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DEFERRING TO SECRECY

MARGARET B. KWOKA*

Abstract: In prescribing de novo judicial review of agencies' decisions to withhold requested information from the public under the Freedom of Information Act (FOIA), Congress deliberately and radically departed from the typical deferential treatment courts are required to give to agencies. Nonetheless, empirical studies demonstrate that the de novo review standard on the books in FOIA cases is not the standard used in practice. In fact, despite being subject to the stringent de novo standard, agencies' FOIA decisions are upheld at a substantially higher rate than agency decisions that are entitled to deferential review. This Article posits that although courts recite the appropriate standard in FOIA cases, they have created a collection of practices unique to FOIA cases that have the effect of deferring to the government's secrecy positions. First, in some cases, courts expressly defer to particular representations made by the government, even though these representations are themselves crucial to the overall determination of the legality of the withholding. Second, in every FOIA case, certain procedural practices have become part of the body of case law governing how FOIA cases are adjudicated, and these practices stack the deck in favor of the government. This Article concludes that these procedural practices, which are departures from the federal procedural system's trans-substantive design, may be the more pernicious of the deference doctrines under FOIA, as they hide the true nature of the rulings, make it more difficult for the political branches to respond, and diminish public confidence in the judiciary.

INTRODUCTION

Administrative agencies are charged with carrying out the vast majority of business of the federal government. Their activities range from promulgating regulations,¹ to adjudicating individual claims for bene-

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¹ See Administrative Procedure Act, 5 U.S.C. § 553 (2006) (explaining procedures for agency rulemaking).

fits,² to providing public works and services,³ to licensing the rights to engage in various activities,⁴ and beyond. Almost every agency decision affects the public in some perceptible way. As a result, the legitimacy, correctness, and lawfulness of nearly every agency action has the potential to be the subject of a lawsuit.

Despite the availability of judicial review for most agency decisions, almost all agency actions are entitled to deference from the courts.⁵ Rationales for deference to agency actions include agency expertise in the subject matter of the decision, a desire to avoid courts duplicating the efforts of the agency, and the concern, rooted in the separation of powers, that courts not unduly interfere with the political branches of government.⁶ Moreover, deference to the agencies is not limited to their findings of fact; unlike appellate review of trial court decisions that do not arise from agencies, courts reviewing agency actions typically defer to the agency's position even on questions of law.⁷

In stark contrast to the vast majority of standards of judicial review applied in administrative law, judges are required to exercise *de novo* review over agency decisions to withhold government records under the Freedom of Information Act (FOIA).⁸ The legislative histories of the standards of review articulated in FOIA and the Administrative Procedure Act (APA) demonstrate that Congress acted deliberately.⁹ As one scholar put it, "It is doubtful that Congress wants scope of review to be an irrelevant labeling exercise."¹⁰ A FOIA withholding is different from other agency actions in important ways: it is one of the few administrative actions in which the agency's own illegitimate self-interest is often at stake, it is uniquely about the public's oversight right over the

² See, e.g., 42 U.S.C. § 421(b) (2006) (providing for a hearing before the Social Security Administration regarding entitlement to social security disability benefits).

³ The services offered by government are too numerous to catalog reasonably, but they include, of course, national security, public works projects, subsidies, and many more. See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT (2012).

⁴ For example, the Federal Communications Commission licenses the rights to broadcast television and radio stations. See *Licensing*, FED. COMM. COMMISSION, <http://www.fcc.gov/topic/licensing> (last visited Jan. 11, 2013).

⁵ See *infra* notes 25–50 and accompanying text.

⁶ See *infra* notes 51–78 and accompanying text.

⁷ See *infra* notes 25–50 and accompanying text.

⁸ 5 U.S.C. § 552(a)(4)(B) (2006).

⁹ See *infra* notes 79–105 and accompanying text.

¹⁰ Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682 (2002).

administrative state, and Congress intended judges to act as protectors of the public interest.¹¹

Despite Congress's clear intentions, commentators have observed that judicial review of agency FOIA decisions is less than vigorous.¹² Most notably, Professor Paul Verkuil's empirical study suggests that FOIA requesters who challenge denials in court fail to get the benefit of the searching review provided for by Congress.¹³ He reports a ninety percent affirmance rate in FOIA cases, which is higher than the affirmance rate for comparable administrative decisions supposedly reviewed with greater deference.¹⁴ Verkuil labels judicial review of FOIA decisions "anemic," and attributes this outcome to a "black box of inarticulate factors" that influence courts' decision making.¹⁵

Others have suggested various subjective motives that might underlie judicial decisions in this area, including hostility to FOIA as a transparency tool, unsympathetic plaintiffs, and overconfidence in the government's assessments of harms associated with releasing documents such as those related to national security.¹⁶ Rather than probe judges' subjective intentions or motivations, this Article theorizes a system of judicial practices that amount to deferential treatment and account for the astronomical affirmance rate, and in so doing, fills in a portion of the "black box" of judicial decision making in FOIA cases. This Article posits that, contrary to Congress's purpose, the judiciary

¹¹ See *infra* notes 106–119 and accompanying text.

¹² See generally Meredith Fuchs, *Judging Secrets: The Role That Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006) (arguing that courts overly defer to agencies' national security claims); Verkuil, *supra* note 10 (evaluating the affirmance rate in FOIA cases, reviewed under a *de novo* standard, as compared with the affirmance rate in Social Security disability cases, which are reviewed under a deferential standard); Nathan Slegers, Comment, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209 (2006) (noting various instances in which courts expressly depart from the *de novo* standard of review prescribed in the statute).

¹³ Verkuil, *supra* note 10, at 730. As Verkuil states, "The challenge is to make district judges more curious about these cases so that they might look behind agency affidavits." *Id.*

¹⁴ *Id.* at 706, 713 (reporting an approximately ten percent reversal rate in FOIA cases during the ten-year period from 1990 to 1999, which was "closer to the hypothesized arbitrary and capricious standard" and fell far below the over fifty percent reversal rate in Social Security disability cases).

¹⁵ *Id.* at 718.

¹⁶ See, e.g., Fuchs, *supra* note 12, at 163 (describing courts' reluctance "to probe agency explanations" for withholding national security information); James T. O'Reilly, "Access to Records" Versus "Access to Evil." *Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 KAN. J.L. & PUB. POL'Y 559, 567 (2003) (arguing that the particular requester's motives factor into judicial decision making about release); Verkuil, *supra* note 10, at 715–16 (citing courts' "skepticism" toward FOIA, if not "resistance").

has created a de facto system of deference in its judicial review of FOIA cases, while continuing to pay lip service to the de novo standard of review articulated in the statute. This deference is two-pronged. First, in some instances, the judiciary expressly has adopted doctrines of deference for particular types of secrecy decisions, not rooted in statutory or other authority, based on its own view of the correct decisionmaker in a given context.¹⁷ Second, courts have adopted procedural maneuvers unique to FOIA cases that frustrate challenges to agencies' secrecy decisions.¹⁸

Part I demonstrates that Congress made a deliberate and reasoned choice to require courts to engage in a more critical review of FOIA decisions than other agency actions.¹⁹ Part II surveys the empirical evidence on the effect of the standard of review on the outcomes of administrative cases.²⁰ It documents that FOIA's affirmance rate is an outlier that cannot be explained by existing theories of litigation outcomes.²¹ Part III explains the gap between FOIA's stringent standard of review and high affirmance rate by theorizing a system of substantive and procedural deference that results in approval of agency secrecy decisions in FOIA cases.²² Part IV argues that not only is the courts' failure to respect the congressionally chosen standard of review troubling, but also that the courts' use of procedural devices to achieve that outcome poses particular problems for judicial transparency, public response, and the courts' legitimacy.²³ Finally, Part V concludes by providing potential responses to the courts' deference to secrecy.²⁴

I. PURPOSEFUL CONGRESSIONAL CHOICE

A. *Standards of Review of Agency Actions*

Judicial review of most agency actions is governed by the APA.²⁵ Although statutes specific to agencies or particular agency actions may provide otherwise,²⁶ the APA establishes default judicial review stan-

¹⁷ See *infra* notes 168–223 and accompanying text.

¹⁸ See *infra* notes 224–313 and accompanying text.

¹⁹ See *infra* notes 25–119 and accompanying text.

²⁰ See *infra* notes 120–165 and accompanying text.

²¹ See *infra* notes 120–165 and accompanying text.

²² See *infra* notes 166–313 and accompanying text.

²³ See *infra* notes 314–340 and accompanying text.

²⁴ See *infra* notes 341–353 and accompanying text.

²⁵ Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2006).

²⁶ See, e.g., Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 507–09 (2011).

dards providing that courts may review agency actions and set aside any findings or conclusions that are:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.²⁷

These seemingly straightforward standards have produced more confusion than clarity,²⁸ and determining how to apply these standards of review has generated lengthy and hair-splitting decisions.²⁹

The default standards operate differently depending on whether the question before the court is one of fact, law, or discretion.³⁰ By way of comparison, in the context of appellate review of trial court (rather than agency) decisions, facts found by a district court are reviewed for clear error by a court of appeals, discretionary decisions are reviewed for an abuse of that discretion, and legal questions are reviewed de

²⁷ 5 U.S.C. § 706.

²⁸ See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 153 (2010).

²⁹ See David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 530 (2011) (noting that it has “never been easy for courts to distinguish between questions of law, questions of fact, and mixed questions of law and fact, subsequently apply the right standard of review, and then finally perform a catchall review for arbitrariness”).

³⁰ As I describe the various standards that apply, I attempt only to describe the formal standards and their basic applications to show that the vast majority of administrative decisions are reviewed deferentially. I do not contend that all of these standards are different from one another in practice. Nor do I contend that these standards are clear in their application or justified either by the APA or administrative common law. I note only that the literature raises serious doubts about all of those questions. See, e.g., Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–84 (2010) (arguing that the judicial standard of deference to agency interpretations of ambiguous statutes, stemming from the 1984 Supreme Court case, *Chevron U.S.A. Inc. v. NRDC*, is unjustified, has unduly complicated judicial review, and has failed to effectuate its purpose); Zaring, *supra* note 28, at 166–67 (positing that the differing standards, in practice, amount to the same level of review).

novo.³¹ These familiar standards are founded on the precept that the district court is in the best position to view the evidence, find facts, and employ the most just exercise of discretion, whereas courts of appeals specialize in answering legal questions and unifying the law.³² As a result, appellate courts do not defer to trial courts on questions of law, but they do review findings of fact and discretionary decisions under these deferential standards.

Although agencies face tasks analogous to those of district courts, appellate courts reviewing agency decisions treat agency decisions differently. First, these familiar standards are inapplicable to judicial review of agency actions. Rather, the usual division between factual and discretionary decisions as the province of the initial decisionmaker, on the one hand, and legal questions as the province of the reviewing body, on the other, itself breaks down. Instead, in the agency context, some type of deference applies in almost all circumstances.

To begin, in reviewing formal agency proceedings subject to trial-like procedures under the APA, courts review findings of fact using the “substantial evidence” standard.³³ Factual findings made in informal proceedings are reviewed under the APA’s “arbitrary or capricious” standard.³⁴ Both of these standards are highly deferential. The U.S. Supreme Court has defined substantial evidence review as equivalent to an inquiry into whether there was sufficient evidence to support a jury verdict,³⁵ a notoriously deferential standard. Similarly, it has declared that arbitrary and capricious review is ultimately a narrow review.³⁶ Many lower courts, including the U.S. Court of Appeals for the D.C. Circuit,³⁷ have concluded that the two standards are identical.³⁸ As in

³¹ See, e.g., *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1207 (D.C. Cir. 2004); see also FED. R. CIV. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous.”).

³² See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436, 440 (2001) (noting that the purpose of de novo review is to allow appellate courts “to maintain control of, and to clarify, the legal principles” (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996))); *id.* at 440 (observing that standards of review may turn on considerations of “institutional competence”).

³³ 5 U.S.C. § 706(2)(E) (2006); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

³⁴ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³⁵ *Universal Camera*, 340 U.S. at 477.

³⁶ *Overton Park*, 401 U.S. at 416.

³⁷ *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984).

³⁸ See *Zaring*, *supra* note 28, at 166–67 (collecting cases). This view is shared by many academics. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (suggesting that there is no difference between

appellate review, initial factual findings are therefore given great deference in administrative review.

The APA also requires deference in reviewing agencies' discretionary decisions. The APA allows a court to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion,"³⁹ a standard that has been interpreted as an overarching requirement applying to all kinds of agency action, including discretionary decisions.⁴⁰ Even in the Supreme Court's decision requiring courts to examine a detailed list of facets of an agency's discretionary action, the Court acknowledged that the standard is "narrow and a court is not to substitute its judgment for that of the agency."⁴¹

As to legal interpretations, some agency determinations are completely unreviewable under the APA, either because Congress vested an agency with complete, unbounded discretion or because Congress specifically abolished review by statute.⁴² A complete lack of review is, of course, ultimate deference, as no agency decision can be overturned if review is unavailable.⁴³ Beyond unreviewable decisions, most of an agency's reviewable legal interpretations also get deferential review under judicially created doctrines. So-called "*Chevron* deference," requiring courts to uphold reasonable agency interpretations of ambiguous statutes, applies when agencies create binding interpretive rules implementing statutes they administer (the bulk of the statutes they interpret).⁴⁴ Agencies interpreting those statutes in guidelines or informal

the arbitrary and capricious standard and the substantial evidence test); Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1910 & n.6 (2009) (contending that the arbitrary and capricious and substantial evidence standards have been applied nearly identically).

³⁹ 5 U.S.C. § 706(2) (2006).

⁴⁰ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983).

⁴¹ *Id.* at 43.

⁴² See 5 U.S.C. § 701(a) ("This chapter applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."); *Overton Park*, 401 U.S. at 410 (describing matters as committed to agency discretion when "statutes are drawn in such broad terms that in a given case there is no law to apply"); see also *Heckler v. Chaney*, 470 U.S. 821, 830–32 (1985) (holding that an agency's refusal to take enforcement action is ordinarily committed to agency discretion).

⁴³ See Verkuil, *supra* note 10, at 689 (hypothesizing the affirmance rate of cases not subject to judicial review as 100 percent).

⁴⁴ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). This standard, known as "Step Two," is only reached if Congress's intent on the precise question is not ascertainable after "employing the traditional tools of statutory construction" to determine the statute's clear meaning. *Id.* at 843 n.9; see Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 702–11 (2007). Professor Peter Strauss

policies are likewise entitled to deference, under the nominally-less-deferential (but still not de novo) “*Skidmore* deference,” in which a court should defer if it finds the agency’s rationale persuasive.⁴⁵ Finally, an agency interpreting its own regulation is entitled to “*Auer* deference,” under which an agency’s interpretation of an ambiguous regulation is controlling unless “plainly erroneous or inconsistent with the regulation.”⁴⁶

In contrast to the pervasive deferential standards that apply to almost every conceivable type of agency action (albeit with varying articulations), de novo review is exceedingly rare.⁴⁷ It does, however, have some limited applications in administrative review. For example, the APA itself contemplates unusual situations under which de novo review applies, such as when the agency’s findings of fact were inadequate.⁴⁸ In addition, under the terms of *Chevron*, de novo review applies to an agency’s interpretation of the APA, the U.S. Constitution, or a statute it

has reconceptualized *Chevron* deference as “*Chevron* space,” connoting an “area within which an administrative agency has been statutorily empowered to act” with judges performing the function of referees ensuring the agency stays within those bounds rather than deciding what the agency should do within them. Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145 (2012).

⁴⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (noting that *Skidmore* held that informal agency interpretations such as letter rulings may merit some deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). There are competing views on whether *Skidmore* deference is really any deference at all. Professor Colin Diver has argued that the “weight” assigned to *any* advocate’s position is presumably dependent upon the factors outlined in *Skidmore*, and he has concluded that “[d]eference in this sense is no more than ‘courteous regard.’” Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985) (discussing *Skidmore*, 323 U.S. at 140). Recent empirical work, however, supports the notion that *Skidmore* deference has a more practical and deferential effect than Diver’s conceptualization would predict. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250–52, 1259 (2007); see also Strauss, *supra* note 44, at 1145 (arguing for *Skidmore* deference to be thought of instead as “*Skidmore* weight,” a term that more accurately reflects courts’ treatment of agency positions).

⁴⁶ *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

⁴⁷ Zaring, *supra* note 28, at 136, 160 (concluding that although “[s]ummarizing the doctrine of judicial review in administrative law is no easy task,” de novo review is not at “the heart of administrative law”).

