

## **Judicial Deference and Agency Accountability: A Federal FOIA Experiment\***

### **Abstract**

Judicial deference to agency accountability has been justified, in part, by agencies' superior democratic accountability when compared to the judiciary. Yet there is important variation in agency design that can work against the democratic accountability the courts use as a rationale for deference. In a repeated measures experiment, we exploit the variation in agency structure intended to increase political responsiveness – our measure of agency politicization – in order to test agency democratic accountability. As part of efforts to do research for other projects, we submitted repeated FOIA requests to every agency with a FOIA office and measured the timing and quality of their responses. Our preliminary findings indicate that agencies with more appointees as a fraction of total employment give slower responses and tend to withhold information more often than agencies with fewer appointees as a fraction of employment. This leads us to conclude that the agency politicization that is intended to enhance political accountability can undercut democratic accountability. Judicial deference to agencies is therefore inadequately nuanced.

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Judicial deference to administrative agencies has been justified various ways. Agencies are thought to be more expert than courts, particularly for complicated issue areas (*Skidmore v. Swift & Co.*,<sup>1</sup> *Chevron U.S.A Inc. v. National Resources Defense Council*,<sup>2</sup> *Mead Corp v. United States* <sup>3</sup>). And a crucial rationale for judicial deference to agencies is agencies' greater democratic accountability by virtue of their being in a political branch (*Chevron*). Agencies' democratic accountability is usually indirect, exercised through their political accountability, or accountability to elected officials. Agencies are usually run by political appointees, who are directed by the president and, to a lesser extent, Congress. Federal courts, on the other hand, are much more insulated. Judges serve during "good behavior", which translates into life tenure (Article III, Sec. I). Federal judges' salaries cannot be lowered Congress.<sup>4</sup> While Congress controls courts' structure, jurisdiction, and funding, these threats, like impeachment, are often thought to be a "phantom menace" due to high procedural hurdles (Prakash 1999; see, however, Clark 2009). Judicial decisions are also rarely subject to being overturned: only four Supreme Court opinions have ever been overturned by constitutional amendments. In formal terms, the courts are much less accountable than the agencies, and in *Chevron v. NRDC* and its progeny, that deficit of accountability is an important reason that courts should defer to agencies.

How much less accountable courts are structurally than agencies varies by agency. From the moment they are created, agencies have different levels of political insulation that determine their level of political accountability, or how accountable agencies are to the public via elected officials (see, e.g., Lewis 2003; Moe 1989; Seidman 1998). Independent central banks like the Federal Reserve, for example, are designed to be insulated from political control so that the

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<sup>1</sup> 323 U.S. 134 (1944).

<sup>2</sup> 467 U.S. 837 (1984).

<sup>3</sup> 533 U.S. 218 (2001).

<sup>4</sup> Congress could theoretically allow judicial salaries to slowly be eroded by inflation, a distant threat (Whittington).

government can resist public pressures to manipulate monetary policy (e.g., inflate the currency to ease the payment of debts). Members named to the Board of Governors of the Federal Reserve serve for 14 year terms and cannot be removed except for cause. The creators of this structure feared that electorally-motivated politicians would interfere in monetary policy in ways that would be harmful for economic growth and stability in the long run. Other agencies, like cabinet departments, are not designed with insulation from public pressures as a primary goal. These agencies are headed by political appointees who are removable at will by the president. They are therefore much less insulated from politicians, which leaves them more open to interference from political actors and more politically accountable.

The fact that there is variation in the extent to which agencies have features we associate with democratic accountability raises the important question of whether courts should defer more or less to those agencies insulated from the influence of elected officials. This is the case for at least two reasons. First, a significant amount of research describes how a tradeoff exists between the degree of democratic accountability and agency expertise (Epstein & O'Halloran 1999; Gailmard 2002; Huber and McCarty 2004; Stephenson 2007, 2008, 2011). Increasing political influence or accountability can reduce the incentives agency workers have to invest in expertise and make it harder for the agency to recruit and retain the most expert career employees (Gailmard and Patty 2007). For example, a robust literature on the politicization of the bureaucracy describes how increased efforts to insert the views of elected officials into administration can decrease agency competence by freezing experts out of decisions and diminishing the incentives for experts to stay in the agency or join in the first place (see, e.g., Cohen 1998; Dunn 1997; Heclo 1975, 1977; Kaufman 1965; National Commission on the Public Service 1989, 2003). Courts looking for a reason to defer to agencies will rarely find cases of

agencies both designed to be very responsive to public officials and very expert. Second, having structural features associated with political accountability may make it *less* likely that an agency is responsive in direct interactions with the public, and that responsiveness is a key component of democratic accountability. For an agency to be responsive to the public, it must be competent. The most electorally accountable agencies, such as those with a large number of appointees, may not be able to be responsive because of a lack of competence. More “political” agencies may also be less responsive to the public because electoral or political motivations may be inconsistent with the demands of public accountability (Stephenson 2008).

In this paper we describe a repeated measures experiment with data collected from federal Freedom of Information Act (FOIA) requests to determine whether more politically accountable agencies are more responsive to the public, and therefore more democratically accountable. Specifically, we submitted a series of control and treatment FOIA requests to federal agencies with the intention of analyzing the resulting response times and response qualities.<sup>5</sup> Since the entire federal executive branch is subject to the same FOIA requirements, broadly speaking, we can create a measure of accountability by sending identical FOIA requests to all agencies and then measuring their performance (e.g., response time, number of exemptions claimed, fee charges, etc.). Variation in agency-specific factors such as agency structure, workload, capacity, and other relevant features can be accounted for with standard controls or a differences-in-differences design we describe below. In preliminary analyses, we find that the most politicized agencies (i.e., politically accountable) are the least likely to respond to requests within the time allotted by FOIA guidelines, the slowest at responding to FOIA requests, and marginally more likely to claim exemptions to the requests. There is no evidence that they are

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<sup>5</sup> The data requested through the Freedom of Information Act is information relevant to other research projects at Vanderbilt and Berkeley but requested in such a way that the process of responding to these requests also provides useful information in its own right.

more likely to otherwise respond adversely to the requester (charge fees, misunderstand request, harass requester).<sup>6</sup> Our findings reveal that the courts' deference to agency decisions, justified on democratic accountability grounds, is inadequately nuanced.<sup>7</sup> We conclude by discussing the broad relevance of the findings to the fields of law, political science, and public administration.

The rest of this paper proceeds as follows. In Section 2, we review existing theories of agency accountability and judicial deference, which we use to guide our hypotheses. In Section 3, we describe our analytic strategy. In Section 4, we present our preliminary findings. In Section 5, we discuss the implications of our findings and conclude.

## **AGENCIES AND JUDICIAL DEFERENCE TO AGENCY DECISIONS**

Scholars of political science and law have theorized about the democratic accountability of agencies. Agencies' democratic accountability is offered as a rationale to justify judicial deference to agency decisions. In *Chevron v. NRDC*, the Supreme Court rationalized its prescription of broad deference to agencies as follows:

“Judges are not experts in the field, and are not part of either political branch of the Government.... While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

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<sup>6</sup> We are still waiting for the full complement of responses to our FOIA requests to be returned to us.

