

# FOIA’s Common Law

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*The Freedom of Information Act (FOIA) replaced the near-total control that agencies held over their records with a judicially enforceable “right” of public access to agency information. Underscoring the importance of this statutory right, FOIA rejected the judiciary’s traditional respect for agency expertise. It instead places the burden of proof on the government and mandates de novo review in litigation. And yet, agencies still effectively control the terms of information disclosure. The government wins nine out of every ten FOIA cases in court. This ratio is a startling departure from other areas of administrative law, where agencies generally enjoy much lower win rates.*

*This Article provides a framework for understanding this tension. Tracing FOIA’s doctrines to their roots, it finds that FOIA jurisprudence reflects the well-established “administrative common law” approach that courts apply elsewhere in administrative law. Specifically, courts have used functional or policy-based reasoning to transport preexisting evidentiary and administrative law doctrines to FOIA litigation, often in ways that challenge statutory text. Because these pre-FOIA doctrines overwhelmingly empowered the executive, the ensuing doctrines that courts grafted onto FOIA (“FOIA’s common law”) predictably and consistently favor agencies.*

*Recognizing FOIA doctrine as a subset of administrative common law holds broader implications. It provides a meaningful baseline for critique by situating FOIA within a larger debate over the judiciary’s proper role in the administrative state. It also offers new perspectives on how Congress can counteract the inertial forces driving FOIA’s common law. Finally, it informs the debate over administrative common law by showing the method’s resilience in an area where Congress has been uniquely active.*

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## Introduction

The Freedom of Information Act (FOIA) is a conspicuously pro-disclosure statute. It allows any person to request any records on any subject from federal agencies.<sup>1</sup> Agencies must provide nearly all responsive records to requesters unless they fall within one of nine “specifically stated” exemptions.<sup>2</sup> Even if part of a record is exempt, agencies still have a duty to disclose any “reasonably segregable” non-exempt information.<sup>3</sup> In litigation, agencies hold the burden of proof and courts review the entire matter de novo.<sup>4</sup> Overlaying these provisions, FOIA’s short title declares that the statute’s purpose is to “clarify and protect the

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1. 5 U.S.C. § 552(a)(3)(A) (2018).

2. *Id.* § 552(d). FOIA’s exemptions cover (1) properly classified information, (2) “internal personnel rules and practices,” (3) information that other statutes exempt from disclosure, (4) privileged or confidential commercial information and trade secrets, (5) privileged internal agency memoranda or letters, (6) some materials that would “constitute a clearly unwarranted invasion of personal privacy if disclosed,” (7) certain law-enforcement information, (8) some reports created by agencies that regulate financial institutions, and (9) certain geological and geophysical information. *Id.* § 552(b). FOIA also contains three narrow “exclusions” for information that agencies do not have to acknowledge when responding to a FOIA request. *Id.* § 552(c) (excluding records of ongoing law-enforcement investigations where the suspect is not aware of the investigation, certain FBI intelligence records, and some confidential informant records).

3. *Id.* § 552(b).

4. *Id.* § 552(a)(4)(B).

right of the public to information,”<sup>5</sup> while congressional findings in a later amendment emphasize that FOIA mandates a “strong presumption in favor of disclosure.”<sup>6</sup> The Supreme Court has sensibly read these statutory instructions to require that courts narrowly construe FOIA’s exemptions<sup>7</sup> and resolve any ambiguity in favor of disclosure.<sup>8</sup>

This pro-disclosure framework is “deliberate.”<sup>9</sup> As then-Professor Scalia noted, these provisions “can only be understood as the product of the extraordinary era that produced them.”<sup>10</sup> Much of FOIA’s modern framework is the offspring of a Congress fueled by post-Watergate fury and a scandal-plagued executive unable to resist.<sup>11</sup> Even today, FOIA’s leading treatise observes that the statute embodies “the power of frustration reflected in congressional distrust for agency withholding.”<sup>12</sup>

And yet, plaintiffs who sue recalcitrant agencies under FOIA face a stark reality: Courts “almost instinctively” side with the government,<sup>13</sup> ninety percent of the time according to some estimates.<sup>14</sup> FOIA’s results are, by far, outliers in administrative law, much of which falls under judicial doctrines that explicitly call for deference to agencies.<sup>15</sup> When these outcomes are considered alongside the well-documented delays and denials that plaintiffs face at the agency level,<sup>16</sup>

5. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 250 (July 4, 1966).

6. OPEN Government Act of 2007, Pub. L. No. 110-175, § 2(1)(3), 121 Stat. 2524, 2524; *accord* U.S. Dep’t of State v. Ray, 502 U.S. 164, 173 (1991).

7. *E.g.*, Milner v. Dep’t of the Navy, 562 U.S. 562, 565 (2011) (“[FOIA’s] exemptions are ‘explicitly made exclusive’ and ‘must be narrowly construed.’” (first quoting EPA v. Mink, 410 U.S. 73, 79 (1973); and then quoting FBI v. Abramson, 456 U.S. 615, 630 (1982))); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 362 (2012) (concluding that FOIA is one of the “rare[]” statutes for which a narrow construction of exceptions is justified).

8. *See* Dep’t of the Air Force v. Rose, 425 U.S. 352, 366 (1976) (“FOIA requires us to choose that interpretation most favoring disclosure.”); *see also* John Doe Agency v. John Doe Corp., 493 U.S. 146, 164 (1989) (Scalia, J., dissenting) (“[O]ur doctrine of ‘narrowly construing’ FOIA exemptions requires . . . ambiguity to be resolved in favor of disclosure.”).

9. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 188 (2013); *see also* 1 JAMES T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE* § 8:22, at 630 (Winter 2018) (“Deference to the findings of an expert agency has a part to play in virtually all administrative law controversies, *except* a FOIA case.”).

10. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG.: AEI J. ON GOV’T & SOC’Y, Mar./Apr. 1982, at 14, 15.

11. *See id.* at 15-16. Congress enacted FOIA in 1966, but “[t]he 1966 version was a relatively toothless beast, sometimes kicked about shamelessly by the agencies.” *Id.* at 15. Congress greatly strengthened FOIA’s mandate and adopted many of its modern provisions in 1974. *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561.

12. 1 O’REILLY, *supra* note 9, § 3:8, at 56 (2018).

13. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002).

14. *See* 1 O’REILLY, *supra* note 9, § 7:1, at 242; Verkuil, *supra* note 13, at 713.

15. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010) (finding a sixty-to-seventy percent agency affirmance rate under *Chevron*, *Skidmore*, and arbitrary and capricious review); *see also* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2008) (finding that the Supreme Court affirms agency legal interpretations sixty-eight percent of the time).

16. Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 465 (2015) (“In the aggregate, the prevalence of delays, questionable denials, and commercial requests, strongly suggests that

it is perhaps unsurprising that commentators have largely concluded that FOIA has failed its mission.<sup>17</sup> Congress apparently agrees. Congressional findings in a 2006 amendment to FOIA conceded that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act.”<sup>18</sup> Newspapers have been more colorful, with one columnist calling FOIA “a Rube Goldberg apparatus that clanks and wheezes, but rarely turns up the data.”<sup>19</sup>

The conventional accounts of the government’s dominance in FOIA litigation blame either the judge-made deference regimes that shield agencies from searching judicial scrutiny<sup>20</sup> or the ostensibly FOIA-specific procedural hurdles that courts impose on requesters.<sup>21</sup> This Article contends that these explanations misdiagnose symptoms of FOIA’s failure as the disease. Both track a larger pattern that underpins a wide swath of FOIA doctrines: Judicial interpretations of FOIA correlate strongly with pre-FOIA discovery and administrative law holdings. Further, the opinions that adapted these doctrines to FOIA litigation relied heavily on functional or prudential reasoning to reach holdings at odds with statutory text. Because pre-FOIA doctrines gave the executive branch near-total control over information disclosure, correlating interpretations of FOIA have likewise given agencies an overwhelming win rate. Meanwhile, FOIA’s pro-disclosure provisions have taken a back seat. The final product is a strong, pro-government gloss over nearly all of FOIA. This Article labels this gloss “FOIA’s common law.”

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many agencies have significant problems in their implementation of the Act.”); *see also* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 891 (2006) (describing how “executive officers and agencies routinely deny access to the government’s inner workings,” making “open government seem[] more like a distant, deferred ideal than an actually existing practice”). This Article does not address agency-level problems with FOIA’s implementation.

17. *See, e.g.*, Mark Fenster, *FOIA as an Administrative Law*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 52, 52 (David E. Pozen & Michael Schudson eds., 2018) (noting that “the conventional wisdom among transparency advocates and the press” is that FOIA’s “history is a sad, disappointing story of a second-best, not very good alternative”); Tai, *supra* note 16, at 456 (“Despite these widespread beliefs in the Act’s benefits, its success in implementation has fallen far short of the statute’s goals . . .”); *see also* STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT, at ii (2016) (collecting feedback from FOIA stakeholders about “delays, abusive fees, inappropriate redactions, and other tactics frustrating the FOIA process”).

18. OPEN Government Act of 2007, Pub. L. No. 110-175, § 2(1)(5), 121 Stat. 2524, 2524.

19. David Carr, *Let the Sun Shine*, N.Y. TIMES (July 23, 2007), <http://www.nytimes.com/2007/07/23/business/media/23carr.html> [<https://perma.cc/VCZ2-2X8M>].