⁴⁸ See 5 U.S.C. § 706(2)(F) (2006) (encompassing situations where fact-finding by the agency was inadequate and providing for de novo trial).

does not administer.⁴⁹ Thus, although some agency actions are reviewed de novo, deference to agency decisions is the norm.⁵⁰

B. *Origins of Deference to Agencies*

Although the deference afforded to agencies' legal interpretations is largely a creature of judicial doctrines, most of the deference courts give to agency decisions comes from Congress's choices made in enacting the APA.⁵¹ Specifically, the text of the APA mandates deference to agencies' factual findings and discretionary decisions.⁵² The legislative history reveals that although the APA was enacted precisely to check the growing power wielded by the administrative state, no serious proposal for administrative reform ever contained a powerful provision for a default de novo standard of judicial review. To the contrary, Congress intentionally created standards of review obligating judges to defer to most agency positions.⁵³

The APA came about largely as a reaction to the expanding administrative state during the New Deal.⁵⁴ The urgency for action regarding administrative procedure peaked in the late 1930s, primarily as a result of two events. First, before 1937, opponents of the New Deal could rely on the Supreme Court to routinely strike down President Franklin Delano Roosevelt's programs.⁵⁵ In 1937, however, the Court performed an

⁴⁹ See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); *Crowell v. Benson*, 285 U.S. 22, 46 (1932). For instance, any federal agency may be called upon to interpret Title VII of the Civil Rights Act of 1964, which applies to all federal agencies. See 42 U.S.C. § 2000e(a) (2006).

⁵⁰ Notably, Professor David Zaring has recently argued that the various standards under which agency actions are reviewed all amount to a version of a "reasonableness" standard and that under any standard of review, agency actions are upheld about two-thirds of the time. Zaring, *supra* note 28, at 137; see also *infra* notes 159–165 and accompanying text (describing Zaring's argument in more detail).

⁵¹ See 5 U.S.C. § 706. Although *Chevron* was a judicially created doctrine, Congress was aware of the direction courts were taking in deferring to agencies on questions of law and in 1981 considered, but did not pass, a law that would have encouraged courts to afford less deference to agencies on legal questions. See generally Ronald M. Levin, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355 (discussing the proposed Bumpers Amendment).

⁵² See 5 U.S.C. § 706. In addition, the APA mandates deference on legal questions to the extent that it provides for circumstances in which no review is available, which is an ultimate form of deference. See *id.* § 702.

⁵³ See *infra* notes 79–105 and accompanying text.

⁵⁴ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1559 (1996).

⁵⁵ *Id.* at 1568–69 (documenting the lack of legislative will to pass early proposals for administrative reform, such as the 1933 bill introduced by Senator Marvel Mills Logan).

about-face on the New Deal programs, upholding the federal government's power to enact program after program.⁵⁶ Accordingly, administrative reform became the primary way in which New Deal programs could be checked.⁵⁷ Second, the European dictators' growing power at the time fueled concerns about communist and totalitarian regimes and their potential threat to American democracy.⁵⁸ The growth of the administrative state was seen by some as antidemocratic and anticapitalist. For instance, an American Bar Association report decried "unfettered discretion to administrative agencies [as] 'a Marxian idea,'"⁵⁹ and one member of Congress argued that "[w]hen we allow Government bureaus to make rules that are tantamount to laws, and then permit no appeal from them, we are rapidly approaching the totalitarian state."⁶⁰ In sum, the routine survival of New Deal programs against court challenges and the fear that New Deal programs portended anticapitalist dictatorship made administrative reform a legislative priority.

In particular, judicial review of agency actions was seen as the ultimate check on the growing administrative state, and questions of scope of review became a central part of the debate. As described by one scholar, Senator Marvel Mills Logan, the proponent of an administrative procedure bill that nearly became law (it was passed by Congress in 1940 but was vetoed by President Roosevelt), explained that the "purpose [of the bill] was to enlarge the availability of judicial review of agency decisions."⁶¹ That bill put forth some of the strongest agency controls ever proposed⁶² and was viewed as a direct attack on the New

⁵⁶ Although known as the "switch in time that saved nine," one scholar has noted that Justice Owen Roberts switched his vote on the first of these cases before the court-packing plan had been announced, probably in response to President Roosevelt's electoral victory in 1936 and broad popular support for his programs, as well as legislative efforts to curtail the Court's judicial review powers. *Id.* at 1563; see *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁵⁷ Shepherd, *supra* note 54, at 1563–64 (observing that once the Supreme Court endorsed the New Deal programs, opponents of the New Deal turned to Congress to restrain the administrative state).

⁵⁸ *Id.* at 1581, 1593.

⁵⁹ *Id.* at 1591 (citing *Report of the Special Committee on Administrative Law*, 63 A.B.A. ANN. REP. 340 (1938)). President Roosevelt himself felt the need to respond to critics who viewed his growing power as akin to Adolf Hitler—he publicly stated, "I have no inclination to be a dictator." *Id.* at 1581.

⁶⁰ See *id.* at 1610 (quoting 86 CONG. REC. 4534 (1940) (statement of Rep. Michener)).

⁶¹ *Id.* at 1602, 1632.

⁶² For a graphic representation of the strength of the protections for individuals against the administrative state, see *id.* at 1619–20.

Deal.⁶³ Critics claimed that the bill would “tie up administrative agencies so completely that they would never get a chance to get any of their work done,”⁶⁴ and that it would allow “judges [to] substitute their views for those of the administrative officers.”⁶⁵ Yet even the most aggressive versions of the bill provided for deferential judicial review of agency actions,⁶⁶ *de novo* review was never on the table.⁶⁷

After multiple attempts to pass an administrative procedure reform bill failed, Congress temporarily abandoned the project with the outbreak of World War II.⁶⁸ The war itself, however, had the unanticipated consequence of arousing substantial public objection to the vast administrative state, as the public blamed war agencies for many of the inefficiencies and unfairness of wartime society.⁶⁹ Consequently, administrative reform was at the top of the legislative agenda when the new Congress opened in early 1945.⁷⁰ After some public debate, negotiations among Congress, agencies, and the Roosevelt and Truman administrations were conducted behind closed doors.⁷¹ These negotiations led to the bill that eventually became the APA.

The official legislative history, consciously scant because of the backdoor nature of the compromise that led to the APA’s passage,⁷² nonetheless explains that the judicial review provision of the APA was designed to “preserve[.]” the “basic exception of administrative discretion.”⁷³ It carried out this purpose by codifying the “substantial evidence” standard that had been used by the courts to review agency fact-

⁶³ Shepherd, *supra* note 54, at 1610. Particular programs and agencies, such as the National Labor Relations Board, were seen as primary targets. *Id.*

⁶⁴ *Id.* at 1600 (quoting 86 CONG. REC. 4654 (statement of Rep. Edelstein)).

⁶⁵ *Id.* at 1605 (quoting H.R. REP. NO. 1149, at 3 (1940)).

⁶⁶ For instance, the version of the bill originally passed by the House of Representatives allowed review of factual findings by agencies under the “clearly erroneous” standard, and the Senate struck that provision. *See id.* at 1621.

⁶⁷ The closest anyone might have come was an American Bar Association (ABA) proposal to permit a court to review evidence under the “preponderance of the evidence” standard, but that proposal was abandoned, even by the ABA. *Id.* at 1660.

⁶⁸ *Id.* at 1641.

⁶⁹ Shepherd, *supra* note 54, at 1642–43. In particular, the public challenged the Office of Price Administration and the Office of War Mobilization, which consumers and farmers criticized for failing to control inflation, problems with rationing and the unavailability of products, and issues with price controls. *Id.* at 1641–42.

⁷⁰ *See id.* at 1654.

⁷¹ *Id.* at 1661, 1655.

⁷² *Id.* at 1663.

⁷³ *Administrative Procedure: Hearings Before the H. Comm. on the Judiciary, 79th Cong.* 84 (1945) (statement of Carl McFarland, Chairman, ABA Special Comm. on Admin. Law).

finding.⁷⁴ Even those who complained that courts' application of the substantial evidence standard amounted to a rubber stamp on agency decisions did not propose *de novo* review.⁷⁵ Rather, competing proposals (ultimately rejected) would have mandated review that upheld agency action only if it was supported by the weight or preponderance of the evidence.⁷⁶ It was always intended, as the bill's Senate Report stated, that "[i]n the first instance . . . it [would] be the function of the agency to determine the sufficiency of the evidence upon which it acts."⁷⁷ The Report also suggested that it did not intend for the bill to "result in some undue impairment of a particular administrative function."⁷⁸

The legislative history thus demonstrates that despite a decade-long fight for administrative reform that would entail meaningful judicial review as a check on the growing administrative state, no serious proposal ever suggested that a default *de novo* review standard apply to all agency decisions. Despite concerns about the New Deal, President Roosevelt's amassing of power, and the growing fear of totalitarianism itself, judicial review was meant to be deferential to the agencies. This deference seems built into the idea of a useful administrative state, which would be undermined if the judiciary fully replicated all agency efforts.

C. FOIA's *De Novo* Break from History

FOIA's judicial review provision parts ways with the default standards of review of agency actions. First, FOIA's judicial review provision expressly rejects the deferential treatment the APA mandates to agencies' factual and discretionary determinations.⁷⁹ Second, FOIA's legislative history reveals Congress's very different concerns regarding the need for judicial review under FOIA than under the APA.⁸⁰

⁷⁴ *Id.*

⁷⁵ *See id.* (statement of Rep. Hatton W. Sumners, Chairman, H. Comm. on the Judiciary) (noting concern that under the substantial evidence standard, "courts look around to see if there is any sort of evidence to support the determination of the agency and, if it does find some evidence to support the determination of the agency, the determination of the agency is upheld").

⁷⁶ *See id.* (suggesting instead that the courts "ought to consider the whole field and weight of the evidence"). This standard is akin to the standard used by district courts to grant a new trial. *See* FED. R. CIV. P. 59.

⁷⁷ *See* S. REP. NO. 79-752, at 216-17 (1945).

⁷⁸ *Id.*

⁷⁹ 5 U.S.C. § 552 (a) (4) (B) (2006).

⁸⁰ *See infra* notes 81-105 and accompanying text.

As originally enacted, the APA included a public information access provision, which provided, in its entirety: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."⁸¹ This provision, however, proved to function more as a "withholding [statute] than as a disclosure statute," and was "cited as statutory authority for the withholding of virtually any piece of information" that an agency did not want to disclose.⁸² In addition, the law provided no judicial review.⁸³ "Above all," one House Report decried, "there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records."⁸⁴

In 1966, FOIA was signed into law.⁸⁵ It abolished the vague APA standards for releasing public information, and in their stead, created the now-familiar nine enumerated categories of records that are exempt from disclosure.⁸⁶ It also created a formal request-and-response process with deadlines and rights to administrative appeal.⁸⁷ FOIA also included a judicial review provision,⁸⁸ which was seen as one of its most important provisions. As one member of Congress said at the time, "for the first time in the Government's history, a citizen will no longer be at the end of the road when his request for a Government document arbitrarily has been turned down by some bureaucrat."⁸⁹

⁸¹ S. REP. NO. 88-1219, at 10 (1964).

⁸² *Id.* at 8, 10; *see also* S. REP. NO. 89-813, at 5 (1965) (noting that one of the deficiencies in the present statute is that "there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to withhold information").

⁸³ S. REP. NO. 88-1219, at 10 (stating that "there [was] no remedy . . . [for the] wrongful withholding of information . . . by Government officials").

⁸⁴ H.R. REP. NO. 89-1497, at 5 (1966).

⁸⁵ *See* Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

⁸⁶ 5 U.S.C. § 552(b)(1)–(9). These exemptions cover records that are (1) properly classified under an executive order, (2) related solely to internal personnel rules, (3) exempt from disclosure by another statute, (4) trade secret or confidential commercial information, (5) not discoverable in ordinary civil litigation against the agency, (6) would cause an unwarranted invasion of personal privacy, (7) fall under certain categories of law enforcement records, (8) pertain to certain banking matters, and (9) concern the location of wells. *Id.*

⁸⁷ *Id.* § 552(a)(3)(A) (providing for request and response); *id.* § 552(a)(6) (providing deadlines for agency response and administrative appeal).

⁸⁸ *Id.* § 552(a)(4)(B).

⁸⁹ 112 CONG. REC. 13,659 (1966) (statement of Rep. Gallagher) ("One of the most important provisions of the bill is subsection C, which grants authority to the Federal district courts to order production of records improperly withheld. This means that for the first time in the Government's history, a citizen will no longer be at the end of the road when

Unlike the APA's standards of review, however, FOIA's judicial review provision requires *de novo* review of all agency decisions to withhold requested records.⁹⁰ Given the APA standards of review, the choice was hardly foreordained. Rather, it was seen as a break from the norm that was integral to FOIA's success: "That the proceeding must be *de novo* is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and [to] prevent it from becoming meaningless judicial sanctioning of agency discretion."⁹¹ Federal courts have concluded that this provision "reflects Congress's intent to provide greater judicial scrutiny over an agency's FOIA determinations than over other agency rulings,"⁹² and "exerts a profound effect upon the amount of respect the court must yield to agency determinations."⁹³

Despite the clear mandate in the original 1966 Act, the *de novo* review standard quickly lost its footing. In its 1973 decision in *EPA v. Mink*, the Supreme Court considered a FOIA request for records that had been classified under an executive order on the grounds of national security.⁹⁴ The Court concluded that despite FOIA's *de novo* review provision, Congress had not intended courts to review the propriety of classification decisions, and thus anything the government properly attested was classified would be exempt from disclosure, without any substantive judicial review.⁹⁵ In essence, the Court in *Mink* deferred completely to an agency determination on classification, which exempted the records from disclosure.⁹⁶

his request for a Government document arbitrarily has been turned down by some bureaucrat."); 112 CONG. REC. 13,649 (statement of Rep. Fascell) ("Let me make another important point. S. 1160 opens the way to the Federal court system to any citizen who believes that an agency has unjustly held back information.").

⁹⁰ 5 U.S.C. § 552(a)(4)(B) ("In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.").

⁹¹ 111 CONG. REC. 26,823 (1965); *see also* H.R. REP. No. 89-1497, at 9 (1966) ("The proceedings are to be *de novo* so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion.").

⁹² *Rizzo v. Taylor*, 438 F. Supp. 895, 899 (S.D.N.Y. 1977).

⁹³ *Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 31 n.42 (D.C. Cir. 1988), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990).

⁹⁴ *EPA v. Mink*, 410 U.S. 73, 81-84 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. 93-502, 88 Stat. 1561 (1974), *as recognized in* *CIA v. Sims*, 471 U.S. 159 (1985).

⁹⁵ *See Mink*, 410 U.S. at 81 (noting that "Congress chose to follow the Executive's determination" on classification and thus did not permit *in camera* inspection of the documents or compelled disclosure of documents, such as those in this case, that were classified pursuant to executive order).

⁹⁶ *See id.* at 93.

Congress immediately responded to this decision. In 1974, now particularly energized by the Watergate scandal and the public's deep distrust of government power,⁹⁷ Congress made several important amendments to FOIA designed to strengthen the public's right to information.⁹⁸ Relevant here, Congress amended the judicial review provision to override the Supreme Court's decision in *Mink* and to provide for de novo review over all exemption claims, including national security classifications.⁹⁹ The legislation reflected a rejection of the suggestion by some members of Congress that a deferential standard of review should apply in the national security context.¹⁰⁰ In fact, this issue was partly the cause of President Gerald Ford's decision to veto the bill and proclaim,

I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.¹⁰¹

President Ford's veto thus called on Congress to implement a deferential standard of review over national security claims under FOIA.¹⁰² Congress's resolve to restore the de novo standard for judicial review of

⁹⁷ *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE, www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm (last visited Dec. 24, 2012) (noting that movement toward reinvigorating FOIA was made against the background of the Watergate scandal).

⁹⁸ See Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2006)).

⁹⁹ Congress effectuated this change in two ways. First, it changed the language of Exemption 1 itself, which used to exempt records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," to make clear that courts should look behind classification labels. See *Mink*, 410 U.S. at 81. The new Exemption 1 covers records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Second, Congress added a provision to FOIA specifically allowing courts to conduct in camera review of withheld records. *Id.* § 552(a)(4)(B).

¹⁰⁰ See *Ray v. Turner*, 587 F.2d 1187, 1193-94 (D.C. Cir. 1978) (remarking that Congress established de novo review against some senators' assertions that agency withholding decisions involving national security matters should be reviewed using a "reasonable basis" standard).

¹⁰¹ 120 CONG. REC. 36,243 (1974) (veto message from President Ford).

¹⁰² *Id.* at 36,243-44.

FOIA cases, however, was so strong that Congress overrode the veto.¹⁰³ Accordingly, the de novo standard was restored, even for cases in which the government invokes the exemption that covers records classified for national security reasons.¹⁰⁴ As one member of Congress stated in response to President Ford's veto,

The courts, in my view, have a duty to look behind any claim of exemption, which all too often in the past has been used to cover up inefficiency or embarrassment even in foreign policy matters which, many times, are fully known by other countries but not printable in our own—supposedly the most democratic and most open in the world.¹⁰⁵

Congress has thus twice insisted on de novo review over agency FOIA exemption claims—once in 1966, when it first enacted the law, and again in 1974, when it overruled *Mink*.