<sup>7</sup> In the law journal version of this paper, we propose new accountability-based criteria for judicial deference.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.”<sup>8</sup>

The *Chevron* majority stressed agencies’ accountability through the executive branch. This political accountability has been emphasized by legal scholars who argue for a unitary executive (Calabresi 1995) and those who champion the power of the president and executive branch in policymaking (Kagan 2001; Lessig and Sunstein 1994; Pierce 1989), as well as by political scientists (Lewis 2008; Moe 1985, 1989; Moe & Howell 1999). The president has the power of removal, and in response to public outrage at lapses in accountability, presidents can remove agency heads or accept their resignations. The president can also change the direction of policy in an agency through the use of various types of presidential directives (e.g., executive orders, national security directives, signing statements), which can indirectly correct for accountability lapses (Cooper 2002; Howell 2003; Mayer 2001). The president can also influence agency decisions through spending decisions, the broad power of regulatory review, control over federal litigation, and day-to-day decisions about how to prioritize the energies of the federal government in the administration of law (Devins and Herz 1998; Fisher 2000; Nathan 1975; Waterman 1989). Ultimately, the president is accountable to the people, and the logic of that accountability is that if the people disapprove of agency performance, they can change the party in control of the agencies by changing the chief executive – every four years, the people have the ability to exercise this sort of accountability.

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<sup>8</sup> *Chevron* at 865-866.

Agencies are also accountable to the public through the legislature, which creates and oversees most agencies (Howell and Lewis 2002; Lewis 2003; Moe 1989; Seidman 1998). Legislative committees, responding to public opinion, can hold agencies accountable by calling agency executives to hearings where they can be publicly chastised for activities that the people disagree with. The legislature controls the power of the purse and thereby appropriations (Article I), which allows it to reduce agency funding in response to public dissatisfaction with agency performance. The legislature can also threaten to grant or withhold authorization or appropriations and otherwise creatively sanction executive officials from public sanction to the elimination of agencies or programs valued by executives (Aberbach 1990; Dodd and Schott 1979; McCubbins and Schwartz 1984). This provides the legislature tremendous leverage to influence the behavior of agency appointees, another avenue for political accountability of agencies.

But are agencies really democratically accountable via the president and Congress? Certainly, some are more accountable than others. Most federal agencies are created as so-called executive agencies, staffed by the president with consent of the Senate (and removed at the sole discretion of the president), and taking direction from the president while also answering to Congress. Other agencies are designed to be independent and differ from executive agencies in crucial ways. Commissioners appointed by the president and confirmed by the Senate head independent agencies. These agencies are designed with intentional party balance in the top leadership and with limits on removal by the president. Even within the two main classes of agencies (executive and independent), we observe different amounts of political insulation, which reflect political conditions at the time of their creation (Moe 1989; Lewis 2003, 2008). Even among the executive agencies, there is substantial variation in the number and penetration

of political appointees, arguably the primary link for political accountability, the people's indirect avenue to democratic accountability of agencies.

### *Political Accountability and Agency Responsiveness*

Agencies designed to provide more access to elected officials may not be the most responsive to the public, however. An emerging literature describes how the politicization of the civil service in the United States and other countries creates performance problems (Cohen 1998; Dunn 1997; Durant 1992; Heclo 1975, 1977; Kaufman 1965; National Commission on the Public Service 1989, 2003; Newland 1983; Rosen 1983). In the United States the increased "presidentialization" of the administrative state is generally viewed in a negative light because of its effects on agency performance (Heclo 1975, 1977; Suleiman 2003; see, however, Moe 1985). Presidents have increased in the number and penetration of appointees into the bureaucracy (Lewis 2008; National Commission on the Public Service 1989, 2003), extended their control of the selection of appointees to even those at the lowest levels and have increasingly focused on loyalty as a criteria for selection of appointees (see, e.g., Edwards 2001; Mackenzie 1981; Moe 1985; Pfiffner 1996; Weko 1995). Presidents have also gained greater control over budgets and regulation through the reorganization of the Bureau of the Budget and the centralization of regulatory review (Heclo 1975; Lewis and Moe 2009). These actions have ostensibly increased agency responsiveness to the president but it is not clear they have increased democratic accountability per se. They may damage an agency's ability to be responsive and introduce political factors into agency decision making that are at variance with democratic accountability more generally.

The choices presidents have made to make agencies more accountable can make them less effective and, thus, less responsive to the public. At a basic level, the selection of appointees

on the basis of loyalty rather than competence can have obvious effects on agency performance. Appointees selected on the basis of loyalty are systematically less likely to have the subject area expertise and public management skills of those executives selected on the basis of competence (Lewis 2008).<sup>9</sup> Increasing the number and penetration of appointees can hurt agency performance through its effects on the agency personnel system. If appointees increasingly make the key policy decisions and take the jobs with the highest pay and responsibility, this decreases the incentive for career civil servants to invest in the expertise that previously would have been useful to them in influencing agency decisions and earning promotions. If the expertise civil servants work hard to acquire is going to be overlooked by appointees making decisions or, worse, used by appointees to make decisions civil servants do not prefer, civil servants will not put forth the effort to acquire it. They may also begin to entertain outside options. This makes it more difficult for the agency to retain the best people working in the agency. When the highest paying jobs and influence over policy are removed as options for civil servants, retirement or work for government contractors or other firms that pay a higher salary becomes more attractive. Indeed, in recent survey of federal executives over half of federal executives reported that people at their level are regularly approached about higher paying jobs in the private sector (Bertelli and Lewis 2011). Potential agency employees that see little opportunity for influence, advancement, or access to the best jobs are unlikely to join the agency in the first place. The creeping penetration of political influence dampens agency morale and increases executive turnover to the detriment of agency performance (Boylan 2004; Hecl 1977; Stanley, Mann, and Doig 1967). Agencies may or may not want to be responsive to the public but efforts to increase political accountability can hinder their ability to be responsive even if that is their goal.

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<sup>9</sup> The reverse is also true. Agency heads selected on the basis of competence are less likely to be responsive to political direction.

Equally troubling from the perspective of judicial deference is that agencies with structural features that ostensibly make them more *politically* accountable may actually make them less *democratically* accountable. Adding layers of appointees introduces political or electoral considerations into agency decisions at variance with what a fully informed majority would prefer. Agencies populated with large numbers of appointees may be more likely to make decisions on the basis of short term political calculations rather than sound policy judgment in the long run (Krause, Lewis, and Douglas 2011). Increased political accountability via appointees can also add layers of review and increase the involvement of less expert decision makers in agency choices, leading either to error or delay as appointees have to overcome their information asymmetry. Appointees concerned about the potential impact of agency decisions for the reputation of the administration have an incentive to add layers of review, delay, and scrutiny to avoid adverse outcomes.<sup>10</sup> The introduction of electoral considerations does not always make agencies more responsive to the general public as opposed to a narrower election constituency. For example, federal grants are disproportionately distributed to states that are most relevant in presidential election contests, battleground states (Chen 2009; Hudak 2011; Mebane and Wawro 2002; Shor 2006).

In total, agencies designed to be most politically responsive may not be the most democratically responsive.

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<sup>10</sup> Agencies designed to house a large number of appointees provide an easy location to place patronage appointees given jobs in exchange for electoral or political support. Agencies staffed with patronage appointees are more likely to make decisions to satisfy the needs of the party, patron, or campaign organization that secured their rise to power. The interests of these sponsoring organizations may or may not overlap with the interests of voters more broadly.