20. *See, e.g.*, David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 652-58 (2005); 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, 224-32 (2006).

21. *See, e.g.*, John C. Brinkerhoff Jr. & Daniel B. Listwa, *Deference Conservation—FOIA’s Lessons for a Chevron-less World*, 71 STAN. L. REV. ONLINE 146, 151-52 (2018); Kwoka, *supra* note 9, at 211; Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 731 (2006). For a discussion on some of these hurdles, see *infra* Section I.B.5.

FOIA's common law is not unique. It is an extension of "administrative common law," the well-documented method that courts use when interpreting the Administrative Procedure Act (APA). Under this approach, courts draw decisions from "judicial conceptions of appropriate institutional roles, along with pragmatic and normative concerns, that are frequently constitutionally infused and developed incrementally through precedent."<sup>22</sup> No article has analyzed the implications of administrative common law outside of traditional APA litigation.

This Article examines such an effect within FOIA. It proceeds in three parts. Part I introduces FOIA's common law as a prominent force in FOIA jurisprudence. After providing a brief account of administrative common law and its connection to FOIA, it illustrates FOIA's common law through five doctrinal case studies. Part II links FOIA's common law to its pro-government outcomes, detailing how FOIA's fundamental incompatibility with preexisting administrative and evidentiary common law undermined its mission. It then discusses the survival of FOIA's common law in an increasingly textualist judicial environment.

Part III considers some implications of FOIA's common law. It first uses the debate over administrative common law as a lens to evaluate the legitimacy of FOIA's common law. It then explores why courts targeted FOIA for the administrative common law treatment, looking at the role of established precedent and the concurrent development of APA doctrine as catalysts. Next, it leverages FOIA's common law to make a broader assessment of how Congress could counteract well-entrenched federal common law. It concludes with a brief discussion on the lessons that FOIA's common law holds for the larger administrative common law debate.

## I. Defining FOIA's Common Law

This Part briefly examines the administrative common law method and its relation to FOIA. It then details the contours of FOIA's common law through five case studies that encompass substantive and procedural facets of FOIA litigation. Each case study originated from pre-FOIA judicial doctrines, departs from statutory text, and is grounded in functional or policy-based reasoning, fitting the administrative common law paradigm.

### A. *Situating FOIA Within the Administrative Common Law Method*

Broadly speaking, administrative common law is judicial doctrine that "exceeds the boundaries of any permissible interpretation" of the APA or other

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22. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012); see also Jack M. Beerman, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2 (2011) ("[F]ederal courts may not actually behave all that differently than court systems with an openly acknowledged common law tradition in administrative law.").

administrative statutes.<sup>23</sup> Digging deeper, it holds two key features. First, it emphasizes functional, institutional, and prudential considerations over statutory text.<sup>24</sup> Second, it develops incrementally over time through precedent, often from pre-APA federal common law.<sup>25</sup> Collectively, it represents an expansive body of doctrine that “would be ‘unrecognizable’ to the APA’s drafters.”<sup>26</sup>

Ripeness, the presumption in favor of judicial review, and the “logical outgrowth” doctrine are all administrative common law doctrines.<sup>27</sup> A quintessential example is the *Chevron* doctrine, which holds that courts must defer to reasonable agency interpretations of ambiguous statutes.<sup>28</sup> The *Chevron* Court never cited the APA, which mandates that courts “shall decide all relevant questions of law [and] interpret . . . statutory provisions.”<sup>29</sup> It instead relied on institutional concerns and pre-APA common law.<sup>30</sup> And without statutory grounding, *Chevron* evolved substantially over time.<sup>31</sup>

It is not surprising that courts have taken a common law approach to FOIA. When Congress enacted it, Louis Jaffe’s *Judicial Control of Administrative Action*, the “summa theologica of this era of administrative law scholarship,”<sup>32</sup> simply noted as a descriptive fact that a “common law of review” defined administrative law.<sup>33</sup> The other leading treatise at the time agreed, observing that “most of [administrative law] is common law in every sense.”<sup>34</sup> As the defining theory of administrative law during FOIA’s formative years, administrative common law is central to understanding the statute’s development.

23. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1212 (2015). Other definitions are broader. *E.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (“‘Federal common law’ . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text, whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense.”).

24. *See, e.g.*, Metzger, *supra* note 22, at 1313.

25. Beerman, *supra* note 22, at 3; *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119 (1998) (contending that administrative common law is partially motivated by judges fighting to maintain their pre-APA authority as “law-givers”).

26. Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB’s Design for Administrative Governance*, 36 YALE J. ON REG. 273, 278 (2019) (quoting GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 308 (7th ed. 2016)).

27. *See* Beerman, *supra* note 22, at 8.

28. *See* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

29. 5 U.S.C. § 706 (2018). Others have discussed this tension. *See, e.g.*, Beerman, *supra* note 22, at 22; Duffy, *supra* note 25, at 193-97. Perhaps underscoring *Chevron*’s judicial origins, it is unclear whether courts should treat *Chevron* as a precedent, standard of review, or canon. *See* James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 188-190 (2019).

30. *See* Metzger, *supra* note 22, at 1302 (explaining that the *Chevron* Court justified its decision with “general assumptions about congressional intent, constitutional considerations about the appropriate bounds of the judicial role, and the relative accountability of courts and agencies”).

31. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001) (limiting *Chevron* to certain agency actions). Like *Chevron*, *Mead* lacks grounding in the APA. *See* Metzger, *supra* note 22, at 1302.

32. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 955 n.1 (1997).

33. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 329 (1965).

34. 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.18, at 140 (2d ed. 1978); *see also id.* (“Perhaps about nine-tenths of American administrative law is judge-made law . . .”).

Of course, administrative common law is more complex than this summary suggests. It is often difficult to identify “where statutory interpretation ends and common law begins.”<sup>35</sup> Some commentators define administrative common law as any doctrine formed without guidance from statutory text.<sup>36</sup> Others require doctrine to clash with other interpretive sources, such as legislative intent and statutory purpose.<sup>37</sup> Moreover, most administrative common law doctrines claim tenuous “statutory hooks” in the APA or some other statute,<sup>38</sup> so the difference between statutory interpretation and common law is often “a difference in emphasis rather than a difference in kind.”<sup>39</sup> This nuance often focuses the task of classifying administrative common law on parsing how tenuously a given doctrine fits with the APA.<sup>40</sup> Some commentators pursuing this inquiry have turned to what Evan Bernick has coined “proto-APA originalism,” looking to the APA’s original meaning as a criterion for the legitimacy of administrative common law doctrines.<sup>41</sup>

This Article does not wade too deeply into this process. Its goal is not to comprehensively categorize FOIA jurisprudence or engage with doctrines that lie at the margins. It only presents the modest case that administrative common law operates on FOIA in a material way. To be sure, it is impossible to completely avoid disputes over classification. Some commentators argue that even the clearest examples of administrative common law are indistinguishable from the judiciary’s traditional approaches to statutory interpretation.<sup>42</sup> Still, this Article mitigates these disputes by limiting its analysis to doctrines that not only conflict with FOIA’s text, but also that evolved from pre-FOIA administrative or discovery doctrines and that courts justified with functional, institutional, or policy considerations.

FOIA itself also makes this inquiry clearer than the rest of the APA. Whatever interpretive relevance purposive analysis might have elsewhere, FOIA’s purpose—to “protect the right of the public to information”—is textually

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35. Kovacs, *supra* note 23, at 1212.

36. See, e.g., Duffy, *supra* note 25, at 115.

37. See, e.g., Metzger, *supra* note 22, at 1311.

38. *Id.* at 1310.

39. Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980).

40. See Metzger, *supra* note 22, at 1311.

41. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 830 (2018). For example, Aditya Bamzai challenged *Chevron*’s legitimacy by conducting a thorough analysis of pre-APA judicial review of executive branch legal interpretations. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); see also Steven J. Lindsay, Note, *Timing Judicial Review of Agency Interpretations in Chevron’s Shadow*, 127 YALE L.J. 2448 (2017) (reconciling contemporary administrative common law with the historical practice of giving legal force to interpretive rules).

42. See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 801 (2013); see also ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 208 (2006) (offering that *Chevron* might be justified if “the meaning of the relevant law just is what the agencies say that it is”).

embedded in the statute.<sup>43</sup> Albeit to varying degrees, such statements are largely accepted as interpretive aides.<sup>44</sup> Deploying purposivism to favor secrecy would inherently involve weighing and rejecting this textual purpose in favor of an inapposite, non-textual “purpose.” Such a process would be a normative enterprise, dovetailing with William Eskridge and Philip Frickey’s conclusion that the “attribution of purpose will inevitably be influenced by the interpreter’s current context and the evolution of the statute over time.”<sup>45</sup> Accordingly, this Article classifies any “purposive” analysis that departs from FOIA’s textual purpose as administrative common law.

### B. Case Studies in FOIA’s Common Law

Existing accounts of administrative common law overlook FOIA.<sup>46</sup> This Section fills the gap with five case studies that encompass some of FOIA’s most frequently invoked doctrines. It begins with three of FOIA’s exemptions—defenses that agencies raise to withhold responsive information. It then moves to non-statutory deference regimes and concludes with the judge-made burden-shifting standard that exists in procedural disputes across FOIA.