D. Explaining FOIA's Exceptionalism

The legislative histories of the APA and FOIA demonstrate that Congress acted deliberately both to build in great deference generally to agency factual and discretionary determinations and to demand full and searching judicial review over agencies' FOIA exemption determinations. Even apart from the words of the legislators who drafted and passed these bills, the rationales supporting a deferential approach to agency actions themselves justify a departure in FOIA cases. That is, the reasons for invoking deference to other agency fact-finding and exercise of discretion do not apply with equal force to FOIA. Moreover, the unique purposes of FOIA standing alone justify the scrutiny of de novo judicial review.

¹⁰³ See *id.* at 36,244; see also *Ray*, 587 F.2d at 1190–91 (“In 1974 Congress overrode a presidential veto and amended the FOIA for the express purpose of changing this aspect of the *Mink* case.”).

¹⁰⁴ See 120 CONG. REC. 36,244 (statement of Rep. Moorhead) (“As in the Watergate debacle, the umbrella of ‘national security’ is now being raised in the veto message to cover the real reasons for the bureaucrat’s opposition to the public’s right to know. . . . Contrary to the President’s expressed view, the bill would not in any way bare our Nation’s secrets, nor would it jeopardize the security of sensitive national defense or foreign policy information.”); see also *Ray*, 587 F.2d at 1194 (explaining that Congress “stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security”).

¹⁰⁵ 120 CONG. REC. 36,626 (statement of Rep. Reid).

Deference to agency fact-finding and exercise of discretion is rooted in the notion that agencies bring to bear a special expertise on these matters. Indeed, the Ninth Circuit summarized Supreme Court precedent on this point as follows: “We recognize that where, as here, a court reviews an agency action ‘involv[ing] primarily issues of fact,’ and where ‘analysis of the relevant documents requires a high level of technical expertise,’ we must ‘defer to the informed discretion of the responsible federal agencies.’”¹⁰⁶ The D.C. Circuit has seconded, indicating that it “routinely defers to administrative agencies on matters relating to their areas of technical expertise” when looking at questions of fact and discretionary decisions.¹⁰⁷ In making FOIA decisions, however, although agencies are more familiar with the contents of their records than are the courts, the critical factual decisions that determine whether the records must be released often turn on facts not within the agency’s expertise.

Consider the Nuclear Regulatory Commission (NRC). When the NRC makes a decision about the necessary safety features of a nuclear power plant, there is good reason for a court to defer to the expertise of the scientific, technical, and policy staff at the NRC who know far more about nuclear power plants than generalist judges know or could hope to learn. Suppose, however, a member of the public submits a FOIA request to the NRC to release the business records of one of its regulated companies. If the NRC wishes to claim the FOIA exemption pertaining to agency-held confidential commercial and financial records of third parties,¹⁰⁸ under which the question whether release of a record would cause the third party submitter competitive harm is central to the inquiry,¹⁰⁹ a court is likely as qualified as the NRC to assess whether those records, if released, will cause competitive injury to the company. Industry competition is not the technical specialty of the NRC. To take another example, the Department of Homeland Security does not have special expertise regarding which records, if released, might cause a clearly unwarranted invasion of someone’s personal pri-

¹⁰⁶ *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

¹⁰⁷ *Tripoli Rocketry Ass’n v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006).

¹⁰⁸ 5 U.S.C. § 552(b)(4) (2006).

¹⁰⁹ *See Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). The question of competitive harm is central to an inquiry whether records are exempt from disclosure under FOIA’s Exemption 4, which covers confidential commercial and financial information received from a business. 5 U.S.C. § 552(b)(4).

vacy, which would render them exempt from disclosure under FOIA's Exemption 6.¹¹⁰

Admittedly, some exemption determinations do turn on facts uniquely within the agency's area of knowledge. Yet unique considerations at the heart of FOIA's transparency goal nonetheless justify Congress's departure from the APA. For instance, an agency is uniquely positioned to determine whether records are predecisional and deliberative documents that are exempt from disclosure under Exemption 5's deliberative process privilege.¹¹¹ The agency's expertise in its own decision-making process, however, should not justify deference, because the agency is not a neutral arbiter or guardian of the public interest in a FOIA case. Instead, the agency might illegitimately overreach to keep information from the public and thereby protect itself from embarrassment and avoid democratic accountability for its actions. Likewise, a law enforcement agency that makes a determination that release of records will impede an ongoing investigation may have particular competence in the area,¹¹² but again, the agency would be passing judgment on an exemption under which it could hide information about its own misconduct and prevent oversight. In such cases, the agency is hardly a neutral decisionmaker.

In FOIA cases agencies frequently have illegitimate self-interest at stake. Agencies have often been found to have failed to release records to cover up their mistakes, embarrassing acts, or misconduct.¹¹³ Even more frequently, the institutional pressures of career advancement, risk aversion, and institutional culture weigh heavily on the side of secrecy for the agency employee considering a FOIA request.¹¹⁴ By contrast, other types of agency actions tend to align the agency's interests with the public. For example, when an agency adjudicates a benefits entitlement, it may have a "self-interest" in safeguarding its budget, but that

¹¹⁰ 5 U.S.C. § 552(b)(6).

¹¹¹ See 5 U.S.C. § 552(b)(5) (exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

¹¹² This conclusion would justify withholding under Exemption 7(A). See 5 U.S.C. § 552(b)(7)(A).

¹¹³ See Fuchs, *supra* note 12, at 153; see also Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J.L. & POL'Y 115, 118 (2006) (hypothesizing why government officials routinely deny requests for documents).

¹¹⁴ Morrison, *supra* note 113, at 118 (noting that "no government official ever received a promotion or a medal for releasing a document to the public," and that withholding decisions are often "based on the agency official's different assessment of the benefits and risks of disclosure as opposed to the assessment of those seeking the information and perhaps those who wrote the law").

interest is shared by both Congress, which gave the agency its powers, and the general public. Similarly, an agency conducting a rulemaking may have something akin to “self-interest” in avoiding public backlash. But again, these considerations are a legitimate part of the democratic process of holding the agency accountable to the public. Indeed, agencies are typically required to seek public input as part of the APA-mandated rulemaking process.¹¹⁵ In contrast, the agency’s self-interest in the FOIA context does not advance a legitimate democratic purpose. In fact, Congress’s clear intent to provide *de novo* review and the reality that traditional justifications for deference do not hold up in the FOIA context require courts to look at FOIA determinations with a fresh eye.

A final issue of deference remains. Deference to agencies’ legal interpretations is almost entirely a creature of the judiciary; such deference is not mandated by the text of the APA.¹¹⁶ In 1984, in *Chevron v. Natural Resources Defense Council*, the Supreme Court justified courts’ deference to agencies’ legal interpretations of ambiguous provisions in statutes the agencies are charged with administering based on the theory that Congress has delegated to an agency the authority to interpret the ambiguity.¹¹⁷ This justification does not apply in the context of FOIA. First, FOIA is not administered by any particular agency, but rather binds all of them.¹¹⁸ No single agency would have special competence to interpret FOIA’s legal requirements or the language of any particular exemption. Second, Congress expressly did not delegate to an agency authority to interpret any ambiguities in FOIA. Instead, it expressly required courts to review an agency’s interpretations of FOIA *de novo*.¹¹⁹ Congress’s choice to mandate *de novo* review of agencies’

¹¹⁵ See 5 U.S.C. § 553 (2006).

¹¹⁶ To be sure, a convincing argument can be made that the APA’s provision dictating that a reviewing court shall “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,” is consistent with *Chevron*, and moreover that it intended to incorporate previously decided cases such as *Skidmore*, which rested on the same principles. See Strauss, *supra* note 44, at 1158–61.

¹¹⁷ *Chevron*, 467 U.S. at 843–44.

¹¹⁸ See *AT&T, Inc., v. FCC*, 582 F.3d 490, 496 (3d Cir. 2009), *rev’d on other grounds*, 131 S. Ct. 1177 (2011); *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc), *aff’d*, 484 U.S. 9 (1987).

¹¹⁹ 5 U.S.C. § 552(a)(4)(B) (“In such a case the court shall determine the matter *de novo* . . .”). One scholar suggests another rationale for rejecting deference to FOIA decisions: “FOIA denials, unlike most other agency actions, are made without adjudication, notice and comment, or other protections.” Fuchs, *supra* note 12, at 162. This rationale has justified the lesser *Skidmore* deference, rather than *Chevron* deference, to agencies’ legal interpretations of statutes they are charged with administering. See *Mead*, 533 U.S. at 231–35. It has not, however, been a reason to lessen deference substantially in the context of

FOIA determinations, whether factual, legal, or discretionary, was thus amply justified by the special considerations relevant to FOIA decisions.

II. DE NOVO REVIEW ON PAPER BUT NOT IN PRACTICE

Congress's assignment of de novo review to agency FOIA decisions, in contrast to its treatment of nearly all other agency actions, was not intended to be a distinction without a difference.¹²⁰ As the legislative history reveals, legislators believed that the choice of which standard of review should apply was important, presumably because different standards may lead to different outcomes. Countless judicial opinions, including the U.S. Supreme Court's own jurisprudence, presume that the standard of review impacts the outcomes in particular cases.¹²¹ This, in turn, would result in differing rates of reversal of agency actions.

Professor Paul Verkuil has examined the relationship between affirmance rate and the applicable standard of review.¹²² His model for understanding the operation of various levels of deference articulates with specificity a sentiment shared by many jurists and scholars about the way standards of review are meant to operate.¹²³ According to his model, the most deferential standard, arbitrary and capricious, is akin to a pass/fail standard that is "intended to produce a high pass rate."¹²⁴ Verkuil likens the substantial evidence and clearly erroneous standards, which supposedly entail still deferential but more searching review, to a standard affirming all cases that get a "B" or "C" grade.¹²⁵ Finally, a rule affirming only "A" grade work is akin to de novo review.¹²⁶ Furthermore, Verkuil assigns hypothesized affirmance rates for each standard of review: under a de novo review standard as falling between 40% and 50%, clearly erroneous between 70% and 80%, substantial evidence

agency fact-finding or discretionary decisions. See *Overton Park*, 401 U.S. at 416 (applying arbitrary and capricious review to facts found in an informal adjudication).

¹²⁰ Verkuil, *supra* note 10, at 682.

¹²¹ *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); Zaring, *supra* note 28, at 136–38.

¹²² Verkuil, *supra* note 10, at 692; see also Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84 (2011) (observing that Verkuil's study is the most comprehensive empirical study of district court review of agency decisions).

¹²³ See, e.g., *Dickinson*, 527 U.S. at 162.

¹²⁴ Verkuil, *supra* note 10, at 688.

¹²⁵ *Id.*

¹²⁶ *Id.*

between 75% and 85%, and arbitrary and capricious review at 85% to 90%.¹²⁷

Verkuil's attempt to test this hypothesis empirically, however, produces a startling result—the Social Security Administration's disability benefits determinations, reviewed for an abuse of discretion (akin to arbitrary and capricious), are affirmed only 50% of the time, whereas agencies' decisions not to release records under FOIA, reviewed de novo, are affirmed at a rate of 90%.¹²⁸ This result is nearly the exact opposite of Verkuil's theorized affirmance rates for the relevant standards of review.¹²⁹ He posits that some of the gap may be explained by peculiar FOIA jurisprudence in the national security area, but concludes that this "phenomenon still does not explain the overall FOIA outcomes divergence."¹³⁰ Verkuil also notes judicial skepticism toward FOIA claims as one factor in the high affirmance rate,¹³¹ but ultimately concludes that "FOIA cases are hard if not impossible to explain in terms of outcomes analysis if de novo is to be a meaningful standard of review."¹³² Instead, Verkuil posits, other factors beyond the standard of review must be producing the 90% affirmance rate.¹³³

As such, there is a wide gap between the law as it is theorized and the law as it plays out in judicial review of agency FOIA decisions.¹³⁴

¹²⁷ *Id.* at 689.

¹²⁸ *Id.* at 719. At least one aspect of Verkuil's calculation of FOIA case outcomes seems debatable, namely his inclusion as a form of "affirmance" those stipulated dismissals in which no costs or attorneys' fees were awarded to the plaintiff. *See id.* at 713 n.152. Certainly, the assumption seems facially reasonable that a plaintiff's case must not have merit if no costs or fees are awarded in a settlement, despite being available for prevailing plaintiffs. *See id.* One wonders whether that assumption would stand up to testing in light of *Evans v. Jeff D.*, in which the Supreme Court sanctioned settlement negotiations in which favorable substantive results may be won by giving up rights to attorney's fees. 475 U.S. 717, 736–38 (1986). Nonetheless, the cases in this posture are not so numerous as to call into any serious doubt the conclusion Verkuil draws from the study.

¹²⁹ Verkuil, *supra* note 10, at 719.

¹³⁰ *Id.* at 715.

¹³¹ *See id.* at 715–16. Verkuil attributes the judicial skepticism to concern about law enforcement effectiveness, the unsympathetic nature of many FOIA plaintiffs, concerns about terrorism, and the burden of FOIA compliance on agencies. *See id.* As to the "unsympathetic nature" of many FOIA plaintiffs, he notes that FOIA plaintiffs are often prisoners appearing pro se or business competitors seeking to take advantage of the Act for selfish reasons. *Id.* at 716.

¹³² *Id.* at 730.

¹³³ *See id.*; *see also* Pierce, *supra* note 122, at 84–86 (supporting Verkuil's conclusion that his findings require an examination of the decision-making context to identify unique institutional characteristics that lead to the anomalous results he found).

¹³⁴ Bridging this gap is often referred to as the work of new legal realism. *See* Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1165, 1166 (2006) (describing the "new legal realism" as "mov[ing] us

Verkuil's surprising affirmance rate finding cannot be fully explained by existing theories of dispute resolution. First, one classic model examining the selection bias of those cases that make it to the end of the adjudicatory process anticipates that individual litigants acting in their own self-interest will drop or settle all but the closest of cases, thereby creating a strong bias for a 50% success rate for plaintiffs or for appellants in those adjudicated cases.¹³⁵ Second, deviation from this predicted rate has been attributed to differing incentives between the parties and strategies used by frequent litigants—a theory that predicts high success rates for repeat players, such as the government.¹³⁶ Finally, recent empirical work posits that regardless of the standard of review announced in the case, courts affirm agencies between 60% and 70% of the time.¹³⁷

Although all of these theories may shed light on the FOIA affirmance rate observed by Verkuil, none fully explains it. Consider the theory that cases that reach an adjudicatory resolution are the product of a strong selection effect. Huge numbers of cases are never filed, are voluntarily dismissed before an adjudication, or are settled between the parties, and the outcomes of those cases that are adjudicated are skewed by the decisions the litigants made along the way.¹³⁸ New legal realists have critiqued the practice of studying only those cases that have reached a final judgment (or, even more so, a final appeal) as “tak[ing] for granted that there is a great pyramid of disputing whose most important level is at the top.”¹³⁹ Rather, these theorists emphasize that how well the law is working must be analyzed on the ground; that is, including lawsuits that are settled before an adjudication is reached or are voluntarily dismissed or withdrawn as a result of pre-trial strate-

to the law in action and the living law,” rather than an “assumed paradigm” of how the law works). Professor David Zaring recently made the “normative recommendation . . . that courts and scholars . . . focus more on the unarticulated bases for reversal in administrative law and less on standards of review.” Zaring, *supra* note 28, at 186.

¹³⁵ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984).

¹³⁶ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 108 (1974); Priest & Klein, *supra* note 135, at 53.

¹³⁷ See Zaring, *supra* note 28, at 169.

¹³⁸ See generally Priest & Klein, *supra* note 135 (examining the issue of which cases make it to adjudication).

¹³⁹ Macaulay, *supra* note 134, at 1163; see Marc Galanter, *Notes on the Future of Social Research in Law*, in LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW, 25, 25–27 (Stewart Macaulay et al. eds., 1995).

gies, and even disputes that never materialize into a lawsuit because of the predictions of the litigants and the tactics of their lawyers.¹⁴⁰

Prominent theorists on pre-adjudication litigant behavior have modeled the tendency to produce a 50% success rate for plaintiffs or appellants where both parties have similar stakes and act to maximize their self-interest in settlement negotiations.¹⁴¹ This bias toward a 50% success rate is the result of litigants settling out all but the closest cases based on expectations of success or failure and the risk involved.¹⁴² The theorists acknowledge, however, that the “observed rate of success in any individual set of cases is determined by several factors.”¹⁴³ In particular, unequal stakes in the litigation between the parties or other peculiar incentives unique to the class of litigation studied may produce significant departures from this hypothesized success rate.¹⁴⁴

¹⁴⁰ See Macaulay, *supra* note 134, at 1163; see also Galanter, *supra* note 139, at 25–27 (contending that most legal scholars assume that the most important disputes are the ones that go to trial).

¹⁴¹ Priest & Klein, *supra* note 135, at 5.

