stated goal of "provid[ing] for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public."<sup>184</sup> Likewise, the PRA requires each agency to "improve the integrity, quality, and utility of information to all users within and outside the agency, including capabilities for ensuring dissemination of public information, public access to government information, and protections for privacy and security."<sup>185</sup> In this vein, the PRA centralizes information collection requests (ICRs) by agencies, requiring prior OMB approval.<sup>186</sup> Notably, however, the PRA does not create a private right of action.<sup>187</sup>

*Best Available Data Statutes.* Some, but not many, statutes require agencies to base their decisions on the "best available science."<sup>188</sup> For example, the Endangered Species Act, the Marine Mammal Protection Act, and the Magnuson-Stevenson Act all contain some version of the requirement,<sup>189</sup> as do environmental statutes, such as the Toxic Substances Control Act and the Safe Water Drinking Act.<sup>190</sup> The latter two might create problems for the Trump administration's "secret science"

178. 67 Fed. Reg. 369, 377 (Feb. 22, 2002).

179. CORTEZ, *supra* note 11, at 29 n.216.

180. See, e.g., Dan Davidson, *Nixon's 'Nerd' Turns Regulations Watchdog*, FED. TIMES (Nov. 11, 2002), [http://www.thecre.com/pdf/20021111\\_fedtimes-tozzi.pdf](http://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf) [<https://perma.cc/EK8C-A66D>].

181. CORTEZ, *supra* note 11, at 29 n.216 (citing cases).

182. 44 U.S.C. §§ 3501-3521 (2012).

183. *Id.* § 3506(a)(1)(A).

184. *Id.* § 3501(7).

185. *Id.* § 3506(b)(1)(C).

186. *Id.* § 3507.

187. *Ass'n of Am. Physicians & Surgeons, Inc. v. U.S. Dep't of Health & Human Servs.*, 224 F. Supp. 2d 1115, 1129 (S.D. Tex. 2002); *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F. Supp. 3d 160, 170 (D.D.C. 2014).

188. Lin, *supra* note 136 (manuscript at 25 n.142).

189. *Id.*; 16 U.S.C. §§ 1533(b)(1)(A), 1536(a)(2), 1371(a)(3)(A), 1851(a)(2) (2012).

190. 15 U.S.C. § 2625(h) (2012); 42 U.S.C. § 300g-1(b)(3)(A) (2012).

rule<sup>191</sup> if it requires the EPA to ignore peer-reviewed and validated studies merely because they rely on non-public data.<sup>192</sup> Moreover, extensive edits to the EPA's web site shortly after Trump was inaugurated in 2017 were seen as potentially violating the "best available science" mandates.<sup>193</sup> Nevertheless, these statutes obviously are limited by their terms to specific agencies in specific contexts.

*The Whistleblower Protection Act.* Finally, the Whistleblower Protection Act might protect agency employees who disclose information that they reasonably believe demonstrates a violation of law or regulation, or amounts to a "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."<sup>194</sup> Congress amended the Act in 2012 to protect disclosures concerning "censorship related to research, analysis, or technical information," meaning "any effort to distort, misrepresent, or suppress research, analysis, or technical information."<sup>195</sup> Indeed, the 2017 gag order issued by HHS—barring employees from making public statements and requiring notice to the agency before communicating with Congress—may have violated provisions in the Whistleblower Protection Act covering agency nondisclosure policies.<sup>196</sup> Likewise, after employees at four agencies were instructed to stop external communications while the Trump administration could fill top agency positions,<sup>197</sup> Republicans in Congress sent a letter to President Trump's White House counsel emphasizing that whistleblower protections are a key feature of accountable government.<sup>198</sup> Still, it can be

191. See *supra* Section III.E.

192. Lin, *supra* note 136 (manuscript at 27).

193. Barron, *supra* note 108.

194. 5 U.S.C. § 2302(b)(8)(A) (2012).

195. Whistleblower Protection Act, Pub. L. No. 112-199, § 110(a)(3), (b)(1), 126 Stat. 1472 (2012).

196. Lin, *supra* note 136 (manuscript at 45); 5 U.S.C. § 2302(b)(13); Pamela Wolf, *Republican lawmakers warn HHS secretary that memo may violate whistleblower protections*, EMP. L. DAILY (May 10, 2017), <http://www.employmentlawdaily.com/index.php/2017/05/10/republican-lawmakers-warn-hhs-secretary-that-memo-may-violate-whistleblower-protections/> [<https://perma.cc/RS39-R2N2>].

197. Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html> [<https://perma.cc/7JZZ-CHDR>].

198. Letter from Hon. Jason Chaffetz, Hon. Mark Meadows, and Hon. Charles E. Grassley to Donald F. McGahn, Counsel to the President (Feb. 1, 2017), <https://oversight.house.gov/wp-content/uploads/2017/02/2017-02-01-JEC-MM-CEG-to-McGahn-WH-Whistleblowers.pdf> [<http://perma.cc/B7M3-RGYZ>].

daunting for agency employees to pursue claims under the Act, and claims do not often succeed.<sup>199</sup>

Thus, a variety of statutes constrain executive discretion over information, though all are quite limited in scope and application.<sup>200</sup> Even together, they fail to reach much of the information mischief of the Trump administration.

*Judicial review as a deterrent.* Finally, as a non-statutory legal constraint, perhaps agencies can be deterred from information mischief if they worry it will subvert proposed rules, orders, or other agency actions? For example, cases like *State Farm* direct courts to provide “hard look” review of agency rules, which allows courts to consider the entire record of evidence to determine if the rule is arbitrary and capricious.<sup>201</sup> If the agency’s record can be undermined by evidence of information mischief, it might invite courts to invalidate the agency’s efforts—or at least trigger more searching review.<sup>202</sup> Indeed, there may be hints that the Trump administration’s removal of public data has weakened the administration’s credibility in court. For example, before the Trump administration, courts rarely demanded that agencies consider the effects that new pipelines and other energy transport projects would have on greenhouse gas emissions. But since the Trump administration’s withdrawal of government studies on the social cost of carbon, courts have begun demanding that the administration consider greenhouse gases when it approves these projects.<sup>203</sup> A record of

199. *Whistleblower Protection Since Passage of the Whistleblower Protection Enhancement Act: Hearing Before the H. Oversight & Gov’t Reform Com., Subcomm. on Fed. Workforce, U.S. Postal Serv. & the Census*, 114th Cong. 8–13 (2017) (statement of Thomas Devine, Government Accountability Project).

200. Likewise, constitutional protections like the First Amendment are not helpful. The First Amendment “restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Thus, the First Amendment does not prevent agencies from publishing false or misleading information. Lin, *supra* note 136 (manuscript at 40). Moreover, agency employees speaking in their official capacities do not speak as citizens and thus the First Amendment does not protect them from employee discipline for their speech. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Of course, the line between citizen and agency employee is not always clear. *Id.* at 420–21, 424–25.

201. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

202. See, e.g., Amelia Thomson-DeVeaux, *Should Judges Pay Attention to Trump’s Tweets?*, FIFETHIRTYEIGHT (Feb. 4, 2019), <https://fivethirtyeight.com/features/should-judges-pay-attention-to-trumps-tweets/> [<https://perma.cc/E4CN-7TSG>].

203. See James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH L. REV. 119, 128–29, 152 (2018) (explaining that, until recently, courts have not required such studies but recently courts and one FERC commissioner have decided they are now necessary); Amanda Reilly, *Trump killed Obama carbon reviews, but courts still want them*, E&E NEWS (Sept. 1, 2017), <https://www.eenews.net/stories/1060059539> [<https://perma.cc/9F62-YPS9>] (explaining how courts have become more aggressive in response to President Trump’s efforts to rescind government studies).

information mischief might reverse, or at least weaken, the usual presumptions of good faith or normality that agencies often enjoy.

### *B. Non-Legal Constraints*

If statutes leave many important executive information activities untouched, do non-legal mechanisms impose meaningful constraints? Here I examine the extent to which internal agency policies, norms, and practical constraints, such as third-party archiving and monitoring, might help deter information mischief.