#### 1. Exemption 5 and “Inter-Agency or Intra-Agency” Records

Exemption 5 allows agencies to protect “inter-agency or intra-agency memorandums or letters that would not be available by law to a [non-agency] party in litigation.”<sup>47</sup> The Supreme Court has reasonably interpreted this exemption to allow agencies to claim some of the privileges that they receive in litigation, such as the deliberative process privilege.<sup>48</sup> But most appellate courts have gone further. They hold that even though the exemption is limited to “inter-agency or intra-agency memorandums or letters,” agencies can use it to protect records that consultants or other outside parties create.

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43. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 250 (July 4, 1966).

44. See, e.g., WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 106 (2016) (asserting that textual purposes have “added significance” because they have been enacted into law); SCALIA & GARNER, *supra* note 7, at 217-18 (agreeing that expressions of purpose in statutory text can be used to resolve statutory ambiguities).

45. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 358 (1990); see also SCALIA & GARNER, *supra* note 7, at 18-19 (noting that purposivism’s “manipulability” enables judges to climb “levels of abstraction” to reach desired results).

46. Gillian Metzger examined one FOIA case, but she did not distinguish FOIA from the rest of the APA. See Metzger, *supra* note 22, at 1306-08.

47. 5 U.S.C. § 552(b)(5) (2018). If an agency raises the deliberative process privilege, it must also prove that it created the record within twenty-five years of the FOIA request. *Id.*

48. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 32 (1983). But see *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979) (noting that it was “not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery” and that extending Exemption 5 to new privileges should be “viewed with caution”).

It is doubtful that any reasonable reading of “inter-agency or intra-agency” could encompass third parties. But even if it could, FOIA itself eliminates doubt. It defines “agency” as “each authority of the Government of the United States” in the executive branch, including “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the Executive Branch of the Government . . . or any independent regulatory agency.”<sup>49</sup> Third parties plainly fall outside this definition.

Courts did not try to square their interpretation with FOIA’s text. They instead reasoned that “common sense”<sup>50</sup> or “[a] moment’s reflection”<sup>51</sup> demanded that they adopt “a functional rather than a literal test in assessing whether memoranda are ‘inter-agency or intra-agency.’”<sup>52</sup> The first court to consider the issue did so in a footnote; it offered without further discussion that “[t]he Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity.”<sup>53</sup> The government’s “special need[s]” have nothing to do with whether a memorandum is “inter-agency or intra-agency.” Still, other circuits adopted this interpretation, which came to be known as the “consultant corollary,” by simply citing this footnote.<sup>54</sup>

Without text to ground it, the interpretation evolved over time. Following a Supreme Court decision that questioned the propriety of protecting third-party information through Exemption 5,<sup>55</sup> multiple circuits held that the exemption does not protect information submitted by parties that have an interest in a related agency proceeding.<sup>56</sup> One circuit also carved out an exception to this exception, holding that Exemption 5 protects the records of self-interested parties that share the same interest as the government.<sup>57</sup> These distinctions are of course absent from Exemption 5’s text.

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49. §§ 551(1), 552(f)(1).  
 50. Ryan v. Dep’t of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).  
 51. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987).  
 52. Durns v. Bureau of Prisons, 804 F.2d 701, 704 (D.C. Cir. 1986), *vacated and remanded on other grounds by* 486 U.S. 1029 (1988) (mem.).  
 53. Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).  
 54. See, e.g., Lead Indus. Ass’n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979) (citing *Soucie*, 448 F.2d at 1078 n.44); Wu v. Nat’l Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (citing *Soucie*, 448 F.2d at 1078 n.44). *But see* Lucaj v. FBI, 852 F.3d 541, 549 (6th Cir. 2017) (rejecting the interpretation). Even Justice Scalia, no champion of policy-based interpretation, found the policy considerations too tempting. He acknowledged that “the most natural meaning” of the first requirement would exclude outside parties. U.S. Dep’t of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting). But he concluded that extending Exemption 5 to third parties was “textually possible” and “desirable” because it aligned with “Exemption 5’s purpose of protecting the Government’s deliberative process.” *Id.*  
 55. See Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 9 (2001). For further discussion, see *infra* notes 191-198 and accompanying text.  
 56. See, e.g., Nat’l Inst. of Military Justice v. U.S. Dep’t of Def., 512 F.3d 677, 681 (D.C. Cir. 2008).  
 57. Hunton & Williams v. U.S. Dep’t of Justice, 590 F.3d 272, 287-88 (4th Cir. 2010).

The interpretation itself evolved from the deliberative process privilege, which gained prominence in the years before FOIA's enactment.<sup>58</sup> Justice Reed offered the paradigmatic formulation of the privilege, noting that it protected "open, frank discussion between subordinate and chief concerning administrative action."<sup>59</sup> This broad privilege included third-party statements to agency officials.<sup>60</sup> Tellingly, one of the earliest courts to extend Exemption 5 to third parties discussed the "leading" pre-FOIA case for protecting third-party statements.<sup>61</sup>

But Congress did not transfer this privilege to FOIA unscathed. It added a requirement that records be "inter-agency or intra-agency memorandums or letters."<sup>62</sup> Courts appeared to ignore this obligation, focusing instead on the government's "special needs." By doing so, they failed to consider how FOIA departed from the government's traditional privileges.

## 2. Exemption 4 and "Confidential" Commercial Information

Exemption 4 protects trade secrets and any "privileged or confidential" "commercial or financial information" that agencies receive from private parties.<sup>63</sup> Most Exemption 4 litigation hinges on whether commercial information is "confidential."<sup>64</sup> This term was not new to FOIA. FOIA's predecessor—the APA's public disclosure section—allowed agencies to withhold information that they considered "confidential for good cause found."<sup>65</sup> Agencies often designated information that private parties submitted in

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58. See T. D. Taubeneck & John J. Sexton, *Executive Privilege and the Court's Right to Know—Discovery Against the United States in Civil Actions in Federal District Courts*, 48 GEO. L.J. 486, 507 (1960) ("[T]he Executive's interest in privacy extends as well to all other internal transactions and documents. . . . [M]emoranda and other expressions of opinion should be protected . . ."); see also HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 198 (1953) ("Records of the Executive Departments are indeed 'quasi-confidential,' 'privileged communications' commonly beyond the reach of the public, press, or courts.").

59. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.); accord *Zacher v. United States*, 227 F.2d 219, 226 (8th Cir. 1955); see also *E.W. Bliss Co. v. United States*, 203 F. Supp. 175, 176 (N.D. Ohio 1961) (holding that "in all but exceptional cases," the government "must have the benefit of [its agents'] full, free advices"). Although the deliberative process privilege gained popularity around the time of FOIA's passage, courts had long recognized variants of it. See, e.g., *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (concluding that "[i]t would seriously cripple the proper and effective administration of public affairs" if an executive official was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages").

60. See Taubeneck & Sexton, *supra* note 58, at 505 ("[T]here has been little inclination to make information more readily available on the ground that it was from outsiders.").

61. See *Brockway v. Dep't of the Air Force*, 518 F.2d 1184, 1191-92 (8th Cir. 1975) (citing *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963)).

62. 5 U.S.C. § 552(b)(5) (2018).

63. *Id.* § 552(b)(4).

64. See 2 O'REILLY, *supra* note 9, § 14.26, at 511.

65. 5 U.S.C. § 1002(c) (1964).

confidence as “confidential,” which protected it from public access.<sup>66</sup> By using “confidential” while dropping any “good cause” requirement, Exemption 4 likely sought to preserve this framework and protect information that private parties submitted to agencies in confidence, so long as it was “commercial or financial.” This interpretation would track early circuit holdings<sup>67</sup> and one fair reading of the exemption.<sup>68</sup>

Of course, “confidential” might be susceptible to other interpretations. But that question is ultimately beside the point. It is enough that the dominant judicial interpretation of the term, which the D.C. Circuit established in *National Parks & Conservation Ass’n v. Morton*, misses the mark. *National Parks* defines confidential in terms of policy outcomes: Information is confidential when its disclosure would (1) “impair the Government’s ability to obtain necessary information in the future” or (2) “cause substantial harm to the competitive position of the person” providing the information.<sup>69</sup> The *National Parks* Court reached this holding by looking to “legislative purpose,” which it found within the congressional testimony of executive officials.<sup>70</sup> The final holding unsurprisingly bore little resemblance to FOIA’s text. Nevertheless, every circuit to consider the issue has followed the *National Parks* framework.<sup>71</sup>

This interpretation, unmoored from FOIA’s text, also evolved. The D.C. Circuit later cabined the *National Parks* test to information that private parties voluntarily provide to the government, adopting a different test for involuntarily submitted information.<sup>72</sup> Other circuits expanded *National Parks* to consider

66. See 2 O’REILLY, *supra* note 9, § 14.2, at 481; see also James A. Pike & Henry G. Fischer, *Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125, 1130 (1943) (“An agency holding the information in a special capacity may not be compelled to produce the secrets of one citizen for the benefit of another any more than an attorney may be.”). See generally Milton M. Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PENN. L. REV. 166, 188 (1958) (identifying similar protections in pre-FOIA statutes).