## **ANALYTIC STRATEGY AND DATA**

Evaluating the relationship between structural features—like the number of political appointments—and responsiveness is difficult because few comparable measures of agency responsiveness (or performance more generally) exist. Scholars have examined budget forecasting data, surveys of federal employees including questions about agency leadership and performance, and performance information used in the federal budget process (see, e.g., Krause, Lewis, and Douglas 2006; Brewer and Selden 2000; Chun and Rainey 2005; Choi and Rainey 2010; Oh and Lewis 2008; Lewis 2008). Each measure has its limitations. Notably, it is unclear whether findings to a particular type of agency (e.g., budget forecasting agencies) are generalizable to other types of agencies and whether federal employees accurately perceive the true performance of their agencies. Budget-based performance information has been difficult to collect comparably and in an unbiased fashion across different programs and agencies, and agencies may put more or less effort into providing this information depending upon its likely impact on their budget (see, e.g., Gilmour 2006; Metzenbaum 2009; Moynihan 2006, 2008; Posner and Fantone 2007; Radin 2005; U.S. Government Accountability Office 2004, 2005, 2008).

An examination of the timing and quality of responses to identical FOIA requests provides one measure of agencies' democratic accountability. We can look at whether or not agency Freedom of Information Act offices respond, how quickly they respond, how many exemptions they apply, and how many attempts they make to not respond, in order to evaluate responsiveness, which is key to accountability. The Act has existed since 1967. It provides a presumption of access to information for any person, which is only rebutted if the information

requested falls under one of nine exemptions.<sup>11</sup> In order to make a FOIA request, one must only send a request to the agency stating the records requested, willingness to pay for searching time and photocopies, the fee category of the request, and contact information. After the agency responds to the request, if the requestor disagrees with any exemptions or non-response, she may file an appeal. If she remains unsatisfied after appeals within the executive branch, the requestor's next remedy is in the courts.

Since the entire federal executive branch is subject to the same FOIA requirements, this provides two avenues for empirical analysis. Broadly speaking, we can create a measure of responsiveness, and therefore accountability, by sending identical FOIAs to all agencies and then measuring their response time, number of exemptions claimed, etc. and normalizing the measure to account for variation in agency workload and capacity. This allows us to estimate different variations of the following simple models:

$$\# \text{ days}_i = \alpha + \beta \chi_i + \varepsilon_i \quad (1)$$

$$\# \text{ exemptions}_i = \alpha + \beta \chi_i + \varepsilon_i \quad (2)$$

for agency  $i$ , where  $\# \text{ days}_i$  is the number of days it takes an agency to fill a FOIA request,  $\# \text{ exemptions}_i$  is the number of exemptions included in the agency's response,  $\chi_i$  includes key agency-level covariates such as measures of politicization and also controls such as FOIA workload, FOIA office staff size, etc, and  $\varepsilon_i$  is random error. Our expectation is that more politicized agencies will be less likely to respond to requests, be slower when they do respond, and provide responses with lower quality information than other agencies.

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<sup>11</sup> These exemptions are: (b)(1) EXEMPTION - Protects Classified Matters of National Defense or Foreign Policy; (b)(2) EXEMPTION - Internal Personnel Rules and Practices; (b)(3) EXEMPTION - Information Specifically Exempted by Other Statutes; (b)(4) EXEMPTION - Trade Secrets, Commercial or Financial Information; (b)(5) EXEMPTION - Privileged Interagency or Intra-Agency Memoranda or Letters; (b)(6) EXEMPTION - Personal Information Affecting an Individual's Privacy; (b)(7) EXEMPTION - Investigatory Records Compiled for Law Enforcement Purposes; (b)(8) EXEMPTION - Records of Financial Institutions; (b)(9) EXEMPTION - Geographical and Geophysical Information Concerning Wells. This list provided by the Department of Commerce (<http://www.osec.doc.gov/omo/foia/exemptions.htm>, last accessed June 12, 2011).

## *Experimental Setup*

Another way of accounting for variation in agency-specific factors such as agency structure, workload, capacity, and other relevant features is to organize the research as a form of repeated measures experiment (Ross and Morrison 2004). While part of the definition of “experiment” is that subjects are randomly selected and randomly assigned to treatment and control, here, we do not need to do either. We conduct a census of the entire list of federal agencies with a FOIA office,<sup>12</sup> and because we use repeated measures, we do not assign treatment and control; rather every subject receives two types of treatments (“baseline” and “sensitive”) after which, we observe the response (Ross and Morrison 2004). In effect, each agency serves as its own control.

The structure of the repeated measures experiment is depicted in Figure 1, where A is the agency, X is a treatment, the subscripts “b” and “s” represent baseline and sensitive treatments, and O is our observation.

### **FIGURE 1**

A1:  $X_bO - X_sO$

A2:  $X_bO - X_sO$

A*n*:  $X_bO - X_sO$

$X_b$  is the measure that allows us to establish an agency’s baseline responsiveness to a simple FOIA request.  $X_s$  is our measure of the agency’s responsiveness to a politically-sensitive FOIA request. To avoid any time-related interference with the ability of the agencies to respond to our requests, for each set of requests, we sent both the baseline and sensitive requests on the same day.

Because agencies differ in their budgets, FOIA backlog, and other possible confounders on our measure of the time to respond, we record the difference between the baseline and

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<sup>12</sup> This also obviates the need to defend our external validity, since we measure the entire population.

sensitive response times, rather than the response times themselves (Figure 2). In other words, we ask “how much more time does it take an agency to respond to a politically sensitive request, compared to a baseline request?” and “How many FOIA exemptions do agencies claim to sensitive requests, compared to baseline requests?” The combination of delay for sensitive requests and exemptions claimed should give us insight into responsiveness to the public, which is a key feature of democratic accountability. Because every agency receives the exact same requests, any differences between their responses can be thought of as heterogeneous treatment effects, explained in part by politicization.

**Figure 2. Empirical Strategy Utilizing Baseline and Treatment Requests**

Less Politicized Agencies $k$	More Politicized Agencies $j$	Difference in Differences
$\Delta \#days_k = \# \text{ days to fill sensitive request} - \# \text{ days to fill baseline request}$	$\Delta \#days_j = \# \text{ days to fill sensitive request}_j - \# \text{ days to fill baseline request}_j$	Is $\Delta \#days_k = \Delta \#days_j$ statistically distinguishable?
$\Delta \#exemptions_k = \# \text{ of exemptions in sensitive request} - \# \text{ of exemptions in baseline request}$	$\Delta \#exemptions_j = \# \text{ of exemptions in sensitive request}_j - \# \text{ of exemptions in baseline request}_j$	Is $\Delta \#exemptions_k = \Delta \#exemptions_j$ statistically distinguishable?

We predict that the sensitive – baseline time difference will be greater in agencies that are more highly politicized, because their politicization should slow their response to politically sensitive requests. We also expect that more politicized agencies will claim more exemptions to the information requests.