¹⁴² See *id.*

¹⁴³ *Id.* at 55. Another factor that might affect the fifty percent success rate is unequal information about the likely success between the parties. *Id.* at 19 (“[A]n important determinant of the extent to which the observed success rate approximates 50 percent will be the parties’ error in estimating the outcome.”). At first blush, this seems like a plausible explanation for deviation in the FOIA context, since the government almost always has more information about the underlying lawsuit than the requester, and therefore might make more accurate predictions about the merits. Typically, in FOIA litigation, the government releases records to the requester as it realizes that it has no defensible basis for withholding them, and then the adjudication only concerns any remaining records still in dispute. See, e.g., *Hussain v. U.S. Dep’t of Homeland Sec.*, 674 F. Supp. 2d 260, 263 (D.D.C. 2009) (noting that the parties were only disputing the release of five out of the original documents); Plaintiff’s Unopposed Motion for an Extension of Time Within Which to Respond to Defendant’s Motion for Summary Judgment at 1, *Hussain*, 674 F. Supp. 2d 260 (No. 07-1633) (noting that one day before the government filed its motion for summary judgment, it released ninety-six pages of previously withheld documents to the plaintiff). If the government’s information led it to make more accurate predictions, it would not be taking litigation positions it later realizes it cannot defend. Even as to those litigation positions it does ultimately defend, I suspect that the government makes that decision based on the perceived importance of secrecy to the government’s interests in light of the resources required to litigate the exemption, rather than the perceived likelihood of success on the merits of the exemption’s applicability. Although I cannot prove the government’s subjective motivations, my inclination is based on the agency’s rational self-interest in fighting to the end over records they do not want made public, for whatever reason (legitimate under FOIA or not), given that they are not bearing the expense of their defense, which is provided by the U.S. Department of Justice.

¹⁴⁴ As one example, Professors George Priest and Benjamin Klein explain an eighty-one percent success rate for the government in antitrust prosecutions as the product of differential stakes between the parties. Priest & Klein, *supra* note 135, at 52–53 (citing WILLIAM BAXTER, *THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER* (Robert D. Tollison ed., 1980)).

The effect of the selection of cases that are adjudicated on outcomes is worthy of consideration in the FOIA context because only a tiny fraction of agency FOIA decisions are ever reviewed in court. For example, in fiscal year 2011, 644,165 FOIA requests were made, with 438,638 final agency decisions, resulting in 202,164 denials in full or in part.¹⁴⁵ By contrast, there are consistently between 300 to 500 lawsuits filed challenging FOIA denials each year.¹⁴⁶ Thus, the vast majority of FOIA law operates wholly at the administrative level where pre-dispute selection effects are likely to be strong.¹⁴⁷ Nonetheless, the default 50% success rate hypothesis does not operate here. Were that model to operate as predicted in FOIA cases, a high rate of affirmance of agency denials would dissuade prospective litigants from pursuing marginal cases. This, in turn, would increase the odds that comparatively more meritorious cases would be adjudicated rather than settled, eventually lowering the success rate of agencies back to an equilibrium of around a 50% affirmance rate. As Verkuil demonstrates, however, the agencies' 90% success rate shows no signs of moderating.¹⁴⁸

The primary factor Professors George Priest and Benjamin Klein identify as potentially driving deviation from the 50% success rate hypothesis—differences in the incentives between the parties—may be partially responsible for the affirmance rate in FOIA cases, but is unlikely to explain it fully.¹⁴⁹ In his influential work, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, Professor Marc Galanter describes how repeat players in the litigation system engage in a long-term strategy to procure favorable precedent, even at the cost of

¹⁴⁵ *FOIA Data at a Glance, What Is FOIA?*, U.S. DEP'T OF JUST., <http://www.foia.gov> (last visited Jan. 11, 2013).

¹⁴⁶ See FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATABASE (1979–2008), <http://www.icpsr.umich.edu/icpsrweb/landing.jsp> (select "Find & Analyze Data," then search for "federal judicial center integrated database") (last visited Jan. 10, 2013). This dataset was examined in Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 227 (2011).

¹⁴⁷ See Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 396 (2010) ("[U]nlike many other areas of the law where enforcement is broadly decentralized, only a small fraction of the millions of FOIA decisions made annually are ever scrutinized by someone with the power or authority to alter them.")

¹⁴⁸ See Verkuil, *supra* note 10, at 734 (reporting the affirmance rate for the ten-year period of 1990 to 1999). Because Verkuil's statistical period begins almost twenty-five years after FOIA's enactment, one might assume that if equilibrium were to be reached, this rate would be abating.

¹⁴⁹ See Priest & Klein, *supra* note 135, at 53; see also Verkuil, *supra* note 10, at 718 n.181 (citing Priest and Klein's selection hypothesis as a possible explanation for the FOIA affirmance rate).

the immediate stakes in a single dispute.¹⁵⁰ When a “repeat player” litigates against a “one-shotter,” the incentives of the parties are uneven.¹⁵¹ As Priest and Klein explain, “Stakes are most clearly symmetrical where the parties seek solely a dollar judgment in a dispute over activities in which neither party ever expects to engage again.”¹⁵²

For FOIA litigation, none of these ideal conditions for symmetrical stakes exists. First, FOIA suits do not involve claims for monetary damages, but only injunctive relief.¹⁵³ Second, the government is the ultimate repeat player.¹⁵⁴ Even breaking down the government defendants by agency, FOIA requests are heavily concentrated on a relatively small number of agencies and departments, each with its own interest in securing favorable long-term legal rules.¹⁵⁵ Finally, even the plaintiff may be a repeat FOIA requester with his or her own long-term agenda, thereby further distorting the incentives.¹⁵⁶ And even if the requester is not a repeat requester, the importance of the information to each requester will vary widely.¹⁵⁷ Most especially, however, the government’s strategic advantages as a repeat player and long-term goal of procuring favorable precedent over a short-term victory are likely to skew the pre-adjudication selection effect and contribute to the government’s high success rate.¹⁵⁸

¹⁵⁰ See Galanter, *supra* note 136, at 100–05.

¹⁵¹ See *id.*

¹⁵² Priest & Klein, *supra* note 135, at 28. Thus, they suggest that parties will have more equal incentives to litigate (and therefore, would be more likely to proceed to trial) when their stakes in the outcome are equal. They also note that if one of the parties (in the typical FOIA case, the government), expects to continue to engage in the same activity that led to the dispute (here, denying a FOIA request), that party’s stake in the litigation will be much higher because the judgment will affect future behavior. *Id.*

¹⁵³ See 5 U.S.C. § 552(a)(4)(B) (2006) (specifying that suits may be brought in district courts to enjoin an agency from withholding records). Attorney’s fees are, however, available to prevailing plaintiffs. *Id.*

¹⁵⁴ See Galanter, *supra* note 136, at 111–12. As Galanter explains, having the government as a party to a lawsuit increases the likelihood that a case is adjudicated because of the government’s incentive to “externalize the decision to the courts,” the incentive of opponents to litigate against the government, and the government’s unique decision-making process. *Id.*

¹⁵⁵ For example, in fiscal year 2011, half of all FOIA requests were made to just four agencies: the Departments of Defense, Health and Human Services, Homeland Security, and Justice. *Top 10 Federal Agencies Receiving the Most FOIA Requests*, FOIA PROJECT, http://trac.syr.edu/foiaproject/foia_requests.shtml (last visited Jan. 11, 2013).

¹⁵⁶ For example, organizations such as Public Citizen, the American Civil Liberties Union, and Judicial Watch are repeat players in the FOIA context.

¹⁵⁷ See Galanter, *supra* note 136, at 111 (providing, as an example, an organization that sponsors much church-state litigation, and explaining that there are some repeat players who “seek not furtherance of tangible interests, but vindication of fundamental cultural commitments” and that when such a repeat player is involved, “there is less tendency to settle”).

¹⁵⁸ See *id.* at 100–05.

It is unlikely, however, that all of the deviation from the 50% affirmance rate hypothesized both by Verkuil's work and Priest and Klein's theory can be attributed to the government's repeat-player status and the nature of the remedies. Were that the case, there should be similar astronomical success rates for other types of litigation challenging agency decisions, which share the government as the defendant and also involve nonmonetary claims. Professor David Zaring recently conducted an empirical study on affirmance rates across various standards of review.¹⁵⁹ His findings, like Verkuil's, do not support the hypothesized affirmance rates set out by Verkuil.¹⁶⁰ Instead, he concludes that "[c]ourts reverse agencies at roughly the same [60 to 70%] rate, regardless of the standard of review."¹⁶¹ He posits that despite hand-wringing over the appropriate standard of review, courts in practice approach review of agency actions as more of a reasonableness analysis, thus producing similar affirmance rates across differing standards of review.¹⁶² This theory of judicial review is supported by his empirical evidence.¹⁶³

But FOIA is an outlier. The consistent 60% to 70% affirmance rate across agencies, courts, and standards of review, is not reflected in FOIA decisions, which, as noted, affirm agency nondisclosure at a 90% rate.¹⁶⁴ Zaring was surprised by Verkuil's finding in light of his own research; he suggests that possible differences may be attributed to different approaches that district and appellate courts may take in reviewing agency decisions.¹⁶⁵

Although this extraordinary affirmance rate may be attributable in part to known theories, a 90% affirmance of agency FOIA decisions is at odds with the statute's *de novo* standard of review and cannot be fully explained by the dominant theories of pre-adjudication selection effects or the unique nature of litigation against the government. Despite the courts' formal invocation of the statutory *de novo* standard, this affirmance rate likely represents a super-deference, which produces

¹⁵⁹ See generally Zaring, *supra* note 28 (summarizing the results of his findings).

¹⁶⁰ See *id.* at 169.

¹⁶¹ *Id.*

¹⁶² *Id.* ("Although there are a number of possible conclusions to draw, the doctrinal one worth taking most seriously is that, unless there is some reason to believe that these very similar validation rates mask very different sorts of inquiries, what courts are really doing is the same sort of analysis regardless of the standard of review. The consistency in outcomes suggest a consistent inquiry: courts look to see if the agency has acted reasonably.")

¹⁶³ *Id.*

¹⁶⁴ Verkuil, *supra* note 10, at 719.

¹⁶⁵ Zaring, *supra* note 28, at 176 n.134.

even more affirmances than cases reviewed under formally deferential standards. As the data indicate, the way courts actually review agency decisions to withhold records under FOIA is not the *de novo* review Congress required.

III. SYSTEMATIZING DEFERENCE TO SECRECY

An examination of FOIA decisions reveals that, whether intentionally or unintentionally, courts have developed a set of practices in FOIA cases that collectively contribute to this super-deferential review. The practices divide into two categories, which I call “spoken” and “unspoken” deference. The spoken deference practices are instances where courts, despite the express mandate for *de novo* review, have concluded that some deference to a relevant agency position is warranted under a common law theory.¹⁶⁶ Unspoken deference is a set of procedural practices developed uniquely for FOIA cases—contrary to the supposed trans-substantivity of the Federal Rules of Civil Procedure (the “Federal Rules”)—which produce significant litigation advantages to the government and effectively result in deference to the government’s position.¹⁶⁷ This two-pronged framework for understanding the ways that courts defer to agency secrecy decisions helps to reveal the problematic attributes of these practices and to identify potential responses.

A. *Spoken Deference*

Some amount of the deference observed in the 90% affirmance rate in FOIA cases can be attributed to courts’ expressly stated, judicially created deference doctrines.¹⁶⁸ That is, in litigation involving certain FOIA exemptions, courts have proclaimed that they owe deference to some agency representations relevant to a nondisclosure decision despite the *de novo* review required by the statute.¹⁶⁹ This type of def-

¹⁶⁶ See *infra* notes 168–223 and accompanying text.

¹⁶⁷ See *infra* notes 224–313 and accompanying text.

¹⁶⁸ See Verkuil, *supra* note 10, at 714–15. Professor Paul Verkuil has conducted an empirical analysis of the effect of deference accorded the government in one subset of the cases I group under “spoken deference,” the national security claims made under Exemption 1, which exempts properly classified records. *Id.*; see 5 U.S.C. § 552(b)(1) (2006). He concludes that although these cases do increase the overall affirmance rate slightly, they do not even approach a full explanation of the difference between a hypothesized *de novo* affirmance rate and the observed rate. See Verkuil, *supra* note 10, at 736–37. Verkuil does not, however, explore the full range of stated deference doctrines.

¹⁶⁹ See generally Slegers, *supra* note 12 (providing examples of cases in which judges have stated that they owe deference to agencies’ determinations under FOIA).

erence is found in FOIA cases involving three types of claimed agency interests: (1) national security, (2) federal law enforcement, and (3) the deliberative process privilege.¹⁷⁰

1. National Security

National security has historically justified deference to decisions made by the political branches of government.¹⁷¹ Agency decisions are no exception.¹⁷² Under FOIA, courts routinely review government claims that records must be withheld from the public for national security reasons under an expressly deferential standard.¹⁷³

¹⁷⁰ I do not include FOIA's Exemption 3, which covers records exempt from disclosure by another statute. See 5 U.S.C. § 552(b)(3). Because the other non-FOIA statute that qualifies under Exemption 3 is often an organic statute that a particular agency is charged with administering, some courts, including the D.C. Circuit, have concluded that the agency's interpretation of that other statute is entitled to either *Chevron* or *Skidmore* deference. See, e.g., *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1137 (D.C. Cir. 2001) (applying *Skidmore* deference to the Internal Revenue Service's interpretation of a portion of the Internal Revenue Code that specifically exempts taxpayer return information); *Lehrfeld v. Richardson*, 132 F.3d 1463, 1467 (D.C. Cir. 1998) (applying *Chevron* deference to a Department of the Treasury interpretation, in a regulation, of the same statute); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (same). Other courts, however, have taken the approach that an Exemption 3 statute, like other FOIA exemptions, should be narrowly construed, and thus, that the traditional administrative law deference doctrines do not apply to agencies' interpretations of those statutes. See *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 144 (2d Cir. 1994) (detailing the disagreement among the circuits). I am setting aside the question of which position is the correct one and the effect of this potentially unwarranted deference on the overall affirmance rate, because there are not many FOIA cases according deference under *Chevron* or *Skidmore* to agency interpretations of Exemption 3 statutes.

¹⁷¹ For instance, in *Korematsu v. United States*, the U.S. Supreme Court infamously upheld the governmental order that Japanese Americans be held in internment camps as justified by wartime exigencies. See 323 U.S. 214, 219 (1944). Although an extreme example, invocations of national security justifications commonly get special solicitude from the courts. More recently, in *Zadvydas v. Davis*, the Court confronted an immigration detention situation in which it declared that although "terrorism or other special circumstances" were not present in that case, if they were, "arguments might be made for . . . heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. 678, 696 (2001).

¹⁷² Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 585 (2011) (arguing that the military continues to enjoy "super-deference," even though the general APA standards apply).

¹⁷³ Fuchs, *supra* note 12, at 163 ("Even when purporting to conduct a *de novo* review as mandated by FOIA, courts have adopted a doctrine of deference to executive claims that secrecy is needed to protect national security interests."). In her article, one commentator chronicles the lack of meaningful review of national security claims under FOIA. See *id.* at 163–68.

FOIA protects national security interests primarily under Exemption 1, which exempts records “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order.”¹⁷⁴ This language was adopted in 1974 to overrule the U.S. Supreme Court’s decision in *EPA v. Mink*, in which the Court held that classification decisions by the government were not reviewable under FOIA, except to determine if the record was in fact classified.¹⁷⁵ The new language, paired with a new provision expressly permitting a court to review withheld records in camera,¹⁷⁶ was intended to provide the same type of review for classification decisions as for other FOIA withholdings by requiring courts to verify that the records were in fact properly classified under an executive order.

Although the idea that national security concerns uniquely justify a heightened level of secrecy is facially appealing, national security experts have explained that there are many instances in which publicity and transparency would increase security, rather than hamper it.¹⁷⁷ When information is kept secret, it is often not shared even in other parts of government that might be able to augment the knowledge on the subject matter and advance security interests.¹⁷⁸ Moreover, an unaware public cannot be vigilant or aid in the government’s security efforts.¹⁷⁹ Experts have concluded that overclassification itself reduces the effectiveness of classification.¹⁸⁰ Although legitimate reasons for secrecy exist and some amount of information should be protected, Congress

¹⁷⁴ 5 U.S.C. § 552(b) (1) (2006).

¹⁷⁵ *EPA v. Mink*, 410 U.S. 73, 81 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. 93-502, 88 Stat. 1561 (1974), *as recognized in* *CIA v. Sims*, 471 U.S. 159 (1985); *see supra* notes 94–105 and accompanying text. The language of the original 1966 Act, which was considered by the Court in *Mink*, exempted records “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.” *See Mink*, 410 U.S. at 81.

¹⁷⁶ 5 U.S.C. § 552(a) (4) (B).

¹⁷⁷ Fuchs, *supra* note 12, at 136–39 (citing *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats, and Int’l Relations of the H. Comm. on Gov’t Reform*, 109th Cong. 3 (2005) (statement of J. William Leonard, Director, ISOO, National Archives & Records Administration)).