67. See *Gen. Servs. Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969) (“[T]he exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential.”); see also *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971) (holding that Exemption 4 covers information that “would customarily not be released to the public by the person from whom it was obtained” (quoting S. REP. NO. 89-813 (1965))).

68. See *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring) (noting that “[i]f ordinary usage controlled,” confidential would simply mean records that are “conveyed [and] acted on . . . in confidence” and are “not publicly disseminated” (quoting *Confidential*, WEBSTER’S THIRD INTERNATIONAL DICTIONARY (1981))).

69. 498 F.2d 765, 770 (D.C. Cir. 1974).

70. *Id.* at 768-70 (quoting *Hearing on S. 1666 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 88th Cong. 199 (1963) (statement of Norbert A. Schlei, Assistant Att’y Gen., U.S. Dep’t of Justice)). The court also cited FOIA’s House and Senate reports, as well as a statement from a floor debate over a predecessor to FOIA, all for the broad proposition that third-party information needed protection. *Id.* at 767 (quoting 110 CONG. REC. 17,667 (1964) (statement of Sen. Humphrey)). But these sources did not speak directly to Exemption 4, much less *National Park’s* holding.

71. See, e.g., *Pac. Architects & Eng’rs Inc. v. U.S. Dep’t of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Acumenics Res. & Tech. v. U.S. Dep’t of Justice*, 843 F.2d 800, 807 (4th Cir. 1988).

72. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (holding that involuntarily provided information was confidential when it was “of a kind that would customarily not be released to the public by the person from whom it was obtained”).

whether disclosure would harm *any* “identifiable private or governmental interest.”<sup>73</sup> One notable addition was the amorphous “interest” of preventing the “impairment of the effectiveness of a government program.”<sup>74</sup>

These tests might appear, as one judge lamented, “fabricated, out of whole cloth.”<sup>75</sup> But they mirror pre-FOIA discovery protections. Although agencies could use the “confidential” label to protect third-party records from public disclosure under FOIA’s predecessor, confidentiality was not a shield to discovery in litigation.<sup>76</sup> There, private litigants could obtain confidential records if they established “good cause.”<sup>77</sup> Specifically, they had to prove that their need for the “confidential” information outweighed the government’s interest in secrecy.<sup>78</sup> The *National Parks* test and its progeny mirror three common government interests in these disputes—(1) the need to use privacy to “induce[] . . . full disclosure” from private citizens,<sup>79</sup> (2) the competitive harm that might result from disclosure of trade secrets to competitors,<sup>80</sup> and (3) the risk that violating an agency’s “promises of confidentiality would hamper the efficient operation of an important Government program.”<sup>81</sup>

73. 9 to 5 Org. for Women Office Workers v. Bd. of Govs. of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983); *accord* Wash. Post Co. v. U.S. Dep’t of Health & Human Servs., 865 F.2d 320, 327 (D.C. Cir. 1989) (“[O]ther interests may indeed be considered under exemption 4.”).

74. E.g., Pub. Citizen Health Research Grp. v. Nat’l Insts. Health, 209 F. Supp. 2d 37, 52 (D.D.C. 2002); *accord* 9 to 5 Org., 721 F.2d at 10. Some courts have adopted a “case by case” approach to identifying the government’s interests, leading to what the Justice Department admits are “sometimes conflicting” results. U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 309 (2009).

75. Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring) (quoting John C. Janka, Comment, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334, 364 (1987)).

76. See Communist Party of the U.S. v. Subversive Activities Control Bd., 254 F.2d 314, 321 (D.C. Cir. 1958) (holding that it was “well settled” that the fact that “documents are merely confidential does not protect them against compulsory disclosure”); Carrow, *supra* note 66, at 188.

77. FED. R. CIV. P. 34 (1966) (repealed 1970) (requiring the party seeking discovery to establish “good cause” for the disclosure).

78. See Taubeneck & Sexton, *supra* note 58, at 491.

79. 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2377 (3d ed. 1940) (“[W]here the Government needs information for the conduct of its functions, and the persons possessing the information need the encouragement of privacy in order to be induced to make full disclosure, the protection of a privilege should be accorded.”); see also Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir. 1963) (granting the privilege after concluding that the government’s ability to get truthful information “would be jeopardized” without assurances of confidentiality); cf. Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 661 (D.C. Cir. 1960) (refusing to grant the privilege because “[t]he likelihood seems slight that in the future persons outside the Board . . . will avoid providing the Board with all information requested if production of documents is judicially ordered in this case”).

80. See, e.g., FCC v. Cohn, 154 F. Supp. 899, 912-13 (S.D.N.Y. 1957) (ordering the FCC to keep privately submitted trade evidence confidential because it related to “a highly competitive industry” and disclosure of it “might well do great if not irreparable harm to the respondents’ businesses”); see also FCC v. Schreiber, 381 U.S. 279, 285 (1965) (upholding the FTC’s rule for reviewing evidence in camera when “disclosure would irreparably damage private, competitive interests”); 8 WIGMORE, *supra* note 79, § 2212 (discussing other protections for trade secrets).

81. Machin, 316 F.2d at 339; *accord* Harwood v. McMurtry, 22 F. Supp. 572, 573 (W.D. Ky. 1938) (withholding disclosure by recognizing the government’s interest in “the maintenance of efficient public service”); see also Note, *Government Privilege Against Disclosure of Official*

But these “interests” are untethered from Exemption 4. Whether a document was “confidential” was logically anterior to whether the government’s interests outweighed those of a private litigant. Pre-FOIA agencies deployed these interests in the “good cause” analysis to prevent litigants from receiving undisputedly confidential documents. FOIA’s use of “confidential” suggests that Exemption 4 implicates an antecedent issue to whether the government could assert a sufficiently strong interest. Exemption 4 is thus an outlier in FOIA that actually favors secrecy when compared to preexisting discovery doctrine. Tellingly, courts compensated in a pro-transparency direction with the *National Parks* test, suggesting that they preferenced pre-FOIA discovery rules over FOIA’s text.

### 3. Exemption 7 and Records “Compiled for Law-Enforcement Purposes”

Exemption 7 contains six sub-exemptions that each protect a category of law-enforcement information—for example, investigation techniques and the identity of confidential informants.<sup>82</sup> But before an agency can invoke one of these sub-exemptions, it must first prove that the information was “compiled for law enforcement purposes.”<sup>83</sup> Every circuit to reach the issue has conditioned its interpretation of this language on the type of agency involved, even though FOIA contains no such distinction. If an agency has mixed law-enforcement and administrative functions (e.g., the IRS), courts “scrutinize with some skepticism the particular purpose claimed.”<sup>84</sup> But where an agency’s primary function is law enforcement (e.g., the FBI), some courts hold that the requirement does not apply at all (the *per se* test), while others require only a “rational nexus” between information and a claimed law-enforcement purpose (the rational nexus test).

The First Circuit pioneered the idea of bifurcating Exemption 7’s threshold requirement in *Irons v. Bell*, where it adopted the *per se* test.<sup>85</sup> *Irons* concluded that Exemption 7 could protect FBI records “lacking even a colorable claim to law enforcement purpose.”<sup>86</sup> The court first made a passing attempt to reconcile its interpretation with FOIA, noting that the “character” of Exemption 7’s

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*Documents*, 58 YALE L.J. 993, 993 (1949) (describing the interaction of executive privilege and this interest).

82. 5 U.S.C. § 552(b)(7) (2018) (excluding “records or information compiled for law enforcement purposes, but only to the extent that [disclosure] (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 . . . [or] 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”).

83. *Id.*

84. *Pub. Emps. for Envtl. Responsibility v. Int’l Boundary & Water Comm’n*, 740 F.3d 195, 203 (D.C. Cir. 2014) (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002)).

85. 596 F.2d 468 (1st Cir. 1979).

86. *Id.* at 472.

subcategories “suggests” a distinction between agencies.<sup>87</sup> It also referenced statements from individual congressmen emphasizing Exemption 7’s general breadth.<sup>88</sup> But *Irons* offered nothing that suggested a distinction between “mixed” and “law enforcement” agencies, much less the per se test. Rather, the holding emerged from the “strong policy reasons” that *Irons* identified to support its decision, such as threats to personal privacy and the risk of reducing cooperation from government informants.<sup>89</sup> As with the previous two case studies, other circuits cited *Irons* to adopt the per se test.<sup>90</sup>

The first court to adopt the “rational nexus” test failed to offer any rationale. It instead cited *Irons* (presumably erroneously) for the proposition that law-enforcement agencies need only provide a “‘rational nexus’ between enforcement of a federal law” and the disputed information.<sup>91</sup> When the D.C. Circuit subsequently adopted the rational nexus test, it admitted that “FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions.”<sup>92</sup> But it reasoned that treating all agencies the same would be “unnecessarily wooden” and that “congressional purpose, common sense, and notions of judicial economy” justified its holding.<sup>93</sup> Like *Irons*, it limited its analysis of “congressional purpose” to the general nature of documents covered under Exemption 7.<sup>94</sup>

Both tests brought Exemption 7 closer to pre-FOIA law. Under its modern two-part framework, the exemption adopts many longstanding provisions that regulate criminal discovery. For example, Exemption 7(D) houses the well-established “informant’s privilege,”<sup>95</sup> while the discovery rules that have long protected internal investigatory files are reflected in Exemptions 7(A) and 7(E).<sup>96</sup> But as with Exemption 5, Congress added a predicate requirement—the

87. *Id.* at 474. But the “law enforcement purposes” requirement predated Exemption 7’s subsections. As originally enacted, the exemption protected “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.” 5 U.S.C. § 552(b)(7) (1970).