*Threats to Validity*

Of the commonly-discussed threats to experimental validity (history, maturation, testing, instrumentation, regression to the mean, selection, mortality, and SUTVA violations<sup>13</sup>), our project is most susceptible to testing effects and SUTVA violations. In designing the

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<sup>13</sup> The education literature refers to a similar threat: diffusion of treatment. We refer here to the Rubin causal framework’s concept of SUTVA, which encompasses diffusion of treatment and is more common in political science literature (Rubin 1974).

experiment, we faced tradeoffs. One was whether we should send both requests from Nashville (Lewis's location), or randomize whether the requests came from Nashville or Berkeley (Wood's location). Because of the different political reputations of the two cities, we chose to send all requests from Nashville. That left us open to testing threats to validity, because both baseline and sensitive requests came from the same place, which could have sensitized the respondents into changing their behavior in response to the two "treatments". After receiving responses to our first round of treatments (targeting the FOIA office itself), we noted in the FOIA logs that many requests are made not only from the same city, but they seem to be made in batches, from the same person. An interview with a former FOIA officer confirmed that it is considered good practice to separate out each request, such that FOIA offices are not surprised by seeing multiple requests from the same person. The testing threat to validity is therefore weak to non-existent. To the extent that the "subject" agency officials are responding more quickly or more thoroughly to the sensitive request as a result of having exposure to the (simultaneous) baseline request, the validity threat would work against our finding differences.

We have yet to determine whether a SUTVA violation exists with our second batch of requests. The SUTVA (stable unit treatment value) assumption is that the treatment effect the requests to one sub-part of the agency (say, the OIG) is not any different because other parts of the agency (say, the Political Liaison or Human Resources offices) were also treated. In other words, we assume that there is no interference between treatments (Rubin 1974). We assume, among other things, that the agency officials did not change their response to treatment because others were being treated. Our research design should have mitigated any SUTVA risk, because the baseline and sensitive requests sent to each sub-part of the agency were different. Given, that three of the four sets of requests were sent to the same FOIA office (even if they involve separate

parts of the agency), however, makes it possible that smaller agencies recognize a pattern of requests from one city in a way that violates this assumption.<sup>14</sup>

We did have one interesting brush with validity, and it was one we could not have anticipated. The General Counsel of the Postal Regulatory Commission also runs a FOIA-centered website called [governmentattic.org](http://governmentattic.org), which regularly requests FOIA logs from various agencies. He called one of the senders to tell him that he knew he had sent an identical request to all agencies in the government. The General Counsel/website affiliate did not know this from his work as an agency official; rather he must have known it from his work for the website. This is a violation we could not have anticipated. Our results are robust to removing the Postal Regulatory Commission data from the dataset.

### *Data*

Over the course of three weeks in May 2011, we submitted 4 sets of FOIA requests to almost all agencies in the federal government.<sup>15</sup> We sent baseline and sensitive requests targeting four areas of each agency: the FOIA office itself, the political liaison, the Office of Human Resources, and the Office of Inspector General (OIG).<sup>16</sup> Because fewer agencies have their own OIG, we have fewer agencies to observe for that round of measurements ( $n=79$ , compared to  $n=132$  for the other three). We sent the requests in two waves. The first wave was 264 requests targeting only the FOIA office (132 of each type), and the other wave of requests targeting OIG, Political Liaison, and Human Resources (722 requests). Because the second-

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<sup>14</sup> We have received a few responses from people filling the second round of requests (to human resources, OIG, and the political liaison) indicating that they want to bundle our requests, implying a possible SUTVA violation. When we analyze that data, we will check it for robustness to removing the agencies that gave us the “bundling” responses.

<sup>15</sup> If two agencies shared a FOIA office or officer, we only sent the request to the “parent” agency that hosted the FOIA office. This design choice resulted in our excluding all military commands (like Africa Command and Northern Command) and a few other DoD sub-agencies, as well as a few other agencies in similar situations. For the complete list of cases and those we excluded, see Appendix A.

<sup>16</sup> We have actually sent two sensitive requests to the OIG, and it appears that one was entirely too sensitive to produce results.

wave requests were destined for different parts of the agency, we sent them all on the same day. (The full set of requests is in Appendix B.)

### *Preliminary Analysis*

For the analysis in this paper we are only able to analyze the first wave of FOIA requests. This wave was placed in the mail on May 9, 2011. Our requests to the FOIA office, sent by different people on the same day, are located below. The normal procedure for agencies is to send a confirmation by letter or email that they have received a request and they assign the request a unique case identifier. In some cases the confirmation and determination arrive in the same communication (i.e., we received your request and here is the determination). The first agency confirmations and determinations arrived on May 12, 2011. For the analysis in this paper the last data collected in response to these requests was received June 9, 2011.

[BASELINE]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the following sets of records from the Department of Agriculture:*

- *The agency's FOIA log from 2010 or equivalent listing the FOIA request number, name of requester, and a description of the records being requested.*

*If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$200, which I agree to pay. This request is for educational purposes.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may reach me by email at dsjlewis@yahoo.com, or by telephone at 615-712-9087.*

*Sincerely,*

*Saskia C. Lewis  
2006 Linden Avenue  
Nashville, TN 37212*

[POLITICALLY SENSITIVE]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the below-listed sets of records from Department of Agriculture. If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$200, which I agree to pay. This request is for educational purposes.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may telephone me at 203-231-0287. I can also be reached via email at [john.hudak.1@gmail.com](mailto:john.hudak.1@gmail.com).*

*Sincerely,*

*John Hudak  
4600B Idaho Avenue  
Nashville, TN 37209*

***Requested Records:*** *A list of the FOIA requests from 2010 about which a political appointee (persons appointed under schedule C, a non-career member of the Senior Executive Service, or Senate-confirmed appointee) personally made an inquiry, personally reviewed, or personally had a hand in the disposition of the request.*

To measure agency responsiveness we focus on several features of the FOIA process. Notably, FOIA regulations require an agency to issue a determination within 20 working days of receiving a request, excluding weekends and holidays. Agencies may ask for extensions to this time frame or stop working on a request until the requester provides fees or clarifying information. We first examine whether an agency has sent a confirmation or receipt of our request and how long it took them to send a confirmation. June 9 is comfortably longer than 20 working days from the time a request would reasonably be expected to reach an agency FOIA office. Out of 264 requests, we received confirmation of 179 by June 9, 2011 (67.80%). The average time to confirmation, if we give all of the outstanding requests the maximum time observed to date, is 19 days.

We also examine whether and how long it took for agencies to fill requests and the contours of their responses. Out of 264 agencies, 120 filled the request by June 9, 2011 and the

average time was 23 days. For agencies that made a determination, we collected data on the number of exemptions claimed and the quality of the response (did they charge a fee, did they misunderstand the request, did they harass the requester, etc.). Among the 120 cases where an agency made a final determination, 20 (17%) agencies claimed exemptions and 19 (16%) agencies had responses that we classified as a poor response. Some examples of poor responses include:

- Charging exorbitant fees
- Asking for notarized proof of identity
- Claiming their agency does not have political appointees when their letterhead includes information about their appointees
- Changing the grounds on which a request is rejected.