¹⁷⁸ *Id.* at 136.

¹⁷⁹ *Id.* at 138 (citing *Joint Investigation into September 11th: Hearing Before the J. S. and H. Intelligence Comms.*, 107th Cong. 1 (2002)) (discussing the congressional testimony that suggested that only publicity could have thwarted the terrorist attacks of September 11, 2001).

¹⁸⁰ *Id.* at 139 (citing INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 7 (2002)).

rationality can require the executive branch to justify national security withholdings as it does other secrecy decisions.¹⁸¹

Despite two attempts by Congress to establish *de novo* judicial review of decisions to withhold records based on national security, courts acknowledge outright the deference they afford to claims of national security classification.¹⁸² As one court explained:

Courts . . . accord substantial deference to the [agency's] determination that information must be withheld under Exemption 1, and will uphold the agency's decision so long as the withheld information 'logically falls into the category of the exemption indicated' and there is no evidence of bad faith on the part of the agency.¹⁸³

Another court elaborated, "Even in those instances where the court might have its own view of the soundness of the original policy decision . . . it must defer to the agency's evaluation of the need to maintain the secrecy of the methods used to carry out such [classified] projects."¹⁸⁴ Courts are also reluctant to exercise their statutory power to review classified records *in camera*, citing concerns about resource constraints and intrusions on the agency.¹⁸⁵

Courts rationalize the deference given to agency positions under Exemption 1 by employing the legislative history of the 1974 amendments, which reveals statements from the amendments' proponents that agencies' affidavits would carry substantial weight.¹⁸⁶ As the U.S.

¹⁸¹ *See id.*

¹⁸² *See, e.g.,* *ACLU v. U.S. Dep't of Justice*, 681 F.3d 61, 76 (2d Cir. 2012) ("[T]his Court must adopt a 'deferential posture in FOIA cases regarding the uniquely executive purview of national security.'" (citation omitted)); *Maynard v. CIA*, 986 F.2d 547, 555-56 (1st Cir. 1993) (stating that courts afford substantial deference to the CIA's determination that information must be withheld under Exemption 1); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217-18 (D.C. Cir. 1987) (noting that the court owes substantial weight to detailed agency explanations, as set forth in affidavits, in the national security context).

¹⁸³ *Maynard*, 986 F.2d at 555-56 (citations omitted).

¹⁸⁴ *Stein v. U.S. Dep't of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981) (citations omitted).

¹⁸⁵ *Slegers*, *supra* note 12, at 232.

¹⁸⁶ *See* 120 CONG. REC. 34,167 (1974) (statement of Rep. Moorhead) ("First of all, a court could only determine whether the information was 'properly classified pursuant to (an) Executive order.' In other words, the judge would have to decide whether the document met the criteria of the President's order for classification—not whether he himself would have classified the document in accordance with his own ideas of what should be kept secret. Second, as we have said in the joint explanatory statement of the committee of conference: 'The conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed

Court of Appeals for the D.C. Circuit explained, Congress “emphasized that in reaching a de novo determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had ‘unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record.’”¹⁸⁷ Without doubt, this legislative history suggests that some members of Congress were concerned that agency expertise not be ignored.

Despite what some courts contend,¹⁸⁸ according substantial weight to an affidavit is not inconsistent with de novo judicial review. Rather, in evaluating an exemption claim, a court could easily take agency affidavits into account, while still conducting an independent review of all of the arguments and evidence before it. But the statute itself does not state the weight to be accorded the agency’s affidavit, which would suggest that the affidavit should be treated like any other piece of summary judgment evidence. And yet, citing legislative history, the D.C. Circuit has declared that “Congress has instructed the courts to accord ‘substantial weight’ to agency affidavits in national security cases.”¹⁸⁹ Not so. The statute prescribes de novo review.¹⁹⁰ As the former Vice President and General Counsel of the National Security Archive, a watchdog group, noted, “In a subtle but telling shift of nomenclature, the D.C. Circuit . . . [has] called the standard of review in [national security] cases ‘the substantial weight standard’ rather than the de novo standard of review mandated by Congress.”¹⁹¹ In sum, courts’ reluctance to conduct searching review of claims of exemption based on classification cannot be justified on the grounds of legislative history,

record.’”); *see also* Slegers, *supra* note 12, at 227 (acknowledging the legislative history, but maintaining that “it is also clear that the role that Congress intended for courts involves more than merely approving classifications that appear logical,” as courts have done).

¹⁸⁷ *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (quoting S. REP. NO. 93-1200, at 12 (1974)).

¹⁸⁸ *See Stein*, 662 F.2d at 1253 (“From these statements, it appears that Congress did not intend that the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of the classification status of each classified document.”).

¹⁸⁹ *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (citing S. REP. NO. 93-1200, at 12 (1974)).

¹⁹⁰ 5 U.S.C. § 552(a)(4)(B) (2006).

¹⁹¹ *Fuchs*, *supra* note 12, at 165 (citing *Halperin v. CIA*, 629 F.2d 144, 147–48 (D.C. Cir. 1980)); *see also* Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1208 (2004) (“Most observers agree that courts are generally deferential to claims of harm to national security, rarely overriding the government’s classification decisions. Although purporting to apply de novo review, they effectively apply something less.” (footnote omitted)).

for the 1974 amendments clearly established a mandate for courts to conduct such review de novo.¹⁹²

In addition to Exemption 1, Exemption 3 is often at issue in national security cases. There, too, the courts have deferred to agencies' nondisclosure decisions. Exemption 3 covers records "specifically exempted from disclosure by statute,"¹⁹³ and the government often relies on the statute that protects from disclosure Central Intelligence Agency records reflecting "intelligence sources and methods."¹⁹⁴ The Supreme Court has weighed in on the deference debate on sources and methods, explaining in a leading Exemption 3 case, *CIA v. Sims*, decided in 1985, that "[t]he decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."¹⁹⁵ In sum, courts have now fully integrated deference into claims regarding national security made under FOIA, without any statutory justification.

2. Law Enforcement

Historically, routine law enforcement activities have not enjoyed the same privileged legal status as do military and national security matters. Nonetheless, judicial decisions have given rise to deference in at

¹⁹² *Ray*, 587 F.2d at 1193 ("The legislative history underscores that the intent of Congress regarding de novo review stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document.").

¹⁹³ 5 U.S.C. § 552(b)(3). Interestingly, there is an alternative claim that the interpretation of Exemption 3 statutes, which tend to be statutes on particular subjects and directed at particular agencies, are entitled to *Chevron* deference. See Slegers, *supra* note 12, at 229 (suggesting that a different standard of deference seems appropriate for Exemption 3); *supra* note 170. The decisions discussed in this Article, however, do not apply the *Chevron* framework.

¹⁹⁴ National Security Act, 50 U.S.C. § 403-1(i)(1) (2006) ("The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.").

¹⁹⁵ *Sims*, 471 U.S. at 179. Notably, the deference described in these decisions is not justified by *Chevron* or *Skidmore* principles but rather is created out of whole cloth based on the judiciary's notions of national security interests. See *id.*; Brent Filbert, Note, *Freedom of Information Act: CIA v. Sims—The CIA Is Given Broad Powers to Withhold the Identities of Intelligence Sources*, 54 UMKC L. REV. 332, 342 (1986) (arguing that *Sims* gave the CIA broad discretion to protect the identities of individuals involved with the CIA's intelligence operations under FOIA and the National Security Act of 1947); see also Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 n.6 (2006) (collecting articles by scholars who have criticized *Sims* for its broad reading of the National Security Act).

least two different situations when agencies claim records are exempt under FOIA due to a law enforcement concerns.

Law enforcement interests are protected under FOIA Exemption 7.¹⁹⁶ To demonstrate that this exemption applies, the agency must first cross Exemption 7's threshold requirement that the records were "compiled for law enforcement purposes."¹⁹⁷ Both agencies whose principal function is law enforcement, such as the Federal Bureau of Investigation, and agencies that engage in law enforcement activities and other administrative functions, such as the Internal Revenue Service, can claim this exemption.¹⁹⁸

The threshold requirement, however, has been interpreted not to be the same for all agencies. In considering an agency's claim that it has passed the Exemption 7 threshold, the D.C. Circuit presumes that an agency acts within its legislated purpose.¹⁹⁹ Agencies whose primary function is law enforcement may provide "less exacting proof" that the records concern law enforcement.²⁰⁰ By contrast, a court must "scrutinize with some skepticism" claims made by mixed-function agencies that records were compiled for law enforcement purposes.²⁰¹ The end result, the D.C. Circuit has explained, is that "courts apply a more deferential standard to a claim that information was compiled for law en-

¹⁹⁶ Exemption 7 exempts from mandatory disclosure

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (2006).

¹⁹⁷ *Id.*

¹⁹⁸ *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002).

¹⁹⁹ *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982).

²⁰⁰ *Id.*

²⁰¹ *Id.*

forcement purposes when the claim is made by an agency whose primary function involves law enforcement.”²⁰²

Other circuits have followed the D.C. Circuit’s lead and adopted its standard.²⁰³ Diverging from the D.C. Circuit, however, is another group of circuits that has adopted an even more deferential standard, called the “per se” rule.²⁰⁴ Under this rule, “documents compiled by law enforcement agencies are inherently records compiled for law enforcement purposes within the meaning of Exemption 7.”²⁰⁵ Accordingly, under the per se rule, an agency that is primarily a law enforcement agency need not offer any proof at all that records are compiled for law enforcement purposes, not even the “less exacting proof” the D.C. Circuit requires.²⁰⁶ Although longstanding, these deference doctrines are nowhere rooted in the statutory text.

Deference under Exemption 7 does not end there. After meeting the threshold requirement of demonstrating that records were compiled for law enforcement purposes, an agency must also demonstrate that law enforcement records fall within one of six enumerated categories.²⁰⁷ The first category covers records the release of which “could reasonably be expected to interfere with enforcement proceedings.”²⁰⁸ In 2003, in *Center for National Security Studies v. U.S. Department of Justice*, the D.C. Circuit declared that some agency assertions made pertaining to this second step of the Exemption 7 analysis are also entitled to deferential treatment by the courts.²⁰⁹ The court considered a claim that the release of records concerning individuals detained as part of a post-September 11 investigation would interfere with that investigation.²¹⁰

²⁰² *Tax Analysts*, 294 F.3d at 77.

²⁰³ *See, e.g.*, *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 488 F.3d 178, 184–86 (3d Cir. 2007); *Church of Scientology v. U.S. Dep’t of the Army*, 611 F.2d 738, 748 (9th Cir. 1979).

²⁰⁴ *See, e.g.*, *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1195 (10th Cir. 2011); *Jones v. FBI*, 41 F.3d 238, 245–46 (6th Cir. 1994); *Williams v. FBI*, 730 F.2d 882, 883–86 (2d Cir. 1984); *Kuehnert v. FBI*, 620 F.2d 662, 666–67 (8th Cir. 1980); *Irons v. Bell*, 596 F.2d 468, 473–76 (1st Cir. 1979).

²⁰⁵ *Jordan*, 668 F.3d at 1193 (quoting *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1235 (10th Cir. 2007)) (internal quotation marks omitted).

²⁰⁶ *See id.*

²⁰⁷ *See* 5 U.S.C. § 552(b)(7) (2006); *supra* note 196 (providing the text of Exemption 7).

²⁰⁸ *Id.* § 552(b)(7)(A).

²⁰⁹ *See* *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003).

²¹⁰ *Id.* The plaintiffs primarily sought the detainees’ names, attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention. *Id.* at 921. The government claimed that release of this information would “enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it.” *Id.* at 928.

The court concluded that an agency's assertion that releasing records would harm national security is entitled to the "same deference under Exemption 7(A)" as it would receive if the agency were invoking Exemptions 1 or 3, the national security exemptions.²¹¹ "Judicial deference depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked," the D.C. Circuit declared.²¹² Although that case was limited to enforcement proceedings involving national security interests, this represents the first time that such deference has been granted in the context of a routine law enforcement exemption claim.²¹³ Whether courts will apply this deference to enforcement proceedings other than national security related matters remains to be seen.

3. Deliberative Process

Perhaps the most surprising appearance of spoken deference to agency FOIA decisions has occurred when agencies invoke the deliberative process privilege under FOIA's Exemption 5. The deliberative process privilege is meant to protect the agency's decision-making process.²¹⁴ To that end, it exempts from mandatory disclosure records that are both predecisional and deliberative.²¹⁵ Records are considered predecisional if they were created before a final decision was reached on the records' subject matter, and are deliberative if they contain opinion, recommendation, or policymaking material, rather than factual accounts.²¹⁶

Deferring to an agency's determination that the release of records would injure its own decision-making process opens the door for an agency to claim an exemption for a wide swath of records. Nonetheless, at least one district court judge has concluded that some deference is warranted.²¹⁷ Proclaiming that "[t]he [agency] is better situated than either [the requester] or this Court to know what confidentiality is

²¹¹ *Id.* at 928; see *supra* notes 171–195 and accompanying text.

²¹² *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

²¹³ As one scholar has explained, this decision conflicts with courts' original position that deference to national security concerns is "intended for (b) (1) [classification] exemptions only." Wells, *supra* note 191, at 1208.

²¹⁴ 5 U.S.C. § 552(b) (7) (5) (2006) (exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); see *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798–99 (1984).

²¹⁵ See *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

²¹⁶ See *id.*

²¹⁷ *Chem. Mfrs. Ass'n v. Consumer Prods. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984).

needed ‘to prevent injury to the quality of agency decisions’ while the decision-making process is in progress,” the court concluded that “[t]here should be considerable deference to the [agency’s] judgment as to what constitutes . . . ‘part of the agency give-and-take—of the deliberative process—by which the decision itself is made.’”²¹⁸ Although no precedential opinion has endorsed this type of deference, several other district court judges have adopted the same approach.²¹⁹

The potential for agency abuse in claiming the deliberative process privilege is particularly troubling because illegitimate agency self-interest, such as protection from embarrassment, is more likely to be a factor in a deliberative process case. Moreover, there is a serious risk of “secret law,” that is, agency policies and decisions that affect the public but about which the public has no information.²²⁰ Preventing secret law is at the heart of the purpose of FOIA.²²¹ Again, the deference these courts give to agency representations has no statutory basis, and flies in the face of the clear statutory command to review *de novo* all agency decisions to withhold records under FOIA.

Taken together, the courts’ express deference to agency exemption claims is substantial. Deference doctrines have crept into parts of four of FOIA’s nine statutory exemptions.²²² None is based on statutory text or reflects congressional intent. Rather, the deference doctrines reflect courts’ views on the propriety of second-guessing the executive branch in particular circumstances, divorced from the mandate of the governing law.²²³

²¹⁸ *Id.* (citations omitted).

²¹⁹ See *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, No. 07Civ.3378 (GEL), 2007 WL 4233008, at *10 (S.D.N.Y. Nov. 30, 2007); *Williams v. McCausland*, No. 90Civ.7563 (RWS), 1994 WL 18510, at *9 (S.D.N.Y. Jan. 18, 1994); *Rollins v. U.S. Dep’t of Justice*, No. Civ.A. H-90-3170, 1992 WL 12014526, at *8 (S.D. Tex. June 30, 1992); *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989).

²²⁰ See *Tax Analysts*, 117 F.3d at 617 (“A strong theme of our [deliberative process] opinions is that an agency will not be permitted to develop a body of ‘secret law.’”); *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (1992) (“Because an agency’s interpretations of its decisions often become the ‘working law’ of the agency, documents deemed ‘postdecisional’ do not enjoy the protection of the deliberative process privilege. This insures that the agency does not operate on the basis of ‘secret law.’” (citations omitted)).

²²¹ See *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 872 (D.C. Cir. 2010) (“As we have repeatedly explained, FOIA provides no protection for such ‘secret law’ developed and implemented by an agency.”).

²²² See *supra* notes 168–223 and accompanying text.

²²³ See 5 U.S.C. § 552(a)(4)(B) (2006); *supra* notes 120–165 and accompanying text.

B. *Unspoken Deference*

In addition to instances where courts develop deferential standards of review for particular questions under FOIA, in almost every FOIA case, special procedures have effectively resulted in deference to the government's claimed need for secrecy.²²⁴ In these instances, courts have developed procedures unique to FOIA litigation that weigh in favor of the government's nondisclosure position. These neutral-sounding procedural rules sometimes appear sensible and benign. Both individually and especially cumulatively, however, these devices have an even greater effect in rubber-stamping government secrecy decisions than the spoken deference categories discussed above because they apply in every litigated FOIA case.