First, agencies have adopted a variety of internal structures, policies, and procedures that govern their information practices and thus might constrain their discretion to various degrees.<sup>204</sup> As noted above, agencies have adopted policies governing scientific integrity, FOIA disclosures, data quality, and many more. Such policies can serve as pre-commitment devices, particularly when made public. Much of the action here occurs, of course, within agencies and thus constitutes what Gillian Metzger and Kevin Stack call “internal administrative law.”<sup>205</sup> These internal machineries generally are not subject to judicial review because they do not constitute “final” agency action, do not give rise to justiciable claims, or involve internal personnel and management prerogatives.<sup>206</sup> When viewed in this frame, the Obama administration’s open government directives signal precisely the kind of “rule-of-law values, including transparency, argumentation, and consistency,” that Metzger and Stack call for in the absence of external judicial review.<sup>207</sup> For example, agency scientific integrity policies qualify as internal guidance and do not, therefore, create enforceable legal obligations.<sup>208</sup> Nevertheless, agencies such as the EPA now have a “Scientific Integrity Official” and use mechanisms such as a “Scientific Integrity Review Panel” to investigate violations of these policies.<sup>209</sup> Even though the policies are not subject to judicial review, they can enhance agency decisionmaking and deter information mischief.

Second, a close relative to internal agency policies and procedures is agency norms. Though not traditionally binding or enforceable,

204. For an analysis of various forms of policies and how agencies comply with them, see CORTEZ, *supra* note 11, at 30–72 (evaluating the CFPB, FTC, and FDA).

205. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1251, 1264 (2017).

206. *Id.*

207. *Id.* at 1297.

208. EPA SCIENTIFIC INTEGRITY POLICY, *supra* note 26, at 2.

209. *Id.* at 10; EPA SCIENTIFIC INTEGRITY DETERMINATION, *supra* note 25.



norms can reinforce institutional legitimacy. Norms represent informal, extralegal “rules” and expectations for behavior,<sup>210</sup> typically enforced in non-legal ways.<sup>211</sup> Norms of openness and disclosure have been built over the last two decades with increasing government use of the Internet.<sup>212</sup> Likewise, norms of vigorously defending FOIA suits also pass from one administration to the next. Unfortunately, many longstanding government norms have been disregarded by the Trump administration.<sup>213</sup> Norms themselves can be powerful constraints on behavior, but are at risk of eroding if not observed.

A final constraint on information mischief is practical. Non-government parties, motivated by fears that the Trump administration might remove or manipulate data, are closely monitoring federal web sites and have engaged in large-scale archiving. These collective efforts to make the data available elsewhere might deter agencies from trying to remove or manipulate data. After the November 2016 election, a variety of private and non-profit groups sprang into action to save public data sets,<sup>214</sup> a move called “guerilla archiving.”<sup>215</sup> For example, researchers from the University of Pennsylvania and the University of North Texas organized efforts to archive federal web pages before Trump was inaugurated.<sup>216</sup> Likewise, legal scholar Paul Gowder created a Python script to monitor public data and track deletions or modifications.<sup>217</sup> Similarly, after the Trump administration removed from the EPA and Interior Department web sites documents discussing how climate change might affect desert ecology in the southwest, the City of Chicago posted the same documents archived during the Obama ad-

210. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2196 (2018).

211. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350 (1997).

212. See *supra* Part II.

213. See, e.g., Lin, *supra* note 136. For example, the Sunlight Foundation noted how Donald Trump was “the least transparent modern candidate in modern history” because he “held no press conference . . . from July 2016 until January 11, 2017, released no tax returns, and made no proactive disclosures around transition or inauguration.” *Tracking the Trump Administration’s Record on Transparency*, *supra* note 151.

214. Megan Molteni, *Diehard Coders Just Saved NASA’s Earth Science Data*, WIRED (Feb. 13, 2017), <https://www.wired.com/2017/02/diehard-coders-just-saved-nasas-earth-science-data/> [<https://perma.cc/Q3VH-9HW6>]; Zoe Schlanger, *Rogue Scientists Race to Save Climate Data From Trump*, WIRED (Jan. 19, 2017), <https://www.wired.com/2017/01/rogue-scientists-race-save-climate-data-trump/> [<https://perma.cc/G44W-J4BG>].