To measure the degree of political accountability we use the percentage of an agency's employees that are political appointees.<sup>17</sup>

## RESULTS

Do structural features that enhance political accountability undermine democratic accountability? In Table 1 we present the results of simple analyses of FOIA responses, namely

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<sup>17</sup> Specifically, we use  $((\# \text{Senate confirmed positions} + \# \text{non-career SES} + \# \text{Schedule C}) / \# \text{employees March 2011}) * 100$ . We collected the number of Senate-confirmed positions from the 2008 Plum Book and the other data from March 2011 data from OPM's Fedscope website (<http://www.fedscope.opm.gov/>, last accessed June 11, 2011). The mean is 2.5 and the standard deviation is 5.9 (min 0, max 41). We have also estimated models that measure politicization using the number of layers between the signatory on the agency response letter and the nearest appointee in the agency organization chart. Some FOIA officers work directly for an appointee (0) and for others you have to go up to 7 levels higher to get to an appointee in the organization chart. So, for example, if a FOIA officer works in the Office of the General Counsel and the General Counsel is an appointee this would be coded as 0 layers. If, however, the General Counsel is not an appointee but works directly under an administrator that is an appointee, this would be coded as 1 layer. The median (mean) number of layers in the organization chart a FOIA letter writer has to go to get to an appointee is 1(1.5) layer. Since calculating this measure depends upon having a response letter, however, we only have this data for agencies that have responded and can find the respondent in the organization chart in the *Federal Yellow Book*. The *Federal Yellow Book* is a directory of upper level agency employees and staff published quarterly by Leadership Directories, Inc. These results are included in Appendix C.

did the agency send a confirmation and did the agency make a determination (0,1) within one month after we sent out the requests? The models include controls for agency and FOIA office-specific factors. They include controls for whether the agency is located in the Executive Office of President (0,1; 4%), located in the Cabinet (0,1; 39%), and the log of the number of agency employees (7.52; SD 2.63).<sup>18</sup> They also control for the log of the number of FY 2010 agency FOIA requests (6.14; SD 2.53)<sup>19</sup> the number of staff working in the FOIA office (43.15; SD 104.6; Min 0 Max 798) in FY 2010.<sup>20</sup> They also control for request type (baseline or sensitive).

**Table 1. Logit Models of FOIA Responses: Influence of Politicization on Whether Agencies Confirm or Fill Requests**

	Confirm		Fill	
	(Coef.)	(S.E.)	(Coef.)	(S.E.)
<i>Politicization</i>				
(Appointees/Employees)*100	-0.12**	0.04	-0.15**	0.04
<i>Agency Characteristics</i>				
EOP (0,1)	1.21	1.05	1.34	0.95
Cabinet (0,1)	0.45	0.43	0.94**	0.44
Ln(Agency Employment)	-0.07	0.13	-0.32**	0.14
<i>FOIA Office Details</i>				
Ln(Number of FOIA Requests FY 2010)	-0.12	0.11	-0.18*	0.11
#FOIA Staff FY 2010	-0.00	0.00	0.00	0.00
Politically Sensitive Request (0,1)	-0.37	0.30	-0.48	0.30
Constant	2.43**	0.76	3.57***	0.79
N	222		222	
LR Test (7df)	20.82		40.17	

<sup>18</sup> The number of agency employees varies from 10 to 314,066. Given the skew and the possibility of influence by the extreme values, we include the log. The main results are robust to the way we control for agency employment.

<sup>19</sup> The number of requests varies dramatically from 0 to 130,089. Given the skew and the possibility of influence by the extreme values, we include the log.

<sup>20</sup> Source: <http://www.foia.gov/>, last accessed June 11, 2011. We have also estimated models that control for the FOIA backlog in the agency at the end of fiscal year 2010. The results are similar to what are reported here.

In both models, as the percentage of agency employees that are appointees increases, the less likely it is that the agency has sent a confirmation to a FOIA request or filled the request. The coefficients are reasonably large and estimated precisely. Substantively, the estimates indicate that increasing the percentage of appointees by one percentage point, say from 2.5% to 3.5% decreases the probability that the agency sent a confirmation by 2-3 percentage points. It decreases the probability that an agency actually filled the response by 3-4 percentage points.<sup>21</sup> This is important evidence that agencies with the features of political accountability (i.e., greater number and penetration of appointees) are actually less responsive to the public when it comes to requests for information. Features of administrative agencies that enhance political accountability may decrease direct democratic accountability.

Interestingly, agencies in the Executive Office of the President (EOP) and Cabinet are estimated to be more likely to fill requests than other agencies. EOP and agencies and bureaus in the cabinet are estimated to be 9 and 3 percentage points more likely to have responded to a request, respectively. It should be noted, however, that many of the responding agencies are bureaus in the cabinet with hardly any appointees such as the Defense Finance and Accounting Service or Federal Aviation Administration. Larger agencies and agencies that receive lots of requests were also less likely to fill requests.

Agencies were also marginally less likely to fill sensitive requests ( $p < 0.11$ ), 10 to 11 percentage points less likely than baseline requests. It should be noted, however, that in cases where agencies have made a determination in a politically sensitive request, almost all have been made because the agency determines that they have “no records responsive” to the request. This

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<sup>21</sup> Models that use the number of layers between the FOIA office and the closest appointee, show a similar pattern although the estimates are less precise. As the FOIA officers get closer to appointees, the FOIA office is less likely to fill a request. We cannot use this measure to evaluate confirmation time because we do not have data on cases where we have no respondent to locate in the organization chart. See Appendix C.

means that the politically sensitive requests that have been filled have come from agencies that find them easy to fill. There are very few cases, by contrast where agencies have responded to a baseline requests with a “no records” response.

Whether or not a FOIA office responded to a request after 1 month is only one measure of responsiveness since some offices respond more quickly than others. Table 2 includes estimates from hazard models of the time it took for agencies to confirm or fill FOIA requests.<sup>22</sup> A negative coefficient indicates that it took agencies a greater number of days to respond to the FOIA requests because an increase in politicization decreases the “hazard” of a response. The coefficients indicate that more politicized agencies and FOIA offices take longer to respond to requests. The higher the percentage of appointees, the lower the hazards, and the longer the time it takes to fill requests.<sup>23</sup> Substantively, increasing the percentage of agency employees that are appointed by 1 percentage point is estimated to increase the average FOIA response time by 1-3 days. This is further evidence that those agencies with features that presumably create political accountability may make agencies less responsive to the public and therefore less democratically accountable.

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<sup>22</sup> Since the hazard rate should be increasing in time, we estimate Weibull models. When we graph the hazard rate non-parametrically, the hazard rate actually appears to be non-monotonic, increasing initially before decreasing. Our expectation, however, is that this pattern is unlikely to reflect the true underlying hazard rate and it will look different once data collection is completed. It should be noted that the results are not sensitive to the specification of the error density.

<sup>23</sup> The closer the FOIA office is to an appointee (the fewer the number of layers), the lower the hazard of a response, and the longer it takes for the agency to respond to FOIA requests. Decreasing the number of layers between the FOIA officer and an appointee by one layer is estimated to delay FOIA requests by 2-3 days. See Appendix C.