To understand how these practices came about, it is necessary to consider how FOIA cases are typically litigated. Unlike in most other civil litigation, FOIA expressly provides that the defendant (i.e., the government) bears the burden to prove that an exemption to disclosure applies.²²⁵ Also, unlike other civil litigation, there is an inherent information imbalance between the parties because the government knows the contents of the records that have been requested, whereas the FOIA plaintiff almost always does not.²²⁶ Moreover, the government's knowledge about the records' creation and use, and the likely effect of the release of the record on private, public, or national interests, is often far greater than the knowledge held by FOIA plaintiffs, if not exclusive.²²⁷ Thus, although the government bears the burden of proof, it also holds almost all of the information relevant to meeting that burden.

Because of these peculiarities, courts have sometimes concluded that the typical adversarial process cannot apply in the same way as in other civil litigation, and thus special procedures are needed in FOIA cases.²²⁸ These special processes sometimes have arisen from an attempt to help requesters themselves navigate the difficult litigation

²²⁴ See *infra* notes 225–313 and accompanying text.

²²⁵ 5 U.S.C. § 552(a)(4)(B) (“[T]he burden is on the agency to sustain its action.”).

²²⁶ Information imbalances in other civil litigation are, of course, designed to be equalized through the discovery process. See FED. R. CIV. P. 26(b) (making discoverable any non-privileged information relevant to any party's claim or defense); see also *infra* notes 243–271 and accompanying text (discussing discovery issues unique to FOIA cases).

²²⁷ Although discovery could potentially remedy this imbalance, judicial decisions have rendered it ineffective in the FOIA context. See *infra* notes 243–271 and accompanying text.

²²⁸ See, e.g., *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) (“This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.”).

landscape, but they often thwart any real possibility of challenging the government's factual assertions and undermine the statutory requirement that the government justify its withholding decisions. Although these FOIA-specific procedural practices are interrelated, I categorize them into four groups.²²⁹

1. *Vaughn* Index

The *Vaughn* index is the most famous FOIA-specific procedural device. It arose early in FOIA's history, when, in 1973, the D.C. Circuit decided *Vaughn v. Rosen*.²³⁰ As the court explained, the *Vaughn* index procedure was designed to remedy the information imbalance inherent in FOIA lawsuits: "In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information."²³¹ In this regard, the court then noted that, in contemporary FOIA litigation, the government typically was permitted to "aver that the factual nature of the information is such that it falls under one of the exemptions. . . . [and then] the opposing party [was] comparatively helpless to controvert this characterization."²³²

The D.C. Circuit first considered requiring routine in camera review of records, but concluded that such review would overburden courts and would fail to remedy the plaintiff's inability to test the government's exemption claim.²³³ The court then turned to Supreme Court precedent that generally described detailed affidavits or oral testimony as the basis for establishing the government's entitlement to withhold records under FOIA.²³⁴ From there, the D.C. Circuit created the *Vaughn* index procedure as a remedy to the information imbalance. The court required the government to separate the withheld materials, index the withholdings, and provide a separate justification for each withheld record or separate section thereof.²³⁵ It also required that the justification be a "relatively detailed analysis in manageable seg-

²²⁹ See *infra* notes 230–313 and accompanying text.

²³⁰ *Vaughn*, 484 F.2d at 823.

²³¹ *Id.*

²³² *Id.* at 825–26.

²³³ *Id.* at 825.

²³⁴ See *id.* at 826 (citing *Mink*, 410 U.S. at 93).

²³⁵ *Id.* at 827.

ments.”²³⁶ These requirements in many ways parallel the privilege logs required in civil discovery.²³⁷

The D.C. Circuit undoubtedly created the *Vaughn* index to better achieve FOIA’s maximum disclosure goals and to promote genuine testing of government FOIA exemption claims.²³⁸ In theory, the *Vaughn* index process should help combat the information imbalance problem in FOIA litigation.²³⁹ The *Vaughn* index implementation, however, has revealed deep deficiencies. Now, it is often more of a hindrance than a help to requesters. These deficiencies are primarily threefold. First, *Vaughn* indices have become so boilerplate that they are often not of great use to test the government’s claims.²⁴⁰ Second, as a result of these boilerplate indices, FOIA litigation often focuses on a dispute about the adequacy of the *Vaughn* index, rather than a dispute about the merits of the exemption claims themselves—that is, parties contest whether the *Vaughn* index provides sufficient detail about documents instead of contesting whether a document falls within a claimed exemption.²⁴¹ Finally, and perhaps most seriously, the creation of the *Vaughn* procedure has been used to justify denying FOIA plaintiffs any additional discovery as normally permitted in civil cases²⁴² discussed further below. Given the limited assistance the *Vaughn* index provides to most FOIA

²³⁶ *Vaughan*, 484 F.2d at 826.

²³⁷ See FED. R. CIV. P. 26(b)(5) (describing how to claim a privilege in civil discovery).

²³⁸ See *Vaughan*, 484 F.2d at 823–24.

²³⁹ Notably, even assuming the *Vaughn* index were a useful tool, courts have whittled away at requiring its use, finding more and more categories of cases for which a *Vaughn* index is unnecessary. See, e.g., *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999) (holding that a *Vaughn* index is not required when it is not needed to restore the traditional adversarial process); *Crancer v. U.S. Dep’t of Justice*, 999 F.2d 1302, 1316 (8th Cir. 1993) (en banc) (holding that a *Vaughn* index is not required when documents are categorically exempt); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 492 (D.C. Cir. 1980) (holding that a *Vaughn* index was unnecessary for information obtained from a confidential source during a law enforcement investigation because application of the exemption did not depend on the contents of the records).

²⁴⁰ See Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 100 (1992) (providing examples of how the government minimizes disclosure while appearing to describe documents, and thereby fails to allow plaintiffs to formulate meaningful contrary arguments or to assist the court in resolving FOIA disputes); see also Fuchs, *supra* note 12, at 172 (“When courts expect detail, agencies can deliver. When courts are unwilling to insist on a serious specification and indexing of exemption claims, by contrast, agencies take the easy route of relying on boilerplate justifications.”).

²⁴¹ See Deyling, *supra* note 240, at 73. The fault for this phenomenon certainly lies, at least in part, in plaintiffs’ strategic choice to challenge the *Vaughn* index rather than to simply challenge the sufficiency of the evidence supporting the government’s exemption claim on summary judgment.

²⁴² See FED. R. CIV. P. 26–37, 45.

plaintiffs, the procedure's biggest failure may be that it has curtailed meaningful discovery.

2. Discovery

The courts' general failure to allow discovery in FOIA cases is itself a form of deference to the government. As the D.C. Circuit has acknowledged, the Federal Rules, which govern the discovery process, apply with equal force to, and provide no exemption for, FOIA cases.²⁴³ The Federal Rules govern the procedure in federal district courts in all civil suits with limited exceptions that do not encompass FOIA cases.²⁴⁴ As a result, the standard discovery tools—including interrogatories, requests for admission, requests for production, and depositions—are all formally available.²⁴⁵

District courts certainly have great discretion to control discovery in all civil litigation.²⁴⁶ As one prominent proceduralist has noted, there is “a virtual riot of discretion” exercised by district courts in applying the Federal Rules.²⁴⁷ Indeed, district courts retain this “broad discretion to manage the scope of discovery” in FOIA cases as well.²⁴⁸

This discretion, however, has not been exercised on a case-by-case basis, as the Federal Rules envision. Courts instead have systematically eliminated discovery procedures in FOIA cases. In a repeated mantra, district courts have proclaimed that “[d]iscovery is generally unavail-

²⁴³ See *Weisberg v. Webster*, 749 F.2d 864, 867–68 (D.C. Cir. 1984). The only possible exception to full discovery for FOIA cases is that FOIA cases could be construed as actions for “review on an administrative record,” thereby relieving the parties of initial disclosure requirements. See FED. R. CIV. P. 26(a)(1)(B); *Pohl v. EPA*, No. 09-1480, 2010 WL 786918, at *3 n.2 (W.D. Pa. Mar. 3, 2010) (noting the government’s position that initial disclosures are not required in FOIA cases). Although this construction seems a stretch because FOIA cases produce no true administrative record and the record is not closed at the administrative level, even this exemption from initial disclosures would have no effect on active discovery requests and the parties’ obligations to respond. See FED. R. CIV. P. 26(a)(1)(B) (exempting only initial disclosure requirements). In addition, the U.S. District Court for the District of Columbia has adopted a local rule that exempts FOIA cases from initial disclosures, though the basis for that rule is unclear, and no other district court has followed its lead. See D.D.C. LCvR 16.3, 26.2.

²⁴⁴ See *Weisberg*, 749 F.2d at 867; see also FED. R. CIV. P. 1, 81 (defining the scope and applicability of the Federal Rules).

²⁴⁵ See *Weisberg*, 749 F.2d at 868; see also FED. R. CIV. P. 26–37 (providing the discovery devices available under the Federal Rules).

²⁴⁶ See *Ashcroft v. Iqbal*, 556 U.S. 662, 699–700 (2009) (Breyer, J., dissenting).

²⁴⁷ Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 384 (2010).

²⁴⁸ *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); see *Whitfield v. U.S. Dep’t of the Treasury*, 255 Fed. App’x 533, 534 (D.C. Cir. 2007).

able in FOIA actions,”²⁴⁹ or that “[t]ypically, discovery is not part of a FOIA case.”²⁵⁰ Another court has observed that “[d]iscovery is usually not permitted in a FOIA case if the government’s affidavits were made in good faith and provide specific detail about the methods used to produce the information.”²⁵¹

In 1978, Judge David Bazelon of the D.C. Circuit made the first serious attempt to address the question of discovery in FOIA cases, in a dissent in *Goland v. CIA*.²⁵² He began with the unremarkable proposition that “[w]ithout discovery, a party to litigation may not have access to facts necessary to oppose a motion for summary judgment.”²⁵³ Judge Bazelon argued that although there was no contrary evidence demonstrating that the CIA’s response to a FOIA request was inadequate or in bad faith, no such evidence could be produced without according the plaintiff the opportunity to take discovery.²⁵⁴ In considering the effect of the *Vaughn* index procedure on the availability of discovery, Judge Bazelon noted that the plaintiff in *Vaughn* had not attempted to use discovery, and thus the sole issue before the court in *Vaughn* was whether the agency affidavits were sufficient to demonstrate that the claimed exemptions applied.²⁵⁵ Accordingly, the *Vaughn* index was designed to test the government’s statutory burden, not to replace the default system of discovery under the Federal Rules.²⁵⁶

Judge Bazelon’s reasoning, however, did not carry the day. The presumption that a *Vaughn* index is sufficient to meet discovery needs has rendered other discovery nearly unavailable. In 1996, the Ninth Circuit, in *Minier v. CIA*, offered a typical statement of the impact of *Vaughn* indices on discovery when it declared that “*Vaughn* indices are

²⁴⁹ *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003); see also *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 308 (D.D.C. 2007) (“FOIA actions typically do not involve discovery.” (citation omitted)).

²⁵⁰ *Schiller v. INS*, 205 F. Supp. 2d 648, 653 (W.D. Tex. 2002); see also *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 544 (6th Cir. 2001) (noting that “district courts typically dispose of FOIA cases by summary judgment before the plaintiff can conduct discovery”).

²⁵¹ *Lawyers’ Comm. for Civil Rights v. U.S. Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008); see also *Raher v. Fed. Bureau of Prisons*, No. 03:09-CV-00526-ST, 2011 WL 4832574, at *6 (D. Or. Oct. 12, 2011) (“Discovery is sparingly granted in FOIA cases and only when an agency has not taken sufficient steps to find responsive documents”) (citing *Lawyers’ Committee*, 53 F. Supp. 2d at 1131–32); *Schulze v. FBI*, No. 1:05-cv-00180, 2011 WL 129716, at *2 n.2 (E.D. Cal. Jan. 14, 2011) (citing *Lawyers’ Committee* for the proposition that FOIA cases are typically decided on summary judgment without discovery).

²⁵² *Goland*, 607 F.2d at 357 n.2 (Bazelon, J., dissenting).

²⁵³ *Id.* at 357.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 357 n.2.

²⁵⁶ *Id.* at 358.

sometimes necessary because ordinary rules of discovery cannot be followed in FOIA cases where the issue is whether one party is entitled to non-disclosed documents.²⁵⁷ The court, however, never explained why the ordinary rules of discovery cannot be followed.

One rationale for restricting discovery seems facially appealing but fails to withstand scrutiny. Courts have concluded that discovery in a FOIA case is inappropriate because the litigation is solely about the release of records, and courts often assume any discovery would concern the content of the requested records themselves.²⁵⁸ Requesting discovery of the very records that were sought originally under FOIA would be an inappropriate use of discovery in a FOIA case, and there is no serious suggestion to the contrary.²⁵⁹ Proper discovery requests in FOIA cases, however, concern facts external to the records themselves, which are nonetheless highly relevant to a given claim of exemption. For instance, discovery concerning how the records were created, what the records' intended use was, and with whom the records were shared are key inquiries in analyzing a claim that the deliberative process privilege exempts records from disclosure.²⁶⁰ Likewise, the amount of competition a company faces, the measures it uses to guard against release of

²⁵⁷ *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005) (“[D]iscovery relating to the agency’s search and the exemptions it claims for withholding records generally is unnecessary if the agency’s submissions are adequate on their face.” (citation omitted)).

²⁵⁸ *See City & Cnty. of Honolulu v. EPA*, No. 08-00404, 2009 WL 973154 (D. Haw. Apr. 9, 2009).

²⁵⁹ *Id.* In *City and County of Honolulu v. EPA*, the U.S. District Court for the District of Hawaii noted that discovery is limited in FOIA cases “because the underlying case revolves around the propriety of revealing certain documents” and that it is doubly inappropriate to grant discovery where the request “consist[s] of precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to the FOIA.” *Id.* at *1 (citation omitted). In another case, the Ninth Circuit noted, disapprovingly, that the plaintiff appeared to be requesting in discovery “the very information that is the subject of the FOIA complaint.” *Lane v. Dep’t of the Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008); *see also Simmons v. U.S. Dep’t of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (denying discovery because it “appear[ed] largely to be an attempt to . . . learn the contents of the requested documents”); *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983) (denying a deposition concerning the contents of the withheld documents because the deposition would reveal precisely what the defendants maintained was exempt from disclosure); *Driggers v. United States*, No. 3:11-CV-0229-N, 2011 WL 2883283, at *2 (N.D. Tex. July 18, 2011) (“Here, Plaintiff’s discovery seeks detailed information from the withheld records . . . [and] would essentially provide the relief he seeks through this lawsuit.”); *Schulze*, 2011 WL 129716, at *3 (denying discovery because “[p]laintiff’s request relates to the very information that is the subject of his FOIA complaint”).

²⁶⁰ *Kwoka*, *supra* note 146, at 236–37; *see also Coastal States Gas*, 617 F.2d at 868 (noting, for example, that the identity of the parties to a memorandum is important in determining whether a record was predecisional or post-decisional).

particular information, and who is given access to that information are all relevant to an analysis of a claim that records are confidential commercial or financial information.²⁶¹ In fact, the majority of disputes of fact in FOIA cases are disputes not about the contents of the records, but about the circumstances surrounding them.²⁶² Evidence concerning these facts would be appropriately subject to discovery and would not reveal the content of the requested record.

Other courts have not gone as far as to ban discovery completely, but have adopted a standard by which plaintiffs are unable to access the tools of discovery at a normal stage in the litigation process and instead are required to wait until after summary judgment, if the case survives that long. These courts explain that because “[g]enerally, FOIA cases should be handled on motions for summary judgment [a] plaintiff’s early attempt in litigation . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions.”²⁶³ This rule is particularly troubling because summary judgment is the presumptive method for resolution of a FOIA case, with less than one percent of FOIA cases being resolved at trial.²⁶⁴ Thus, virtually no plaintiff will benefit from this potential opportunity for discovery.

A final circumstance courts sometimes identify as warranting discovery is when a FOIA plaintiff can demonstrate the agency’s bad faith.²⁶⁵ By contrast, discovery is not warranted “when it appears that discovery would only . . . afford[] [the plaintiff] an opportunity to pursue a ‘bare hope of falling upon something that might impugn the affidavits.’”²⁶⁶ As Judge Bazelon pointed out, however, a plaintiff will likely

²⁶¹ See Kwoka, *supra* note 146, at 236–37.

²⁶² *Id.*

²⁶³ *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993); see *Taylor v. Babbitt*, 673 F. Supp. 2d 20, 23 (D.D.C. 2009) (“Postponing discovery until the government has submitted its dispositive motion and supporting documents allows the court to obtain information necessary to appropriately limit the scope of discovery or forgo it entirely.”); *Murphy v. FBI*, 490 F. Supp. 1134, 1137 (D.D.C. 1980) (“[A] factual issue that is properly the subject of discovery [in a FOIA case] can arise only after the government files its affidavits and supporting memorandum of law.”).

²⁶⁴ Kwoka, *supra* note 146, at 258 (calculating the percentage of FOIA trials during the period between 1979 and 2008); see *Miscavige*, 2 F.3d at 369 (“Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.”); *infra* notes 272–289 and accompanying text.

²⁶⁵ See *Jones*, 41 F.3d at 242.