215. Vinik, *supra* note 52.

216. *Id.*

217. Paul Gowder, *Minitrue: decentralized defense against changing data*, GITHUB, <https://github.com/paultopia/minitrue> [<https://perma.cc/RQD8-YNHM>].

ministration.<sup>218</sup> The Environmental Data and Governance Initiative (EDGI) has tracked 25,000 web pages since Trump was inaugurated.<sup>219</sup> Even agencies themselves prepared for the worst: in December 2016, the FDA engaged in a “data dump,” making available for the first time data on adverse events related to food products and cosmetics.<sup>220</sup>

Perhaps the most comprehensive and concerted countermeasures are being taken by the Sunlight Foundation. Its “Dark Data” initiative asks web site users to “Help keep track of open data sets removed from federal web sites.”<sup>221</sup> Although the Sunlight Foundation has not found widespread removal of data sets yet, as many have feared, it remains vigilant given how “secretive” the Trump administration has been.<sup>222</sup> According to the Sunlight Foundation, the Trump administration has “one of the worst records on open government in the first 100 days of any administration in American history.”<sup>223</sup>

Thus, third party archivists and monitors can help deter, or at least shine a light on, acts of information mischief. Indeed, their efforts were mirrored by a bill in Congress to preserve federal data. In April 2017, senators Gary Peters (D-MI) and Cory Gardner (R-CO) introduced the Preserving Government Data Act of 2017 to make it more

218. Eilperin, *supra* note 49.

219. Barron, *supra* note 108; *Website Monitoring*, EDGI, <https://envirodatagov.org/website-monitoring/> [<https://perma.cc/YTQ5-B8D6>].

220. Susan Mayne & Katherine Vierk, *Why FDA Is Making Data Extracted from Reports of Adverse Events for Foods and Cosmetics Available to the Public*, HEALTHDATA.GOV (Dec. 8, 2016), <https://healthdata.gov/blog/why-fda-making-data-extracted-reports-adverse-events-foods-and-cosmeticsavailable-public> [<https://perma.cc/9LKN-42B8>]. Note that the original link to this story on the FDA’s own web site no longer directs to this information (<https://blogs.fda.gov/fdavoic/index.php/2016/12/why-fda-is-making-data-extracted-from-reports-of-adverse-events-for-foods-and-cosmetics-available-to-the-public/> [<https://perma.cc/CCD6-L3YV>]). Another consideration is that removal of data can thwart agency-to-agency communications, as well as deregulatory initiatives. For example, removal of enforcement records and data can make it harder for the White House or trade groups to understand which laws are imposing the greatest costs on industry. See, e.g., James W. Coleman, *How Cheap is Corporate Talk? Comparing Companies’ Comments on Regulations with Their Securities Disclosures*, 40 HARV. ENVTL. L. REV. 47, 79 n.137 (2016) (describing inter-agency cooperation between SEC and FDA “to ensure drug manufacturers are not misleading investors about their prospects of regulatory approval”). See also *id.* at 76–80 (describing how EPA and SEC could also coordinate on industry statements about environmental regulation).

221. *Web Integrity Project*, *supra* note 75.

222. Bergman & Rinberg, *supra* note 84.

223. *Id.*; *Sunlight joins C-SPAN to make sense of the state of open government*, SUNLIGHT FOUND. (Mar. 15, 2017), <https://sunlightfoundation.com/2017/03/15/sunlight-joins-c-span-to-make-sense-of-the-state-of-open-government/> [<http://perma.cc/5GWD-L32E>]; Joe Davidson, *Sunshine Week brings Trump’s information darkness to light*, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/03/13/sunshine-week-is-turbid-under-trump/> [<https://perma.cc/9M5W-B2JZ>].

difficult to delete publicly available data.<sup>224</sup> Some have critiqued the bill as too broad,<sup>225</sup> though it has little chance of passing during this administration.

#### CONCLUSION

Since taking office, the Trump administration not only has retreated from a number of open government practices established by predecessors, but has engaged in a variety of mischievous information activities, such as removing and manipulating data, scrubbing disfavored terms from federal web sites, and even using transparency as a pretext to selectively disclose information for more cynical purposes. This Article is a first attempt to log and evaluate the early record of the Trump administration. It is unclear the extent to which legal and non-legal tools can provide meaningful constraints on an executive interested in exploiting its power over information. The most powerful tool may be to fight information with information, drawing attention to these practices and archiving important information.

224. S. 960, 115th Cong. (2017).

225. *New bill would preserve public access to public data online*, SUNLIGHT FOUND. (Apr. 27, 2017), <https://sunlightfoundation.com/2017/04/27/new-bill-would-preserve-public-access-to-public-data-online/> [http://perma.cc/KM9T-VTFJ]; Mariella Moon, *Senate bill would make it harder to delete government data*, ENGADGET (May 2, 2017), <https://www.engadget.com/2017/05/02/bill-preserving-government-data-act-2017/> [http://perma.cc/3S5Y-S3R7].