**Table 2. Hazard Models of FOIA Response Times**

	Confirm		Fill	
	(Coef.)	(S.E.)	(Coef.)	(S.E.)
<i>Politicization</i>				
(Appointees/Employees)*100	-0.08**	0.03	-0.10**	0.03
<i>Agency Characteristics</i>				
EOP (0,1)	0.57	0.47	0.77	0.52
Cabinet (0,1)	0.06	0.22	0.55**	0.27
Ln(Agency Employment)	0.02	0.08	-0.18**	0.09
<i>FOIA Office Details</i>				
Ln(Number of FOIA Requests FY 2010)	-0.08	0.06	-0.16*	0.08
#FOIA Staff FY 2010	-0.00	0.00	0.00	0.00
Politically Sensitive Request (0,1)	-0.17	0.16	-0.26	0.20
Constant	-3.94**	0.48	-2.78**	0.54
N	222		222	
LR Test (7df)	24.34		42.84	

Finally, Table 3 includes estimates of response quality, whether or not an agency claimed exemptions in filling the request or otherwise produced an inferior response to the request. These estimates are based upon fewer cases since they include only those cases that have generated a response.<sup>24</sup> The results here are more mixed. The coefficients, while less precise ( $p < 0.16$ ), generally suggest that more politicized offices are more likely to claim exemptions. Substantively, the estimates suggest that a 1 percentage point increase in the number of appointees in an agency increases the number of exemptions by .01. Since the overall expected number of exemptions is .11, this is about a 9% increase. We cannot reject the null that more politicized agencies are no more likely to produce a poor response.

<sup>24</sup> Indeed, the models estimated using the number of layers between FOIA officer and the nearest appointee includes only 36 cases.

**Table 3. Models of FOIA Response Quality**

	Exemptions		Poor Response	
	(Coef.)	(S.E.)	(Coef.)	(S.E.)
<i>Politicization</i>				
(Appointees/Employees)*100	0.08	0.06	-0.00	0.09
<i>Agency Characteristics</i>				
EOP (0,1)	0.94	0.82	0.39	1.28
Cabinet (0,1)	-0.88	0.69	-0.74	0.85
Ln(Agency Employment)	0.49**	0.23	-0.15	0.24
<i>FOIA Office Details</i>				
Ln(Number of FOIA Requests FY 2010)	-0.09	0.20	0.38*	0.21
#FOIA Staff FY 2010	-0.01	0.01	-0.00	0.01
Politically Sensitive Request (0,1)	-1.54**	0.63	0.64	0.55
Constant	-4.04**	1.36	-2.81**	1.24
N	103		103	
LR Test (7df)	16.47		7.06	

Exemptions model estimated as a Poisson model. Poor response model estimated as a logit model. We also estimated a negative binomial regression and could not reject null that  $\alpha=0$ .

In total, the simple analysis with controls suggests a robust relationship between whether or not the agency has the features we associate with political accountability and a lack of responsiveness to FOIA requests. More politicized agencies are less likely to respond and they respond more slowly. There is also (weaker) evidence that these agencies are more likely to claim exemptions. There is, however, no evidence that the quality of responses from the more politicized agencies is poorer.

#### *Experimental Analysis*

One difficulty with the simple analysis is that there is a significant amount of variation among agencies that can explain variation in FOIA responses that has little to do with political accountability. In the previous section, we sought to account for these confounding factors by

including controls in model estimation. A more effective means of accounting for this variation is to analyze the difference in response times between baseline and politically sensitive requests. Specifically, is the difference in the time to confirmation between baseline and politically sensitive requests larger for more politicized agencies?

In Table 4 we report the difference in the average time it takes to confirm and fill requests by whether or not the agency is politicized (defined as whether the agency is at or above the 75<sup>th</sup> percentile in its percentage of employees that are appointees).<sup>25</sup> Sensitive requests take no longer to confirm but they do take longer to fill. Politicized agencies are slower to confirm and fill both baseline and sensitive requests. More importantly, however, the differences-in-differences is in the expected direction. More politicized agencies take proportionately longer with politically sensitive requests, precisely the kinds of requests that are most important for democratic accountability.

Some caution should be taken in interpreting these findings, however, given the limited number of cases and the lack of variance in the time to confirmation and filling of requests. We cannot reject the null that the differences between more and less politicized agencies are 0. Still, the evidence suggests that more politicized agencies are slower to confirm and slower to fill requests and our expectation is that this effect will emerge more clearly as we allow more data to come in.

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<sup>25</sup> We can also look at the difference in differences of whether or not a request has been confirmed or filled rather than the time. More politicized agencies have lower average percentages of confirming (-0.13 vs. -0.03) or filling a request (-0.11 vs. -0.08).

**Table 4. Difference-in-Differences Analysis**

Less Politicized Agencies <i>k</i>	More Politicized Agencies <i>j</i>	Difference in Differences
$\Delta \#days_k = \# \text{ days to confirm treatment request} - \# \text{ days to fill baseline request}$ <b>0.0 (1.01)</b>	$\Delta \#days_j = \# \text{ days to confirm treatment request}_j - \# \text{ days to fill baseline request}_j$ <b>1.8 (1.38)</b>	Is $\Delta \#days_k = \Delta \#days_j$ statistically distinguishable? <b>1.8 (1.71)</b>
$\Delta \#days_k = \# \text{ days to fill treatment request} - \# \text{ days to fill baseline request}$ <b>0.94 (0.96)</b>	$\Delta \#days_j = \# \text{ days to fill treatment request}_j - \# \text{ days to fill baseline request}_j$ <b>1.18 (1.44)</b>	Is $\Delta \#days_k = \Delta \#days_j$ statistically distinguishable? <b>0.24 (1.73)</b>

Welch's T-Test to allow for heteroskedasticity. Standard Errors in parentheses.

The preliminary nature of this analysis makes it less likely that we will be able to distinguish between more and less politicized agencies. The data collected in the first month generally only allow for a simple analysis of the FOIA responses due to the nature of the responses we have received to sensitive requests. In cases where agencies have filled or responded to a politically sensitive request, the agencies usually have responded because they have “no records responsive” to the request. That is, they have no cases where appointees reviewed FOIA requests, which we asked for in our sensitive request. The outstanding sensitive requests are systematically more likely to be cases where appointees have reviewed FOIA requests and filling the request will take longer. The differences between the baseline and politically sensitive requests should grow over time after all of the easy “no records” responses have been received.

## DISCUSSION AND CONCLUSION

In this paper we have called into question a one-size-fits-all deference from the judiciary to agencies, at least to the extent that it is justified by agencies' greater democratic accountability

as compared to the courts. We have further shown that, counterintuitively, the structures designed to increase agencies' political accountability correlate with decreased direct democratic accountability. Agencies with more appointees as a percentage of all employees are slower to respond, are slower to fill requests, and give less complete responses than their counterparts with fewer appointees as a percentage of all employees. These results are robust to several specifications, and as we receive more responses to our requests, we anticipate that our findings will persist.

Our argument is limited: agency accountability is only one rationale for judicial deference to agency decisions. Agency expertise is the other major rationale for judicial deference, and we do not question it here.<sup>26</sup> Similarly, we recognize that the agency role in providing information is only one type of agency role, fitting in a broader context of agency activities, primary of which are rulemaking and adjudication. Our measure imperfectly captures the accountability of agencies when acting in the roles of rulemaking and adjudication. Our findings show that there is variation in direct agency accountability to the people, and it should not be ignored, or assumed not to transfer to the agency roles more often examined by courts. If an agency is unaccountable in the role that is most directly associated with citizen contact, might it also be unaccountable in rulemaking or adjudication? The possibility remains, and it is highlighted by our findings.