²⁶⁶ *Military Audit Project v. Casey*, 656 F.2d 724, 751–52 (D.C. Cir. 1981) (quoting *Founding Church of Scientology v. Nat’l Sec. Agency*, 610 F.2d 824, 837 n.101 (D.C. Cir. 1979)).

have no way of demonstrating an agency's bad faith, or impugning the affidavits, unless discovery is available.²⁶⁷ Thus, this rule, too, places the plaintiff in a classic catch-22.

In an ironic twist, one of the most prominent FOIA cases to allow discovery was *Weisberg v. Webster*, in which the D.C. Circuit in 1984 permitted the *government* to use discovery to obtain information held by the *requester*.²⁶⁸ Although "in the usual FOIA case, the government will be in possession of all such evidence" concerning the adequacy of its own search, the requester was a devoted researcher of the issues pertaining to the request who, the court concluded, had greater knowledge of the records than the government.²⁶⁹ If ever a discovery rule seemed lopsided, this case seems to have announced one. The court granted discovery to the government-defendant, not the requester-plaintiff.²⁷⁰ Although unusual because discovery was granted, this case exemplifies the norm in FOIA lawsuits: FOIA plaintiffs are almost uniformly unable to access the tools of discovery to gather evidence that could support their case or impeach the government's withholding claims.²⁷¹

3. Summary Judgment

Summary judgment is unusually central to the FOIA litigation process. Under the Federal Rules, summary judgment in a civil case is used to preview trial and resolve pure questions of law and cases with no genuine disputes of material fact.²⁷² If there is a dispute of fact that may affect the outcome of the case, summary judgment is inappropriate and the case proceeds to trial.²⁷³

²⁶⁷ See *Goland*, 607 F.2d at 357 (Bazelon, J., dissenting).

²⁶⁸ See *Weisberg*, 749 F.2d at 868.

²⁶⁹ *Id.* In this case, the plaintiff sought information from the Federal Bureau of Investigation (FBI) regarding the assassinations of President John F. Kennedy and Martin Luther King, Jr. *Id.* at 856–66. The FBI complied and released over 200,000 pages of documents. *Id.* The plaintiff claimed that the FBI's search was inadequate, and the FBI sought discovery as to the basis of these claims. *Id.* at 866. Noting that the plaintiff-requester had spent twenty years researching these issues, the court concluded that it was "entirely possible that the individual members of the agency . . . [were] not as astute or as knowledgeable as to what they have in their files as the plaintiff-requester." *Id.* at 868.

²⁷⁰ See *id.*

²⁷¹ See *supra* notes 243–271 and accompanying text.

²⁷² See FED. R. CIV. P. 56(a).

²⁷³ See *id.* Plaintiffs bringing cases under FOIA do not have a constitutional or statutory right to a jury trial, and therefore these cases proceed to bench trial. See *Lehman v. Nakshian*, 453 U.S. 156, 169 (1981) (holding that the Seventh Amendment of the U.S. Constitution does not apply to claims against the United States because of sovereign immunity); see also 5 U.S.C. § 552 (2006) (lacking a statutory provision for jury trial).

Courts have uniquely applied summary judgment in FOIA litigation.²⁷⁴ Almost uniformly, courts have declared that, “generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified”²⁷⁵ or even that “[a]s a general rule, *all* FOIA determinations should be resolved on summary judgment.”²⁷⁶ The underlying assumption is that FOIA cases turn only on legal questions, the only facts at issue being the contents of the requested records, which cannot be disputed, and thus that resolution at the summary judgment stage is appropriate.²⁷⁷

This assumption is incorrect. The application of FOIA’s exemptions turns on factual inquiries. For instance, Exemption 6 covers records the release of which would likely cause an “unwarranted invasion of personal privacy.”²⁷⁸ This determination requires predictive inquiries as to, on the one hand, the effect of the release on an individual or group of individuals, and, on the other hand, whether the release of the records will contribute to the public’s understanding of the operations and activities of the government.²⁷⁹ These inquiries require findings unrelated to the content of the records themselves, such as what knowledge on the topic is already public and how a record might be used for nefarious purposes. These facts are often in dispute in a FOIA case. As a result, the assumption that summary judgment is an appropriate vehicle for resolving FOIA cases is unwarranted.

Instead of acknowledging these factual disputes and ordering trials, however, courts end up resolving factual disputes at the summary

²⁷⁴ See Kwoka, *supra* note 146, at 244–49 (describing the use of summary judgment in FOIA cases).

²⁷⁵ *Miscavige*, 2 F.3d at 369; see *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 591 (4th Cir. 2004) (“FOIA cases are generally resolved on summary judgment . . .”); *Cooper Cameron Corp. v. U.S. Dep’t of Labor*, 280 F.3d 539, 543 (5th Cir. 2002) (“Summary judgment resolves most FOIA cases . . .” (citing *Miscavige*); see also *ACLU v. U.S. Dep’t of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (“If an agency’s affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency’s bad faith, then summary judgment is warranted on the basis of the affidavit alone.”).

²⁷⁶ *Lawyers’ Committee*, 534 F. Supp. 2d at 1131 (emphasis added).

²⁷⁷ Kwoka, *supra* note 146, at 227.

²⁷⁸ 5 U.S.C. § 552(b)(6).

²⁷⁹ 5 U.S.C. § 552(b)(6), (7)(C) (2006); see *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989); see also Kwoka, *supra* note 146, at 227–44 (providing a detailed analysis of the distinctions between factual and legal questions in FOIA cases).

judgment stage.²⁸⁰ Often, the weighing of evidence and resolution of factual questions is evident in the summary judgment opinions themselves.²⁸¹ In addition, empirical evidence demonstrates that FOIA cases are being treated differently from other civil cases. Because FOIA cases may present myriad factual disputes, presumably they should result in trials at a rate similar to other civil litigation. In reality, although the trial rate in civil cases has been slowly falling—with trials occurring in approximately 3% of civil cases—the trial rate in FOIA cases remains far lower.²⁸² In the years between 1979 and 2008, the trial rate in FOIA cases averaged less than 1%, and in the last ten years, there have been almost none.²⁸³ Additionally, about 12% of non-FOIA civil cases have been resolved by motion, whereas about 38% of FOIA cases are resolved by motion.²⁸⁴

The oddity of resolving factual disputes at the summary judgment stage has not gone unnoticed by the courts of appeals. Although traditionally a summary judgment decision is reviewed *de novo* by a court of appeals because it involves only questions of law, there is a split among the circuits as to the appropriate standard of review for summary judgment decisions in FOIA cases.²⁸⁵ Six circuits maintain the *de novo* standard,²⁸⁶ but five others have adopted varying articulations of a two-tiered standard of review under which the court of appeals reviews the district court's factual findings for clear error and legal conclusions *de*

²⁸⁰ See Kwoka, *supra* note 146, at 238–40 (contending that in some FOIA cases, judges decide factual disputes at the summary judgment stage); Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 732 (2006) (same).

²⁸¹ See, e.g., *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (reasoning, under the deliberative process privilege, that although some evidence tended to show that the requested report was post-decisional because it explained a legislative proposal that was already adopted, other evidence demonstrated the report was prepared to defend against anticipated public attacks, and concluding that the latter evidence was more persuasive, and thus that the exemption applied).

²⁸² Kwoka, *supra* note 146, at 256–60 (cataloging rates of FOIA trials over a thirty-year period).

²⁸³ *Id.* at 258.

²⁸⁴ *Id.* at 260.

²⁸⁵ See *id.* at 261–64 (describing the split in detail); Silver, *supra* note 280, at 735–40 (same).

²⁸⁶ See, e.g., *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009); *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1209 (8th Cir. 2008); *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1177 (10th Cir. 2005); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003); *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1078 (6th Cir. 1998); *Church of Scientology Int'l v. U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994).

novo,²⁸⁷ essentially acknowledging that fact-finding occurs at the summary judgment stage in FOIA cases.

The effect of resolving questions of fact at the summary judgment stage on the ability of FOIA plaintiffs to make their case is likely quite significant. Trials provide the opportunity for lawyers to focus a court's attention on the important points in a case in a way not often achievable in papers alone. Trials also provide the requester an opportunity to cross-examine government witnesses and to test the truth of their assertions, and provide a chance for meaningful discovery.²⁸⁸ Without the chance to see a government witness and assess his or her credibility under cross-examination, a district court is likely to view government affidavits as virtually unassailable and accept the affidavits as credible and true.²⁸⁹

4. Do-Overs

FOIA procedure also uniquely favors the government by giving it a second bite at the apple when it fails to meet its burden in the initial briefing. Typically, FOIA cases are decided not just on one party's motion for summary judgment, but on the government's and the requester's cross-motions for summary judgment. As described above, courts have presumed that these motions are the appropriate vehicles for resolving FOIA cases.²⁹⁰ Deferential treatment to the government occurs under two scenarios described in detail below.²⁹¹ First, the government receives procedural deference when the court concludes that neither motion should be granted, but rather than proceeding to trial, gives the government extra time to marshal its case and an opportunity to file a new motion for summary judgment.²⁹² Second, the court defers to the government's position when the court concludes that the

²⁸⁷ See, e.g., *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 275–76 (4th Cir. 2010); *Lane*, 523 F.3d at 1135 (9th Cir.); *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1189 (11th Cir. 2007); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998); *McDonnell v. United States*, 4 F.3d 1227, 1242 (3d Cir. 1993). The Fifth Circuit has not declared its position. See *FlightSafety Servs. Corp. v. U.S. Dep't of Labor*, 326 F.3d 607, 610–11 & n.2 (5th Cir. 2003) (per curiam).

²⁸⁸ *Kwoka*, *supra* note 146, at 273–76 (interviewing attorneys who have conducted FOIA trials). Empirical evidence, while scant, also suggests meaningful benefits to FOIA plaintiffs from trial proceedings. *Id.* at 264–67.

²⁸⁹ See *id.* at 244–46; see also *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) (holding that “[o]nce a court determines [in a FOIA case] that the [government’s] affidavits are sufficient, no further inquiry into their veracity is required”).

²⁹⁰ See *supra* notes 272–289 and accompanying text.

²⁹¹ See *infra* notes 292–313 and accompanying text.

²⁹² See *infra* notes 304–308 and accompanying text.

government failed to meet its burden of producing sufficient evidence from which the trier of fact could find in its favor on the claimed exemption, but gives the government leave to gather more evidence and thereafter to file a new motion for summary judgment, rather than granting summary judgment to the requester.²⁹³

To understand how these practices constitute deviations from typical litigation, consider first how a FOIA case would work if the normal rules of procedure applied. To begin, the government bears the burden of proof to demonstrate that a FOIA exemption applies, and thus to justify the withholding.²⁹⁴ Although it is highly unusual for a defendant to bear the burden at the summary judgment stage, Congress expressly allocated the burden to the defendant in FOIA cases.²⁹⁵ As a result, the government's task at the summary judgment stage should be substantially more difficult than the plaintiff's. To win a motion for summary judgment, a party who bears the burden of proof—here, the government—must demonstrate evidence on every element of the claim and that there is no genuine issue of material fact on any element of the claim such that a trier of fact could only find in favor of the moving party.²⁹⁶ Put another way, the party who does not bear the burden of proof (the requester in a FOIA case) should defeat a summary judgment motion simply by demonstrating some contrary evidence such that there is a genuine issue of material fact that must be tried.²⁹⁷ By contrast, a party that does not bear the burden of proof may win his or her own summary judgment motion merely by demonstrating a lack of sufficient evidence to find for the defendant on a single essential element of the claim.²⁹⁸

For instance, in the FOIA context, if the government were claiming that records were exempt under the deliberative process privilege recognized under Exemption 5,²⁹⁹ it would have to demonstrate that the records were (1) inter- or intra-agency; (2) predecisional; and (3)

²⁹³ See *infra* notes 309–313 and accompanying text.

²⁹⁴ See 5 U.S.C. § 552(a)(4)(B) (2006) (“[T]he burden is on the agency to sustain its action.”).

²⁹⁵ *Id.*

²⁹⁶ See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 119–21 (2006); see also FED. R. CIV. P. 56 (articulating the summary judgment standard).

²⁹⁷ See FED. R. CIV. P. 56.

²⁹⁸ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

²⁹⁹ 5 U.S.C. § 552(b)(5).

deliberative.³⁰⁰ If the plaintiff moves for summary judgment, points to the *Vaughn* index, and explains how the *Vaughn* index provides a lack of evidence that the records were deliberative, this should be sufficient to prevail on summary judgment.³⁰¹ On the other hand, if the government moves for summary judgment, it must demonstrate sufficient evidence in its *Vaughn* index on each of those three elements.³⁰² Even then, the plaintiff could defeat the motion by producing enough evidence to create a genuine dispute on any single element.³⁰³

But cross-motions for summary judgment in FOIA cases do not proceed this way. Instead, when a court concludes that the government has failed to produce evidence to support an essential element of the exemption claim, rather than grant the plaintiff's motion for summary judgment, a court often denies both motions with an explicit option for the government to refile with more evidence.³⁰⁴ In one case, where the court denied summary judgment to both parties on an Exemption 5 claim, the court ordered the agency to "submit a new *Vaughn* Index as to these documents with proper detailed document descriptions and reasons for withholding that illuminate the contents of the documents and the reasons for nondisclosure."³⁰⁵ In another case, the court oddly "partially granted" the plaintiff's motion for summary judgment on the issue of the inadequate *Vaughn* index, but then denied both motions for summary judgment on the exemption claims on the basis that the court could not make a determination about the exemptions without an adequate *Vaughn* index.³⁰⁶ These cases abound.³⁰⁷

³⁰⁰ See *Mink*, 410 U.S. at 89. Although it is unusual to talk about "elements" of a FOIA claim, as they typically are not defined as such, the components of a given exemption essentially function as elements because all or a certain number must be met for the exemption to apply.

³⁰¹ See *Celotex*, 477 U.S. at 327.

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See *infra* note 307 (collecting cases).

³⁰⁵ *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, No. Civ.A.04-1724(CKK), 2006 WL 696053, at *1 (D.D.C. Mar. 20, 2006).

³⁰⁶ *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d. 157, 175 (D.D.C. 2011).

³⁰⁷ See, e.g., *Clemente v. FBI*, 741 F. Supp. 2d 64, 89 (D.D.C. 2010) (finding the government's evidence inadequate, denying both parties' motions for summary judgment, and ordering the government to file a more adequate *Vaughn* index); *Schoenman v. FBI*, 604 F. Supp. 2d 174, 204 (D.D.C. 2009) (denying both parties' motions for summary judgment and ordering the government to produce a more specific *Vaughn* index); *NYC Apparel FZE v. U.S. Customs & Border Prot.*, No. Civ.A. 04-2105(RBW), 2006 WL 167833, at *36 (D.D.C. Jan. 23, 2006) (denying without prejudice the parties' cross-motions for summary judgment, ordering the government to submit to the court a more specific *Vaughn* index and "any addi-

It is difficult to imagine any other circumstance in which a court would not grant summary judgment against a party which clearly failed to meet its burden of production on an essential element of the claim. District courts often have the discretion to allow a plaintiff to refile with more or better evidence than she produced in the first round.³⁰⁸ The routinization of this practice, however, appears to be unique to FOIA cases, and only benefits the government.

In one striking case, a requester challenged the Bureau of Prisons' (BOP) invocation of Exemption 7, which covers certain law enforcement records.³⁰⁹ At the summary judgment stage, cross-motions contested whether BOP had met its burden to prove the threshold requirement to demonstrate that the records were compiled for law enforcement purposes.³¹⁰ The court explained that "[t]he BOP's supporting declaration neither identifies a particular individual or incident subject to an investigation nor connects a particular individual or incident to a potential violation of law."³¹¹ As a result, BOP did not meet its burden to produce evidence supporting the threshold requirement of

tional declarations" regarding the claimed exemptions, and thereby inviting renewed motions for summary judgment); *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (finding that the agency's *Vaughn* index was not sufficiently detailed, but that the requestor was not entitled to a declaratory judgment that the agency acted contrary to law, and ordering the government to submit a more specific *Vaughn* index after which renewed motions for summary judgment would be considered); *Queen v. Reno*, No. Civ.A. 96-1387(JAR), 2005 WL 762087, at *10 (D.D.C. Apr. 4, 2005) (denying both parties' motions for summary judgment while ordering the government to produce a supplemental *Vaughn* index and inviting the parties to renew their motions thereafter); *Campaign for Responsible Transplantation v. FDA*, 219 F. Supp. 2d 106, 116 (D.D.C. 2002) (finding the agency's *Vaughn* indices inadequate and ordering the government to submit a more specific index, after which renewed motions for summary judgment would be considered); *Sousa v. U.S. Dep't of Justice*, Civ. Nos. 95-375, 95-410, 1996 U.S. Dist. LEXIS 18627, at *32 (D.D.C. Dec. 9, 1996) (denying both parties' motions for summary judgment, granting the government sixty days to submit an amended *Vaughn* index and any additional affidavits, and granting an additional thirty days to refile the motion for summary judgment).