88. 596 F.2d at 474-75 (citing 120 CONG. REC. 17,034 (1974) (remarks of Sen. Kennedy)).

89. *Irons*, 596 F.2d at 474.

90. *See* *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1193 (10th Cir. 2011); *Jones v. FBI*, 41 F.3d 238, 245-46 (6th Cir. 1994); *Kuehnert v. FBI*, 620 F.2d 662, 666 (8th Cir. 1980); *see also* *Williams v. FBI*, 730 F.2d 882, 884-85 (2d Cir. 1984) (adopting the test for different atextual reasons).

91. *Church of Scientology v. U.S. Dep’t of Army*, 611 F.2d 738, 748 (9th Cir. 1979).

92. *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982).

93. *Id.*

94. *See id.* at 417-18 (reasoning that Exemption 7’s subsections “apply more extensively in criminal than in civil law enforcement”).

95. *See* *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *In re Quarles*, 158 U.S. 532, 535-36 (1895).

96. *See* FED. R. CRIM. P. 16(a)(2) (1974) (qualifying that the federal rules of criminal procedure do not authorize discovery of “internal government documents . . . in connection with investigating or prosecuting the case”); *see also* Carrow, *supra* note 66, at 181-84 (discussing judicial privileges for “information obtained by investigation”).

information must have been “compiled for law enforcement purposes.”<sup>97</sup> The per se test ignores this requirement, while the rational nexus test blunts it. Both limit the change that FOIA should have brought to information disclosure.

#### 4. FOIA's De Novo Deference Regimes

Despite a statutory mandate for de novo review,<sup>98</sup> FOIA jurisprudence embraces several deference regimes to shield the assertions that agencies make to justify their invocation of exemptions. Because affidavits from agency officials are typically the only evidence in play at summary judgment—the government can prevent discovery and meet its summary judgment burden with an affidavit and index of its withholdings<sup>99</sup>—this deference is often dispositive and effectively abrogates FOIA's command for de novo review.<sup>100</sup>

To be fair, the original deference regime in FOIA—deference to agencies that invoke Exemption 1 to protect classified information<sup>101</sup>—was not solely the product of judicial creativity. It came from a conference committee report, which instructed courts to “accord substantial weight” to agency affidavits justifying Exemption 1 withholdings.<sup>102</sup> Because early Exemption 1 cases arose during the “high point” of legislative history use,<sup>103</sup> courts eagerly adopted this language as if it were statutory text.<sup>104</sup>

But courts soon charted their own course. They quickly elevated Exemption 1 deference to the near-absolute levels that they give to the executive's national security decisions outside FOIA.<sup>105</sup> Courts began to hold that they “must accept”

97. 5 U.S.C. § 552(b)(7) (2018).

98. *Id.* § 552(a)(4)(B).

99. *See infra* Section I.B.5.

100. *See* 1 O'REILLY, *supra* note 9, § 8:22, at 626 (“Courts have moved away from true ‘de novo’ review.”); Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1208 (2004) (“Although purporting to apply de novo review, [courts] effectively apply something less.”). It is hard to see how FOIA's deference regimes can be squared with de novo review. De novo review of agency action requires unimpaired “authority . . . to make factual determinations, and to apply those determinations to the law.” *United States v. Hagggar Apparel Co.*, 526 U.S. 380, 391 (1999). More broadly, the Supreme Court regularly contrasts deference with de novo review. *See, e.g.*, *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1315 (2015) (“Congress has deviated from the usual practice of affording deference to the factfindings of an initial tribunal in affording de novo review of the TTAB's decisions.”); *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 41 (2014) (“Reviewing courts cannot review their decision de novo. Rather, they must do so with considerable deference.”). Imposing a blanket deference rule inhibits weighing evidence and assessing credibility. Moreover, because the affidavit is the only factual evidence required for an agency to receive summary judgment in FOIA, deferring to the affidavit is tantamount to deferring to the agency itself.

101. *See* § 552(b)(1) (protecting records that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order”).

102. H.R. REP. NO. 93-1380 (Conf. Rep.) (1974), *reprinted in* 1 FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-1200) SOURCE BOOK, at 219, 229 (1975).

103. *See* SCALIA & GARNER, *supra* note 7, at 374.

104. *See, e.g.*, *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978).

105. *See infra* note 297.

agency assertions that are “plausible and reasonable,”<sup>106</sup> reasoning that they were “in no position to second-guess . . . the agency’s [classification] determination.”<sup>107</sup> Modern courts simply examine whether the explanation “appears ‘logical’ or ‘plausible.’”<sup>108</sup> Regardless of formulation, this deference comes close to judicial abnegation—“little proof or explanation is required beyond a plausible assertion that the information is properly classified.”<sup>109</sup> Indeed, despite overseeing most Exemption 1 disputes, the D.C. Circuit has ordered disclosure only four times.<sup>110</sup>

Courts have also extended deference to other exemptions. Some of these deference regimes are relatively loose, such as the “considerable” and “particular” deference agencies receive under Exemptions 4 and 5, respectively.<sup>111</sup> Others are quite powerful. Consider the deference regime for law-enforcement information. In *CNSS v. U.S. Department of Justice*, the D.C. Circuit affirmed an agency’s decision to withhold unclassified information relating to 9/11 detainees under Exemption 7.<sup>112</sup> Cautioning that the capabilities of America’s enemies were “beyond the capacity of the judiciary to explore” and reiterating its “poor position to second-guess the executive’s judgment,” the court held that it owed Exemption-1-strength deference to Exemption 7 claims that implicate national security concerns, even when the responsive information is unclassified.<sup>113</sup>

The D.C. Circuit later extended this deference to non-national-security matters, noting only that courts grant “deference to an agency’s predictive judgment of . . . harm.”<sup>114</sup> The court’s sole support came from *CNSS*, even though the holding and analysis of that decision, which both hinged on national security issues, did not apply. Other courts have since cited this opinion to adopt general Exemption 7 deference.<sup>115</sup> More broadly, some district courts have cited

106. *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982).

107. *Stein v. Dep’t of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981).

108. *Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007) (first quoting *Gardels*, 689 F.2d at 1105; and then quoting *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)).

109. *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). FOIA’s statutory history further highlights the tension between FOIA’s text and this deference regime. Exemption 1’s modern language is the product of a congressional override of the Supreme Court’s prior attempt to avoid substantive review of classification decisions. *See infra* notes 272-280.

110. *See* Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 773 (2014).

111. *See, e.g.*, 9 to 5 Org. for Women Office Workers v. Bd. of Govs. of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983) (Exemption 4); *Island Film, S.A. v. Dep’t of the Treasury*, 869 F. Supp. 2d 123, 135 (D.D.C. 2012) (Exemption 5).

112. 331 F.3d 918 (D.C. Cir. 2003).

113. *Id.* at 928.

114. *CREW v. U.S. Dep’t of Justice*, 746 F.3d 1082, 1098 (D.C. Cir. 2014). Although, a few district courts recognized Exemption 7 deference prior to *CNSS*. *See, e.g.*, *Linn v. U.S. Dep’t of Justice*, No. 92-cv-1406, 1995 WL 631847, at \*9 (D.D.C. Aug. 22, 1995).

115. *See, e.g.*, *Cable News Network, Inc. v. FBI*, 293 F. Supp. 3d 59, 71 (D.D.C. 2018); *Robbins, Geller, Rudman & Dowd, LLP v. SEC*, No. 3:14-CV-2197, 2016 WL 950995, at \*6 (M.D. Tenn. Mar. 12, 2016).

Exemption 1 caselaw to hold that they must “respect the expertise of an agency” and not “overstep the proper limits of the judicial role in FOIA review” when considering *any* exemption.<sup>116</sup> It is unclear how courts can reconcile this language with *de novo* review or the government’s burden of proof.

Deference in FOIA draws heavily from corresponding judge-made deference regimes elsewhere in administrative law. In fact, the originating courts for many of FOIA’s deference regimes cited directly to these regimes.<sup>117</sup> And as they did in FOIA, courts justified deference in traditional APA litigation by gesturing to institutional anxieties, recognizing that the “well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”<sup>118</sup> Pre-FOIA courts raised similar concerns when evaluating the assertions that agencies made to justify executive privilege.<sup>119</sup>

The decision to adopt these deference standards came notwithstanding FOIA’s displacement of that same common law. The statute’s demands for *de novo* review, for the government to hold the burden of justifying withholdings, and for courts to construe exemptions narrowly appear to preclude formalized deference regimes. And yet deference exists, just as it does outside FOIA.