But what does the empirical relationship between politicization and agency responsiveness to FOIA requests imply for democratic accountability? Is it possible that FOIA offices are being *more* democratically accountable by not responding generously to FOIA requests? Indeed, there is a long literature that describes how non-democratic institutions (e.g.,

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<sup>26</sup> Nor do we question the accountability challenges that arise from agencies' greater access to information. See Gailmard and Patty, forthcoming.

courts, professional civil service) are necessary for democracy to flourish (see, e.g., Stephenson 2008). Agencies may be more democratically accountable, for example, by being more careful with requests that involve national security or raise privacy concerns. However, few of our requests had any connection to national security or presented real privacy concerns (although this is clearly a subject of disagreement given the exemptions claimed by some agencies). We submitted requests that were either innocuous or politically sensitive but generally not a danger to national security or privacy. They were the kinds of requests that generate information useful to citizens trying to figure out how agencies are making decisions. This is particularly the case for politically sensitive requests. They are those most important for democratic accountability since information about what elected officials are monitoring within agencies and what they are telling agencies to do is precisely the kind of information voters need to hold government accountable. Yet, in more politicized agencies this information was released less often and more slowly and with more exemptions.

More generally, it is hard to understand how agencies can be more democratically accountable, in the form courts understand it, by being less responsive to citizen requests for simple and uncontroversial information. Agencies are less democratically accountable when they refuse to fill requests, are slower to fill requests, provide less information, and make more mistakes in filling requests. The presumption in the Freedom of Information Act is toward the release of information, yet the agencies designed to be *politically* accountable appear to deviate most from this presumption, failing to live up to the *democratic* accountability that provides an important rationale for judicial deference.

President Obama pledged to provide a more open government and pledged to make FOIA policies more open. Yet this study shows that the structures that any president relies upon for

political responsiveness correlate with less openness in government, and weaker FOIA responsiveness in particular. More politicized offices are not more open and transparent, they are less open and transparent.

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## Appendix A

Below is a list of all the agencies we included in our initial list, which we obtained from the Department of Justice. Offices with one asterisk (\*) were not included in the letters that went to the Offices of the Inspectors General, because they lacked a stand-alone OIG. Agencies with a double asterisk (\*\*) were excluded from all requests.

Department of Agriculture	United States Southern Command FOIA Requester Service Center**
Department of Commerce	United States Strategic Command FOIA Requester Service Center**
National Oceanic and Atmospheric Administration*	United States Transportation Command FOIA Requester Service Center**
Department of Defense*	Department of Education
Air Force	Department of Energy
Army	Department of Health and Human Services Centers for Medicare & Medicaid Services*
Defense Commissary Agency (DeCA)	Food and Drug Administration*
Defense Contract Audit Agency*	National Institutes of Health*
Defense Contract Management Agency*	Public Health Service*
Defense Finance and Accounting Service*	Department of Homeland Security*
Defense Information Systems Agency	Bureau of Customs and Border Protection*
Defense Intelligence Agency	United States Citizenship and Immigration Services*
Defense Logistics Agency	United States Coast Guard*
Defense Security Service	Federal Emergency Management Agency*
Defense Technical Information Center*	Federal Law Enforcement Training Center*
Defense Threat Reduction Agency*	United States Immigration and Customs Enforcement*
Department of Defense Education Activity	DHS Office of Inspector General**
Marine Corps	United States Secret Service*
Missile Defense Agency*	Transportation Security Administration*
National Geospatial-Intelligence Agency	US-VISIT**
National Guard Bureau/JA-FOIA*	Department of Housing and Urban Development
National Reconnaissance Office	Department of the Interior
National Security Agency	Department of Justice
Navy	Department of Labor
Department of Defense Office of the Inspector General**	Department of State
Office of the Secretary of Defense and Joint Staff*	Department of Transportation
TRICARE Management Activity*	Federal Aviation Administration*
United States Africa Command FOIA Requester Service Center**	Department of the Treasury
United States Central Command FOIA Requester Service Center**	Comptroller of the Currency*
United States European Command FOIA Requester Service Center**	Internal Revenue Service*
United States Joint Forces Command FOIA Requester Service Center**	Office of Thrift Supervision*
United States Northern Command FOIA Requester Service Center**	Department of Veterans Affairs
United States Pacific Command FOIA Requester Service Center**	Agency for International Development
United States Special Operations Command FOIA Requester Service Center**	American Battle Monuments Commission*
	Amtrak (National Railroad Passenger Corporation)*
	Broadcasting Board of Governors*

Central Intelligence Agency	Millennium Challenge Corporation*
Chemical Safety and Hazard Investigation Board*	National Aeronautics and Space Administration
Commission on Civil Rights*	National Archives and Records Administration
Committee for Purchase from People who Are Blind or Severely Disabled*	National Capital Planning Commission*
Commodity Futures Trading Commission	National Credit Union Administration
Consumer Product Safety Commission	National Endowment for the Arts
Corporation for National Service	National Endowment for the Humanities
Court Services and Offender Supervision Agency*	National Indian Gaming Commission*
Defense Nuclear Facilities Safety Board*	National Labor Relations Board
Environmental Protection Agency	National Mediation Board
Equal Employment Opportunity Commission	National Science Foundation
Council on Environmental Quality*	National Transportation Safety Board*
Office of Management and Budget*	Nuclear Regulatory Commission
Office of National Drug Control Policy*	Occupational Safety and Health Review Commission*
Office of Science and Technology Policy*	Office of the Director of National Intelligence
Office of the United States Trade Representative*	Office of Government Ethics*
Export-Import Bank	Office of Navajo and Hopi Indian Relocation*
Farm Credit Administration	Office of Personnel Management
Farm Credit System Insurance Corporation*	Office of Special Counsel
Federal Communications Commission	Overseas Private Investment Corporation
Federal Deposit Insurance Corporation	Peace Corps
Federal Election Commission	Pension Benefit Guaranty Corporation
Federal Energy Regulatory Commission*	Postal Regulatory Commission
Federal Financial Institutions Examination Council*	Railroad Retirement Board
Federal Housing Finance Agency	Securities and Exchange Commission
Federal Labor Relations Authority	Selective Service System*
Federal Maritime Commission	Small Business Administration
Federal Mediation and Conciliation Service*	Social Security Administration
Federal Mine Safety and Health Review Commission*	Special Inspector General for Iraq Reconstruction*
Federal Open Market Committee**	Surface Transportation Board*
Federal Reserve System	Tennessee Valley Authority
Federal Retirement Thrift Investment Board*	United States African Development Foundation*
Federal Trade Commission	United States Copyright Office*
General Services Administration	United States International Boundary and Water Commission*
Institute of Museum and Library Services*	United States International Trade Commission
Inter-American Foundation*	United States Postal Service
Legal Services Corporation	United States Trade and Development Agency*
Merit Systems Protection Board	

## Appendix B

In addition to the requests that we made to the agencies' FOIA offices, in a second wave of letters, we sent sensitive and baseline requests targeting other parts of the agencies. Below are example letters that we sent to target the political liaison's office, human resources office, and office of inspector general.