³⁰⁸ To begin, Federal Rule of Civil Procedure 56(a) only states that courts "shall" grant summary judgment. FED. R. CIV. P. 56(a). There is a dispute in the case law as to whether the word "shall" gives district courts discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact, and the rules committee has declined to change the word "shall" to the more clearly mandatory "must" that the new style of rules drafting uses for fear of eliminating existing discretion. See FED. R. CIV. P. 56 committee's note (2010 amend.). Perhaps even more importantly, Rule 56(d) also permits a court to defer ruling or deny a motion where a party demonstrates that there was insufficient opportunity to gather evidence. This situation is not likely directly applicable to the government in a FOIA case, which chooses when to file the motion and controls the relevant evidence, but allowing refiling is likely within the district court's authority.

³⁰⁹ *Benavides v. Bureau of Prisons*, 774 F. Supp. 2d 141, 145 (D.D.C. 2011).

³¹⁰ *Id.* at 146.

³¹¹ *Id.* at 147.

Exemption 7.³¹² Rather than grant summary judgment to the plaintiff, who won the contested issue, the court denied the plaintiff's motion without any invitation to refile (although the opportunity was not yet foreclosed by the scheduling order), and then, in denying that portion of BOP's motion, specified that the denial was "without prejudice."³¹³ Thus, in the court's view, only the government should get a second bite at the apple.

The consequence of this practice is clear. The government need not put its best foot forward in its first round of papers. If it fails to win with its initial try, it will usually get another chance. If the usual summary judgment standard were applied, and the government's failure to produce minimal evidence on an essential element was fatal, plaintiffs would prevail much more often or the government would be forced to put forth a meaningful showing of evidence the first time around.

IV. IMPLICATIONS OF PROCEDURAL MANIPULATION

The spoken and unspoken deference practices discussed above are problematic in and of their own right. Taken together, they defy the will of Congress by distorting the standard of review it prescribed and effectively endorsing greater government secrecy than was envisioned under FOIA.³¹⁴ As one scholar has persuasively argued with respect to extra deference afforded to the military under APA review, departing from a congressionally chosen standard of review by the creation of common law deference doctrines "is problematic on a deeper level than a simple error of statutory interpretation; it represents the courts' failure to respect the democratic process."³¹⁵ At bottom, this poses a fundamental separation of powers problem, with the judiciary failing to give effect to the duly enacted laws of the Congress.³¹⁶

The forms of "unspoken deference" catalogued in this Article have especially troubling implications. As demonstrated, altering the typical discovery processes, manipulating the summary judgment standard, and allowing one litigant special privileges to rehabilitate failed motions all combine to give the government great advantages. At bottom,

³¹² *Id.*

³¹³ *Id.*

³¹⁴ For a detailed and persuasive argument regarding the separation of powers implications of courts' departure from congressionally chosen standards of review, see Kovacs, *supra* note 172, at 608.

³¹⁵ *Id.*

³¹⁶ *Id.*

these “unspoken deference” practices pose an even greater set of problems than the spoken deference doctrines in several important ways.

Most importantly, some of these entrenched procedural practices may consciously or subconsciously have been made because of judges’ underlying views about the merits of FOIA as a transparency tool generally or the merits of the particular FOIA dispute before the court. That at least some judges are not fond of FOIA disclosures is not a particularly well-kept secret.³¹⁷ Indeed, some evidence of this fact can be found empirically. Professor Paul Verkuil’s analysis of FOIA outcomes included an analysis of so-called reverse FOIA cases, cases in which a third party sues the government to prevent release of records to a requester under FOIA, typically by claiming that the records are trade secrets.³¹⁸ Because these cases are brought under the APA, the agency’s decision to release the records is reviewed for an abuse of discretion, a deferential standard that would predict a higher affirmance rate than the affirmance rate for FOIA cases.³¹⁹ Contrary to that prediction, Verkuil finds that the affirmance rate in reverse FOIA cases is significantly lower than in traditional FOIA cases.³²⁰ Thus, agencies’ decisions to release documents are overturned more often than their decisions not to disclose, which are considered under a stricter standard. This finding, although hardly conclusive, nonetheless provides some evidence that judges more systematically defer to secrecy decisions under FOIA.

The obfuscation of substantive decision making through the manipulation of discretionary procedures has been rightly criticized in other contexts.³²¹ One scholar has discussed the U.S. Supreme Court’s use of “substance disguised as process,” in decisions concerning the

³¹⁷ See, e.g., Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar.–Apr. 1982, at 14, 15 (calling FOIA “the Taj Majal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored”); see also Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760–61 (1988) (urging meaningful judicial review, while acknowledging that review “often seems to be done in a perfunctory way” and that “[p]robing even a little into national security matters is not an easy or a pleasant job”).

³¹⁸ See Verkuil, *supra* note 10, at 717.

³¹⁹ See *id.*

³²⁰ See *id.* at 717–18 (observing an affirmance rate of approximately eighty percent in reverse FOIA cases).

³²¹ Although I use the terms “substance” and “procedure” as if their meanings were both distinct and obvious, I recognize that even the Supreme Court recognizes a significant grey zone between the two. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1018–21 (2008) (collecting examples of grey areas between substance and procedure and describing the related scholarly debate).

Guantanamo detainees.³²² In her categorization, “substance disguised as process” cases are those in which procedural rulings are “motivated by the desire to affect the substantive outcome of the case.”³²³ This scholar contends that the use of procedural dodges to avoid substantive decisions concerning the propriety of torture and other war on terror tactics secretly subverts substantive law by failing to address the merits that motivate the decision.³²⁴ As she observes, procedural law itself may be “bent” along the way.³²⁵ Finally, she notes the lack of candor and transparency this represents in the judiciary itself.³²⁶

Likewise, another scholar has strongly critiqued the discretionary decisions made to effectuate substantive preferences in the criminal justice system, especially when those substantive preferences subvert the expressed will of the legislature.³²⁷ He reveals that politicians, the media, and the public enact changes to the criminal justice system, such as sentencing reform, only to have prosecutors rely on discretionary decisions in the use of “low visibility procedures” to undermine these reforms.³²⁸ This scholar observes that using discretionary procedures to affect substantive outcomes impairs legitimacy and trust in the criminal justice system, clouds understanding of the substantive law, and prevents the public from meaningfully participating in reform.³²⁹

The same problems these scholars document in other contexts in which procedural maneuvers hide substantive motivations are present in FOIA cases. To the extent that the unspoken deference in FOIA cases results from underlying views about the merits, it reflects a lack of transparency in the judicial decision-making process itself because it fails to give notice to the public and the parties of the grounds on which the decision really rests.³³⁰ In this way, the merits of the case or of FOIA disclosure laws themselves will not be debated, reasoned, or explained, but rather procedural rulings will disguise the difficult issues.³³¹

³²² Martinez, *supra* note 321, at 1090.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 1091–92.

³²⁷ Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 945–46 (2006).

³²⁸ *Id.*

³²⁹ *Id.* at 946–52.

³³⁰ *Cf.* Martinez, *supra* note 321, at 1091 (arguing that using procedural rulings to achieve substantive outcomes itself evidences a lack of transparency in the judicial process).

³³¹ This can be likened to the accepted use of dismissals for lack of standing as a proxy for a judgment on the merits. *See id.* at 1059 (citing examples in which district courts dis-

In addition, a collection of procedural practices, particularly ones that purport to apply the generic procedural rules or use case-by-case discretion to depart from them, are unlikely to garner the attention or effective response on the part of Congress or the public. When the Supreme Court decided *EPA v. Mink* in 1970 and eviscerated any effective review of classification claims made under FOIA, Congress acted immediately to restore de novo judicial review.³³² Yet when courts use unspoken deference to sanction government secrecy, it is less likely to provoke a public debate about the merits of that deference or to prompt legislative responses. The effect of these practices is simply less clear in the aggregate than a ruling that reflects the substantive effect. Masking these substantive motives with procedural rulings is, therefore, normatively problematic.³³³

In addition to concerns about secret rulings on the merits of a case, distortion of procedural practices in FOIA cases poses other concerns about judicial integrity. The Federal Rules are designed to be trans-substantive—that is, with rare exceptions, the same rules apply to all cases regardless of the case type.³³⁴ A central purpose of trans-substantivity is to create a sense of fairness to the parties and reliability in the litigation system.³³⁵ When courts create special procedures for

missed for lack of standing a suit brought to challenge the National Security Agency's warrantless wiretapping program and a suit brought to challenge detention and rendition to Syria); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1397–1400 (2012) (noting that courts may use standing rules to screen cases as a method of docket management, thereby using standing rules as a proxy for the merits). *But see* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 634 (2006) (arguing that it is not necessarily undesirable if judges' views of the merits influence dismissals based on justiciability).

³³² *EPA v. Mink*, 410 U.S. 73, 81 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. 93-502, 88 Stat. 1561 (1974), *as recognized in* *CLA v. Sims*, 471 U.S. 159 (1985); *see supra* notes 94–105 and accompanying text.

³³³ *See* Martinez, *supra* note 321, at 1091 (“‘Substance disguised as process’ is also troubling from a normative perspective. When substantive issues are resolved under the guise of procedural rulings, there is a lack of candor and analysis of the substantive issues.”); *see also* Fallon, *supra* note 331, at 634 (explaining that numerous scholars have argued that “hidden judgments about what ought to happen at a later stage sometimes influence determinations one step earlier”).

³³⁴ *See* FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 80 (1997) (defining trans-substantive to mean that the same procedural rules are used for different types of cases, regardless of the substantive law being applied).

³³⁵ *See* Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 STETSON L. REV. 55, 100–01 (2005) (arguing that courts should follow neu-

one substantive set of cases, these values are undermined because the rules appear to reflect bias and a lack of predictability.³³⁶ Furthermore, application of the same rules across case type, over time, tends to produce accurate results, whereas departures from the rules increase risk of error in case outcomes.³³⁷ Even more alarming, departing from trans-substantivity to give the government greater deference than Congress provided in the statute can be seen as judges resolving cases on political rather than legal grounds.³³⁸ This perception has serious implications for the public's confidence in the judiciary and view of the judiciary's legitimacy.³³⁹ As one scholar put it, "once one starts debating which procedures are best for which types of cases, it becomes obvious that political decisions are being made."³⁴⁰

All deference to government positions under FOIA contradicts the clear terms of the statute and Congress's express intent in providing for de novo judicial review. Unspoken or procedural deference, however, poses particularly troubling concerns vis-à-vis the role of the judiciary in reviewing agency decisions to withhold records from the public.

V. RESTORING DE NOVO REVIEW

Congress tried not once but twice to ensure de novo judicial review to protect the public's right to access government information under FOIA.³⁴¹ As Judge Patricia Wald said nearly twenty-five years ago,

If courts had to give traditional deference to agency interpretations of the FOIA, as they do in almost every other review of agency action, the Act might have been suffocated in infancy. At the least, the Act would not have occupied its present, major role in our national lives and governance.³⁴²

tral, generally applicable procedural rules in end-of-life cases to ensure fairness to the parties).

³³⁶ *Id.* at 101.

³³⁷ *Id.*

³³⁸ *See id.* at 100, 103.

³³⁹ Judicial departure from the trans-substantive Federal Rules that apply has been rightfully criticized in other contexts. *See id.* at 94 (arguing that judges inappropriately "disregard or distort neutral, generally applicable procedural rules" in end-of-life cases based on the underlying subject matter).

³⁴⁰ Subrin, *supra* note 247, at 384.

³⁴¹ *See supra* notes 79–105 and accompanying text.

³⁴² Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658 (1984) (footnote omitted).

Yet, this deferential review is precisely where the courts have ended up, without acknowledging as much. Although courts give lip service to FOIA's de novo review provision, the ninety-percent affirmance rate for agency decisions to withhold information under FOIA demonstrates that the formal standard does not tell the whole story.³⁴³

A system of deference to agency secrecy has emerged, comprised of circumstances where courts have ignored clear statutory language, including express deference doctrines concerning particular exemption claims and a collection of unique procedural mechanisms in FOIA cases that tilt the scale in the government's favor.³⁴⁴ This deference system explains the observed affirmance rate.

Ideally, of course, courts would reform their own practices to conform to the trans-substantive procedural rules and would treat FOIA cases in the same manner as other civil litigation. In addition, they would reconsider their practices of spoken deference in light of FOIA's statutory mandate.³⁴⁵ Courts have the power to revisit their assumptions about the proper way to review an agency's decision to withhold information from the public and to conclude that their past practices, however long-standing, conflict with the statutory language and congressional intent.³⁴⁶

Nonetheless, we must recognize that these practices are deeply entrenched in FOIA jurisprudence.³⁴⁷ It is therefore worth considering strategies litigants in FOIA cases could employ to resist the system of deference to the government's secrecy positions. First, requesters could more often seek discovery and litigate their entitlement to it, rather than assume its unavailability. Second, requesters faced with the government's motion for summary judgment should, in their cross-motion and opposition, not limit themselves to arguing their own entitlement for summary judgment. Rather, they should also argue in the alternative the inappropriateness of resolution at the summary judgment stage by highlighting genuine disputes of material fact appropriately resolved at trial.³⁴⁸ Third, requesters should challenge the spoken deference

³⁴³ See *supra* notes 120–165 and accompanying text.

³⁴⁴ See *supra* notes 166–313 and accompanying text.

³⁴⁵ See *supra* notes 79–105 and accompanying text.

³⁴⁶ See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.” (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted))).

³⁴⁷ See *supra* notes 166–313 and accompanying text.

³⁴⁸ See *Kwoka*, *supra* note 146, at 273–76 (explaining the benefits of trials in FOIA cases).

doctrines whenever they arise as contrary to the statute and to congressional intent in enacting FOIA. These types of strategies may force courts to view FOIA cases as they view other litigation and make rulings more in line with mainstream procedural practices and with the statutory language.

Although litigants may be able to advance some of these causes, ultimately, courts' deference to governmental secrecy may require a political solution. Congress could approach this problem in several ways. The first option is to attempt to clarify the *de novo* standard by articulating specifically a nonexhaustive list of inquiries to which it applies, legislatively overruling the courts' spoken deference doctrines. For instance, this legislation would specify that courts review *de novo* all inquiries relevant to a claimed exemption, including but not limited to the government's representations about the agency's decision-making process, the potential national security harm that would result from the release of records, and the law enforcement purpose for which records were compiled.³⁴⁹ With specificity in the language of the statute about *de novo* review applying to these questions, it would be difficult for the existing spoken deference doctrines to stand.

Perhaps most importantly, Congress could undertake procedural reform in FOIA cases. Although not common, Congress occasionally does specify departures from the Federal Rules for particular substantive claims as a result of unique problems that arise in specific contexts.³⁵⁰ FOIA is an area with specialized litigation difficulties arising from the information imbalance between the government and the requester and perhaps warrants a specialized procedural solution.³⁵¹ One reform that would greatly reduce the unspoken deference to the government's secrecy decisions includes guaranteeing the availability of some minimal amount of discovery prior to summary judgment motions, such as one set of interrogatories and a single deposition. Giving the requester the opportunity to examine a government official familiar with the records at issue would permit the requester to test genu-

³⁴⁹ See *supra* notes 168–223 and accompanying text (explaining the various areas in which courts have announced formal, stated deference to a government position relevant to a FOIA exemption).

³⁵⁰ See, e.g., Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1071–72 (1999) (describing Congress's decision, in the Private Securities Litigation Reform Act of 1995, to depart in certain ways from the Federal Rules for securities claims, including special sanctions procedures and pleading requirements).

³⁵¹ See *supra* notes 224–313 and accompanying text (describing unique challenges in FOIA litigation).

inely, and perhaps contest, the government's claims.³⁵² Another powerful procedural reform would be to allow the government a single opportunity for a summary judgment motion, requiring the court either to grant summary judgment to the plaintiff if the government fails to produce sufficient evidence to allow the trier of fact to find in its favor, or to order the case to trial if there exists a genuine dispute of material fact. Disallowing do-overs for the government would compel the government to put forth its best case the first time around, allow the court to make a ruling based on the best available evidence, and shorten the litigation process for all involved.³⁵³

CONCLUSION

Taken together, courts, litigants, and Congress should consider their role in remedying the system of deference to secrecy. This system of deference raises troubling questions about whether decision making has suffered at the administrative level under FOIA in reaction to a lack of meaningful judicial review. It also raises concerns that Congress's desire for a true judicial remedy for aggrieved requesters is not available in practice. The courts in particular should consider the effect of using procedural mechanisms to effectuate particular substantive outcomes: hiding the nature of the decision-making process, preventing a meaningful political response, and creating distrust of the judiciary. These serious concerns warrant consideration of FOIA reform for all involved.

³⁵² See Kwoka, *supra* note 146, at 273–76.

³⁵³ See *supra* notes 290–313 and accompanying text.