## 5. Burden Placement

FOIA imposes a presumption in favor of disclosure and places the burden of proof on the government.<sup>120</sup> While courts often acknowledge both requirements, they employ a standard that effectively shifts the burden to requesters: (1) An agency can meet its burden by providing a sufficiently specific explanation, typically in the form of a simple affidavit and an index of withheld information. (2) The burden then shifts to plaintiffs, who must produce specific evidence to materially dispute the government’s allegations. While variations of this framework can be found across FOIA—for example, in the standards for initiating discovery,<sup>121</sup> recommending sanctions,<sup>122</sup> assessing the adequacy of an

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116. See *Parker v. U.S. Immigration & Customs Enf’t*, 238 F. Supp. 3d 89, 98 (D.D.C. 2017) (quoting *Hayden v. Nat’l Sec. Agency*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)); *Pinson v. U.S. Dep’t of Justice*, 160 F. Supp. 3d 285, 293 (D.D.C. 2016) (quoting *Hayden*, 608 F.2d at 1388).

117. See, e.g., *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (first citing *Allen v. Wright*, 468 U.S. 737, 760 (1984); and then citing *Women’s Equity Action League v. Bell*, 743 F.2d 42, 43 (D.C. Cir. 1984)); see also *9 to 5 Org. for Women Office Workers v. Bd. of Govs. of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983) (holding that the “regular confines of administrative law” require “considerable” deference in Exemption 4 cases).

118. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

119. See *Taubeneck & Sexton*, *supra* note 58, at 500.

120. 5 U.S.C. § 552(a)(4)(B) (2018). A narrow exception to this framework exists for agency assertions concerning the technical feasibility of reproducing documents. See *id.*

121. See *infra* note 182.

122. See *infra* note 350 and accompanying text.

agency's search for responsive documents,<sup>123</sup> and determining whether a search request creates an undue burden<sup>124</sup>—it originated in summary judgment disputes.<sup>125</sup> Tellingly, the burden-shifting mechanism substantially mirrors existing practices in general APA litigation.<sup>126</sup>

The standard's two prongs developed separately. The government's burden evolved from pre-FOIA disputes over its privilege claims.<sup>127</sup> Shortly before Congress enacted FOIA, the Supreme Court adopted a deferential posture to these claims. In *United States v. Reynolds*, it held that courts should look to the "evidence and circumstances" surrounding the government's privilege claims rather than examine the disputed evidence directly.<sup>128</sup> Courts justified this decision as a "matter of comity."<sup>129</sup> The Supreme Court later transported this doctrine to FOIA, citing *Reynolds* to hold that agencies can establish that an exemption applies "by means of detailed affidavits or oral testimony" rather than in camera review.<sup>130</sup> In its canonical *Vaughn v. Rosen* opinion, the D.C. Circuit "expanded" on this opinion by dropping the oral testimony option and establishing two requirements for summary judgment: (1) an affidavit explaining the reasoning behind the redactions and (2) where necessary, an index of the government's withholdings.<sup>131</sup> One judge later appeared to admit *Vaughn*'s common law nature, observing that its holding was a "creative solution[] to the problems associated with de novo review of refusals to disclose information."<sup>132</sup>

Courts adopted the "presumption of regularity" for the requester's burden. A well-established standard for assessing challenges to the government's execution of the law, the presumption mandates that "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties."<sup>133</sup> As they did with *Reynolds*, courts rooted the

123. See *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) ("In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.")

124. See, e.g., *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (accepting an agency's assertions as to the burden of a particular search); *Goland v. CIA*, 607 F.2d 339, 369-71 (D.C. Cir. 1978) (requiring the plaintiff to marshal evidence without discovery to challenge an agency's assertions regarding search burdens).

125. See *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) ("Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984))).

126. See *infra* note 182.

127. For more on pre-FOIA government secrecy, see *infra* Section III.A.

128. 345 U.S. 1, 9 (1953).

129. See *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).

130. *EPA v. Mink*, 410 U.S. 73, 93 (1973), *superseded on other grounds by statute*, Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561.

131. 484 F.2d 820, 826-27 (D.C. Cir. 1973).

132. *Ray v. Turner*, 587 F.2d 1187, 1203 (D.C. Cir. 1978) (Wright, J., concurring).

133. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *accord Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 69-70 (1827).

presumption in “a due respect for a co-ordinate branch of the government.”<sup>134</sup> The first appellate court to adopt this presumption in FOIA cited pre-APA common law without discussion to hold that plaintiffs needed either “affirmative proof” of agency bad faith or contrary information to successfully contest agency affidavits.<sup>135</sup> Not only did the presumption raise the bar for plaintiff challenges to agency affidavits, it also relieved agencies from having to produce circumstantial information to support their affidavit.<sup>136</sup> Courts universally adopted this presumption, agreeing that affidavits enjoy “a presumption of good faith” that can withstand a plaintiff’s allegations.<sup>137</sup> The Supreme Court eventually embraced this reasoning, although it qualified that the presumption was “less stringent” in the FOIA context.<sup>138</sup>

Both the *Reynolds* evidentiary standard and the presumption of regularity were themselves departures from ordinary course, resting on express principles of deference to the executive branch. Accepting government assertions at face value while requiring plaintiffs to produce specific evidence is thus unsurprisingly in sharp tension with FOIA’s general presumption in favor of disclosure and the government’s burden of proof. But as with other areas of FOIA’s common law, the standard comports neatly with pre-FOIA common law and existing APA doctrine, which ultimately prevailed.

## II. Connecting FOIA’s Common Law to FOIA’s Outcomes

As Part I discussed, FOIA’s common law forms much of the doctrine that governs FOIA litigation. This Part links this conclusion to FOIA’s modern pro-agency results. It identifies three major pressure points in the statute’s doctrinal development that create overwhelmingly pro-government outcomes. It then concludes by examining the methodological forces that maintain FOIA’s common law in an increasingly textualist judiciary.

### A. Defaulting to a Preexisting Equilibrium

FOIA’s substantive tensions stem from the near-exclusive control that agencies held over their records before FOIA’s enactment.<sup>139</sup> The public had no meaningful right to information outside of narrow affirmative disclosure

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134. *Trade-Mark Cases*, 100 U.S. 82, 96 (1879). According to one pre-APA commentator, this presumption created “room for a *de facto* if not a *de jure* immunity from judicial review.” Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 *YALE L.J.* 781, 788 (1921).

135. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926)).

136. *Colby*, 509 F.2d at 1369.

137. *E.g.*, *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981).

138. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

139. Of course, Congress could subpoena agency records. *See Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946).

requirements.<sup>140</sup> The APA's public disclosure section ostensibly required agencies to provide matters of official record on request. But it lacked a judicial review provision, required that requesters be "properly and directly concerned" with the relevant information, and enabled agencies to withhold information if they had "good cause."<sup>141</sup> These provisions effectively gave agencies unfettered discretion to withhold information.<sup>142</sup> As the Supreme Court would later quip, the APA's public disclosure section "came to be looked upon more as a withholding statute than a disclosure statute."<sup>143</sup>

Litigants who tried to subpoena government information in discovery fared only a little better. Agency officials who refused to testify or produce agency records were immune from contempt proceedings.<sup>144</sup> Although, this shield was less useful when the government itself was a party in litigation. In those situations, courts could encourage disclosure through other means, such as by dismissing the government's case or making adverse findings of fact.<sup>145</sup> To avoid these outcomes, agencies that wanted to maintain secrecy fell back on various facets of executive privilege, which protected sensitive information like state secrets and internal agency communications.<sup>146</sup>

FOIA should have circumvented this jurisprudence. It prevented the executive from accepting adverse findings or the dismissal of its case to protect records from public disclosure. It instead made courts the final arbiters over information disclosure, instructing them to enforce a presumption of open access to government records.

To be sure, Congress sensibly converted many agency defenses into exemptions.<sup>147</sup> For example, it enshrined the attorney-client privilege in Exemption 5, the investigation and informant privileges in Exemption 7, and the state-secrets privilege for classified information in Exemption 1.<sup>148</sup> But Congress restricted many of these protections—for example, limiting Exemption 5 to

140. The public had no general right of access to government information at common law. See CROSS, *supra* note 58, at 25; see also David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 107-15 (2018) (discussing pre-FOIA transparency jurisprudence). Individuals could inspect public records only when they made a showing of necessity and the government found that disclosure would not be detrimental to the public. CROSS, *supra* note 58, at 29.

141. 5 U.S.C. § 1002 (1964). Agencies almost always found good cause. Two notable examples were "the contents of telephone books" and "the guest list for a private pleasure trip on a Navy Yacht by the Secretary of the Navy." Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417, 436 (1965).

142. See CROSS, *supra* note 58, at 228.

143. EPA v. Mink, 410 U.S. 73, 79 (1973).

144. To receive immunity, an official only needed to point to a regulation or a superior's order that required them to withhold disclosure. See U.S. *ex rel.* Touhy v. Ragen, 340 U.S. 462, 469-70 (1951); Boske v. Comingore, 177 U.S. 459, 470 (1900).

145. See, e.g., Mitchell v. Bass, 252 F.2d 513, 519 (8th Cir. 1958) (affirming the trial court's dismissal of the government's case).

146. See Carrow, *supra* note 66, at 176-91.

147. See Sam Lebovic, *How Administrative Opposition Shaped the Freedom of Information Act*, in TROUBLING TRANSPARENCY, *supra* note 17, at 13.

148. See *supra* Section I.B.

“inter-agency or intra-agency memorandums” and Exemption 7 to information “compiled for law enforcement purposes.”<sup>149</sup> It also situated these exemptions within an otherwise pro-disclosure framework. So while FOIA contained some similarities to established doctrine, it still represented a major structural and doctrinal shift toward transparency.