[BASELINE, POLITICAL LIAISON]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the following sets of records from the Department of Agriculture:*

- A list of reports that the Agency made to Congress in 2010 that were mandated in statute and to whom they were sent (e.g. House/Senate committees and subcommittees).*
- A list of the House and Senate committees and subcommittees that heard testimony from agency officials in 2010.*

*If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. The information received will be used in an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [jennifer.selin@gmail.com](mailto:jennifer.selin@gmail.com).*

*Sincerely,*

*Jennifer Selin  
803 Bracken Trail  
Nashville, TN 37214*

[SENSITIVE, POLITICAL LIAISON]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the below-listed records from the Department of Agriculture. If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. The information I receive will be used in an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [jennifer.selin@gmail.com](mailto:jennifer.selin@gmail.com).*

*Sincerely,*

*Jennifer Selin  
803 Bracken Trail  
Nashville, TN 37214*

***Requested records:*** *A copy of all written communications from the agency to the Speaker of the House, John Boehner (R-OH), or Chair of the House Committee on Oversight and Government Reform, Darrell Issa (R-CA), between January 3, 2011 and May 15, 2011.*

[BASELINE, HUMAN RESOURCES]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the following set of records from the Department of Agriculture.*

- A list of all appointees (i.e., personnel appointed as a Senate-confirmed, non-career member of the Senior Executive Service, Schedule C appointee) serving in the agency between January 20, 2001 and May 15, 2011. Please include in the list the title, dates of service, and appointment authority for each appointee (Senate-confirmed, non-career member of the Senior Executive Service, Schedule C appointee). If a person serves in more than one appointed position in the agency during this period, please list each position separately.*

*If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. This information is for an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [gbemende.johnson@gmail.com](mailto:gbemende.johnson@gmail.com)*

*Sincerely,*

*Gbemende Johnson  
920 Woodmont Blvd. Apt. S-11  
Nashville, TN 37204*

[SENSITIVE, HUMAN RESOURCES]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of three related sets of records from the Department of Agriculture.*

- Specifically, I am requesting copies of the resumes (or materials otherwise justifying appropriate pay levels for Schedule C appointees) of all persons appointed to a Schedule C position from August 15, 2009 to May 15, 2011.*
- I am requesting copies of the resumes (or materials otherwise justifying appropriate pay levels for non-career Senior Executive Service employees) of all persons employed by the agency as non-career members of the Senior Executive Service employed from August 15, 2009 to May 15, 2011.*
- Finally, I am requesting copies of the resumes of all persons employed as Senate-confirmed presidential appointments by the agency from August 15, 2009 to May 15, 2011.*

*If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. It will be used in an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [gbemende.johnson@gmail.com](mailto:gbemende.johnson@gmail.com).*

*Sincerely,*

*Gbemende Johnson  
920 Woodmont Blvd. Apt. S-11  
Nashville, TN 37204*

[BASELINE, OIG]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the following sets of records from the Department of Agriculture:*

- *A list of the investigations the Department of Agriculture Office of Inspector General closed in calendar year 2010.*
- *The date that the Department of Agriculture whistleblower hotline became operational, if a hotline exists.*
- *The number of full-time employees working in the Department of Agriculture Office of the Inspector General at the end of calendar year 2010.*

*If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. The information I receive will be used in an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [evanhaglund@yahoo.com](mailto:evanhaglund@yahoo.com).*

*Sincerely,*

*Evan Haglund  
2609 Acklen Ave  
Nashville, TN 37212*

[SENSITIVE, VERSION 1, OIG]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the below-listed sets of records from the Department of Agriculture. If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. The information received will be used for an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [evanhaglund@yahoo.com](mailto:evanhaglund@yahoo.com).*

*Sincerely,*

*Evan Haglund  
2609 Acklen Ave  
Nashville, TN 37212*

***Requested Records:***

- *A list of unique complaints or requests for investigation received by the Department of Agriculture Office of Inspector General in every calendar year between 2000 and 2010, and for each complaint:*
  - *the date of each complaint,*
  - *the allegation(s) in each complaint,*
  - *the resolution of the complaint (prosecution, referral for administrative action, referral to another agency, deemed to be lacking merit, or other resolutions),*
  - *the time to resolve each complaint, and*
  - *whether the source of the complaint was internal, where internal sources are defined as agency employees or federal contractors working for the agency.*

[SENSITIVE, VERSION 2, OIG]

*To Whom It May Concern:*

*Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting copies of the below-listed sets of records from the Department of Agriculture. If there are any fees for searching or copying the records, please let me know before you fill my request. Or, please supply the records without informing me of the cost if the fees do not exceed \$100, which I agree to pay. This request is for educational purposes. The information received will be used for an academic research project at Vanderbilt University.*

*If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information. Notify me of appeal procedures available under the law.*

*If you have any questions about handling this request, you may email me at [evanhaglund@yahoo.com](mailto:evanhaglund@yahoo.com).*

*Sincerely,*

*Evan Haglund  
2609 Acklen Ave  
Nashville, TN 37212*

***Requested Records:***

- A list of meetings in calendar year 2010 between employees of the Department of Agriculture Office of the Inspector General and White House officials.*
- A list of meetings in calendar year 2010 between employees of the Department of Agriculture Office of the Inspector General and White House officials where ongoing investigations were discussed.*
- A list of meetings in calendar year 2010 between employees of the Department of Agriculture Office of the Inspector General and White House officials where completed investigations were discussed.*

**Appendix C. Auxiliary Models Using the Number of Layers in the Organization Chart between FOIA Signatory and the Nearest Appointee as the Measure of Politicization**

**Table A1. Logit Models of FOIA Responses: Influence of Politicization on Confirmation and Filling of Requests**

	Fill	
<i>Politicization</i>		
Number of Layers Bet. FOIA and Appointee	1.17*	0.64
<i>Agency Characteristics</i>		
Ln(Agency Employment)	-0.65**	0.29
<i>FOIA Office Details</i>		
Ln(Number of FOIA Requests FY 2010)	0.95**	0.45
#FOIA Staff FY 2010	-0.12**	0.05
Politically Sensitive Request (0,1)	0.25	0.76
Constant	0.04	1.61
N	56	
LR Test (7df)	27.65	

Note: We exclude agency location indicators (EOP, Cabinet) because of small number of cases.

**Table A2. Hazard Models of FOIA Response Times**

	Confirm		Fill	
<i>Politicization</i>				
Number of Layers Bet. FOIA and Appointee	0.30**	0.10	0.20*	0.10
<i>Agency Characteristics</i>				
Ln(Agency Employment)	0.07	0.10	-0.22*	0.12
<i>FOIA Office Details</i>				
Ln(Number of FOIA Requests FY 2010)	-0.05	0.14	0.40**	0.19
#FOIA Staff FY 2010	0.01	0.01	-0.07**	0.03
Politically Sensitive Request (0,1)	-0.03	0.27	-0.04	0.33
Constant	-7.20**	0.99	-5.02**	0.98
N	56		56	
LR Test (7df)	12.33		26.15	

Note: We exclude agency location indicators (EOP, Cabinet) because of small number of cases.

**Table A3. Models of FOIA Response Quality**

	Exemptions		Poor Response	
<i>Politicization</i>				
Number of Layers Bet. FOIA and Appointee	0.21	0.24	0.17	0.27
<i>Agency Characteristics</i>				
Ln(Agency Employment)	0.21	0.24	-0.18	0.29
<i>FOIA Office Details</i>				
Ln(Number of FOIA Requests FY 2010)	0.42	0.46	0.69*	0.42
#FOIA Staff FY 2010	-0.13	0.13	-0.06	0.09
Politically Sensitive Request (0,1)	-1.93*	1.08	0.32	0.80
Constant	-4.34*	2.36	-3.49**	1.93
N	37		37	
LR Test (7df)	8.31		3.95	

Exemptions model run as a Poisson. Poor response model run as a logit.