The judiciary elided the differences between FOIA's commands and pre-FOIA common law through a crabbed perception of what FOIA changed. Courts of course did not resist FOIA across the board. For example, they had no problem acknowledging that “any person” had a right to bring a FOIA claim, not just those who were “properly and directly concerned” with the relevant information.<sup>150</sup> And with a few exceptions, they agreed that agencies could no longer withhold information simply on “good cause” and had to fit their claims within FOIA's exemptions.<sup>151</sup>

But courts never fully recognized FOIA's substantive departures from other areas of administrative law and civil discovery. This disconnect is most prominent when comparing pre-FOIA privileges to FOIA's exemptions. Courts abrogated many of FOIA's additional requirements by adopting pre-FOIA doctrines wholesale at the expense of FOIA's text—for example defining “inter-agency or intra-agency” to include third parties.<sup>152</sup> More explicitly, the Supreme Court has concluded that “[t]he primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery,”<sup>153</sup> which set a ceiling on FOIA's disclosure mandate that cannot be found in FOIA's exemptions.<sup>154</sup>

149. See 5 U.S.C. § 552(b)(5), (7) (2018).

150. Compare *id.* § 552(a)(3)(A), with 5 U.S.C. § 1002(c) (1964); see also *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989) (“[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request.”).

151. See *EPA v. Mink*, 410 U.S. 73, 79 (1973) (noting that FOIA's exemptions are “explicitly made exclusive”). Still, courts only reached this conclusion after a protracted debate. Some courts initially held that FOIA gave them a “broad equitable power to decline to order release when disclosure would damage the public interest.” See *Rose v. Dep't of Air Force*, 495 F.2d 261, 269 & n.23 (2d Cir. 1974) (collecting cases and discussing a circuit split on the issue). Other circuits concluded that equitable discretion might exist in “exceptional circumstances.” *E.g.*, *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). On rare occasions, courts denied disclosure on these principles. See, e.g., *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 445 F. Supp. 699, 705-706 (S.D.N.Y.), *aff'd*, 587 F.2d 544 (2d Cir. 1978). The last court to reject this approach did so thirty years after FOIA's enactment. See *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1087-88 (9th Cir. 1997).

152. See *supra* Section I.B.1.

153. *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982).

154. There are of course policy considerations weighing against allowing FOIA to conflict with discovery. See Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 194-200 (1984). But FOIA's text does not support such a limit. See § 552(d) (requiring that exceptions to disclosure be “specifically stated” in the statute). Indeed, Congress has amended FOIA when it wanted to stop the use of FOIA as an end run around discovery. See, e.g., 3 O'REILLY, *supra* note 12, § 17:1, at 6-7 (noting that public outcry against a gang member's use of FOIA to discover law enforcement information spurred the 1987 amendments to Exemption 7 (citing Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, tit. I, §§ 1802-03, 100 Stat. 3207-48 to -49)). And yet, courts have relied on *Baldrige* to restrict disclosure. See, e.g., *Hunton & Williams v. U.S. Dep't*

Courts also embraced general administrative common law doctrines that sit in tension with FOIA. Consider the judiciary's decision to require that plaintiffs provide specific evidence to contest unsupported statements by the government.<sup>155</sup> This framework creates a Catch-22 in FOIA. Plaintiffs must provide specific evidence to rebut an agency's affidavit and get discovery, but because the agency controls the information, plaintiffs need discovery to find specific evidence. Challenges to agency denials of FOIA requests thus often become unviable.

The ultimate product is a pro-government jurisprudence out of step with FOIA as a statute. Outside of a few exceptions, pre-FOIA secrecy doctrines gave the executive branch broad latitude to keep information from the public. FOIA's attempt to impose additional requirements, reduce deference, and generally shift decision-making power to the judiciary disrupted—and aimed to disrupt—this preexisting equilibrium. Maintaining pre-FOIA jurisprudence blunted its effect.

### *B. Relying on One-Sided Balancing*

FOIA doctrine also reflects subtler procedural tensions between FOIA's requirements and the preexisting discovery procedures that courts imported. Recall the judiciary's deferential posture toward the government's privilege claims: looking to the "evidence and circumstances" surrounding a claim rather than the potentially privileged records themselves.<sup>156</sup> Courts further caveated this analysis with a quasi-balancing test similar to the "good cause" analysis they used in other areas of civil discovery.<sup>157</sup> When the government asserted a privilege, courts required the party seeking information to make a "showing of necessity" for the information, which would "determine how far the court should probe in satisfying itself that the occasion for invoking the privilege [was] appropriate."<sup>158</sup> The Supreme Court would later frame these privilege disputes as balancing a litigant's need for the information against the "public interest in protecting the flow of information."<sup>159</sup>

FOIA attempted to replace this amorphous balancing with clear rules. As one agency official complained, it was a "simple, self-executing word formula"<sup>160</sup> that allowed agencies to withhold information only as "specifically stated" in nine discrete, exclusive exemptions.<sup>161</sup> But courts still appear to tacitly

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of Justice, 590 F.3d 272, 287-88 (4th Cir. 2010) (invoking this admonition to adopt an atextual interpretation of Exemption 5).

155. See *supra* Section I.B.4.

156. *United States v. Reynolds*, 345 U.S. 1, 9 (1953).

157. See *supra* note 78 and accompanying text.

158. *Id.* at 11; see also Taubeneck & Sexton, *supra* note 58, at 509 (elaborating on this balancing process).

159. *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

160. See Lebovic, *supra* note 147, at 27 (quoting Memorandum from Leon Ulman, Acting Assistant Att'y Gen., OLC, to Bill Moyers (Mar. 16, 1966)).

161. 5 U.S.C. § 552(d) (2018).

follow the “balancing” approach in FOIA litigation.<sup>162</sup> And critically, the balance is broken under FOIA’s framework. On one side, agencies are well represented. Courts consider proxies for their interests, such as the “purposes” underlying FOIA’s exemptions or more baldly the government’s “special need[s].”<sup>163</sup> Indeed, the D.C. Circuit admitted in an Exemption 2 case that its “willingness to sanction a weak relation to [the exemption] may be greatest when the asserted government interest is relatively weighty.”<sup>164</sup> These interests are buttressed by the deference regimes that courts took from other areas of administrative law and civil discovery, which empower an agency’s assessment of its own interests.

Conversely, courts place little weight on the interests of FOIA’s plaintiffs. Traditional pre-FOIA discovery disputes involved agency adjudications and prosecutions *against* individuals, which implicated critical due process concerns. But FOIA disavows any interest in an individual requester’s motivations.<sup>165</sup> It instead offers the amorphous “right of the public to information.”<sup>166</sup> This “right” apparently does not implicate a meaningful “showing of necessity.” At common law, “disclosure” reflected a private interest in information that courts balanced against the “public interest in *protecting* the flow of information.”<sup>167</sup> By reframing disclosure as a public interest, FOIA converted this private right of access into a public right to transparency,<sup>168</sup> a major doctrinal shift that courts have implicitly rejected.

To be sure, many opinions give lip service to FOIA’s goal of disclosure and narrow construction of exemptions.<sup>169</sup> But once these platitudes are issued, they do not reappear.<sup>170</sup> As one dissenting Justice put it, courts treat these provisions

162. Courts openly conceptualize some of FOIA’s exemptions as balancing tests. *See, e.g., Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 865 F.2d 320, 327-28 (D.C. Cir. 1989) (framing the *National Parks* test as balancing the public’s interest in disclosure against the government’s interests in keeping information confidential).

163. *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

164. *Schwane v. Dep’t of Air Force*, 898 F.2d 793, 796 (D.C. Cir. 1990).

165. *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989).

166. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 250 (July 4, 1966).

167. *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (emphasis added); *see also* CROSS, *supra* note 58, at 29 (discussing the adversarial positions that “disclosure” and “public interest” took at common law).

168. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 2(1)(6), 121 Stat. 2524, 2524 (asserting that FOIA ensures that transparency is not based “upon the ‘need to know’ but upon the fundamental ‘right to know’”).

169. *See, e.g., supra* notes 6-7 and accompanying text.

170. This recalcitrance to recognize transparency as a new “value” dovetails with the judiciary’s approach to areas in which it arguably is authorized to exercise discretion. Consider Exemption 6, which exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (2018). While the exemption invites judicial balancing between privacy interests and the public interest in disclosure, the Supreme Court has limited the public interest to FOIA’s “basic purpose,” which is “to open [federal] agency action to the light of public scrutiny.” *Reporters Comm.*, 489 U.S. at 772 (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). Further, litigants have the burden of establishing that “the public interest sought to be advanced is a significant one.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Under the former barrier, areas of clear public interest, such as discovering wrongdoing in

as “a formula to be recited rather than a principle to be followed.”<sup>171</sup> The same courts that look to the government’s “needs” when construing exemptions reject arguments that suggest they consider pro-disclosure values, reasoning that it is not their role to “balance the public interest in disclosure.”<sup>172</sup> Except in isolated areas where FOIA calls for it, a litigant cannot “bolster the case for disclosure by claiming an additional public benefit” from disclosure.<sup>173</sup> This conclusion is of course in line with FOIA’s attempt to shift disputes away from balancing. But it exacerbates the problem of courts considering the government’s “interests” beyond those that FOIA’s exemptions protect.

As a procedural matter, then, much of FOIA’s impotence can be attributed to its poor fit with the discovery and administrative procedures that courts grafted onto FOIA disputes. Congress designed FOIA to circumvent judicial balancing. The judiciary’s tacit decision to maintain the old system created a lopsided framework where well-established government interests transferred seamlessly, overpowering the unfamiliar transparency values that FOIA sought to empower.

### C. Recreating the Appellate Review Model

One of administrative common law’s longstanding features is its expansion of the “appellate review model.” Under the model, courts limit their review to the record that was originally before an agency and the reasoning that the agency used when making its decision.<sup>174</sup> If either the agency record or reasoning is insufficient, the reviewing court will remand to the agency for the development of a new record.<sup>175</sup> On a practical level, this model is responsible for many

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state or foreign governments, lack public interest for FOIA purposes. *See, e.g.*, *Garcia v. U.S. Dep’t of Justice*, 181 F. Supp. 2d 356, 374 (S.D.N.Y. 2002) (“The discovery of wrongdoing at a state as opposed to a federal agency . . . is not a goal of FOIA.”). And the latter barrier enables the government to redact up to the line at which the public interest in withheld information would become significant. *See, e.g.*, *Dep’t of State v. Ray*, 502 U.S. 164, 178 (1991) (holding that the public’s legitimate interest in documents had been “adequately served” by the partial release of other documents).

171. *See* *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 161 (1989) (Scalia, J., dissenting).

172. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981).

173. *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999). Even where FOIA calls for considering the public interest—such as in the Exemption 6 context, *see supra* note 170—courts favor secrecy. The Supreme Court has emphasized that privacy interests in the FOIA context cannot be viewed in “some limited or ‘cramped notion.’” *Favish*, 541 U.S. at 165 (quoting *Reporters Comm.*, 489 U.S. at 763). Lower courts have defined privacy broadly to include interests that are not “patent or obvious,” *Pub. Citizen Health Research Grp. v. U.S. Dep’t of Labor*, 591 F.2d 808, 809 (D.C. Cir. 1978), and those that are “derivative.” *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989).

174. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 941 (2011); *see also* *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 114 (2017) (observing that *Chenery* reformed the appellate model to adjust for separation-of-powers concerns).

175. *See* Merrill, *supra* note 174, at 941.

foundational administrative common law doctrines.<sup>176</sup> For example, courts reviewing agency action under the APA adopt presumptions in favor of summary judgment and against discovery, reasoning that factfinding is better left to agencies.<sup>177</sup> They also adopt a strong presumption in favor of reviewing and potentially remanding agency decisions, but they will only order affirmative agency action in rare, narrow circumstances.<sup>178</sup>

FOIA is incompatible with much of this model. The statute tasks courts with reviewing an agency's decision *de novo* and gives them jurisdiction to affirmatively order production of wrongly withheld records.<sup>179</sup> Courts thus rightly hold that agencies act as traditional litigants, freeing them of the (often unstated) grounds on which their officials relied when rejecting a FOIA request. Agencies instead can raise new arguments and submit new "evidence" (affidavits) in litigation.<sup>180</sup>

But courts still employ a quasi-appellate-review model that simply incorporates these pro-government concessions. They functionally limit FOIA litigation to the equivalent of an agency record—the agency's affidavit and any redacted documents responsive to the underlying request. As noted, courts will deny discovery, discount plaintiff evidence, and grant summary judgment if this "record" meets its deferential bar.<sup>181</sup> Relatedly, courts have imported administrative common law's strong presumptions in favor of summary judgment and against discovery to FOIA.<sup>182</sup> These presumptions reinforce the centrality of the "record" by preventing plaintiffs from presenting an alternative view, investigating the government's response, or challenging the veracity of an agency's affidavit.<sup>183</sup> Finally, courts engage in the near-ubiquitous practice of

176. *See id.* ("[T]he great preponderance of what we today regard as administrative law . . . consists of an elaboration of the implications of the appellate review model.")

177. *See, e.g.,* *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (holding that discovery in APA cases is inappropriate "except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review" (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971))); *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 94 (D.D.C. 2014) (holding that "[s]ummary judgment is the proper mechanism" for adjudicating APA claims and that "the typical summary judgment standards set forth in Federal Rule of Civil Procedure 56 are not applicable").

178. *Compare* *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (recognizing a strong presumption in favor of judicial review), *with* *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (establishing a strong presumption against judicial review of agency decisions to not take action).

179. 5 U.S.C. § 552(a)(4)(B) (2018).

180. *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005); *Young v. CIA*, 972 F.2d 536, 538-39 (4th Cir. 1992).

181. *See supra* Section I.B.5.

182. *See, e.g.,* *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified." (quoting *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993))); *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (holding that discovery in FOIA "should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains" (quoting *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002))).

183. *See* Kwoka, *supra* note 9, at 230-31.

giving the government multiple attempts at summary judgment in lieu of setting a FOIA case for trial.<sup>184</sup> These “do-overs” are functionally similar to remands in traditional APA litigation, where the government gets a second chance to make and defend its decision. The only difference is that an agency’s lawyers, rather than officials, craft the new justification.<sup>185</sup> But that distinction is functionally immaterial to courts and opposing litigants.

The combined effect of these holdings is an appellate model of review supercharged in the government’s favor. Agencies receive many of the model’s benefits, including control over the development of the litigation record and authority over when and how they take action. But they suffer none of its costs. Agencies can raise new arguments in litigation, even between rounds of summary judgment. And FOIA’s version of “remands”—new summary judgment briefings—does not demand the resources that agency reconsideration otherwise requires, as lawyers can simply draft new affidavits to support new arguments.<sup>186</sup> This framework ensures that agencies remain in control throughout litigation despite FOIA’s unique provisions otherwise.

#### *D. Surviving the Textualist Wave*

The modern existence of FOIA’s common law raises an additional tension. As federal common law has substantially narrowed and text has risen as the primary focus of statutory interpretation,<sup>187</sup> FOIA’s common law persists. Indeed, it has thrived. For example, FOIA’s deference regimes have expanded substantially over the past two decades.<sup>188</sup>

Equally consequential and perhaps more telling has been the modern Supreme Court’s response to FOIA’s common law. The Court has heard four FOIA cases over the past two decades. Two are of limited relevance. They considered FOIA’s personal privacy exemptions, which arguably authorize common-law-like judicial balancing.<sup>189</sup> But the other two cases did address FOIA’s common law. And they reveal a clear struggle between textualism and the common law. In both, the Court used textualist reasoning to challenge the

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184. *See id.* at 231-35.

185. *See* Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1085 (2014).

186. *See id.*

187. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113-14.

188. *See, e.g.,* *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1193 (10th Cir. 2010) (adopting the per se test for Exemption 7’s “law enforcement purposes” requirement); *see also supra* Section I.B.3 (discussing the per se test).

189. The first case addressed Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which exempts from disclosure law-enforcement records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (broadly construing the exemption). The second case rejected the Third Circuit’s holding that corporations could raise Exemption 6, FOIA’s other “personal privacy” exemption. *See FCC v. AT&T Inc.*, 562 U.S. 397 (2011); *see also supra* note 170 (discussing Exemption 6).

common law approach of lower courts. But it simultaneously issued decisions that effectively maintained the status quo.

The first case, *U.S. Department of the Interior v. Klamath Water Users Protective Ass'n*,<sup>190</sup> considered the “consultant corollary”—the judge-made doctrine that extends Exemption 5 to records that outside parties create, notwithstanding the exemption’s limit to “inter-agency or intra-agency” records.<sup>191</sup> Criticizing the interpretation, *Klamath*’s unanimous majority observed the “apparent plainness” of the statutory text, which was “underscored” by a statutory definition of “agency” that did not include outside entities.<sup>192</sup> The Court opined that the interpretation made “intra-agency” a “purely conclusory term” and warned that there was “no textual justification for draining the first condition of independent vitality.”<sup>193</sup>

But the Court stopped short of rejecting the doctrine. Disclaiming any views on whether third-party information could receive Exemption 5 protection, it held only that the exemption did not apply to information submitted by parties that have an interest in a related administrative proceeding.<sup>194</sup> This result is odd. While narrow Supreme Court opinions are not unusual, the “interested party” distinction is not located anywhere in FOIA. Regardless, lower courts took the hint. Only one has limited Exemption 5 to government agencies.<sup>195</sup> Every other circuit to reach the issue has construed *Klamath* as a narrow exception to their preexisting holdings, declining to address the challenges raised by its reasoning.<sup>196</sup> One has gone further, adding an exception to the *Klamath* exception.<sup>197</sup> Even judges who opposed reading “inter-agency or intra-agency” as including third parties saw “little point in . . . spending more time on the issue” because of *Klamath*’s narrowness.<sup>198</sup>

The second case concerned Exemption 2, which exempts information “related solely to internal personnel rules and practices.”<sup>199</sup> Lower courts had for decades construed the exemption as protecting records when “disclosure would risk circumvention of the law,”<sup>200</sup> a flatly atextual reading they labeled “High 2.”

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190. 532 U.S. 1, 9 (2001).

191. See *supra* Section II.A.1.

192. *Klamath*, 532 U.S. at 9.

193. *Id.* at 12.

194. *Id.* at 12-13.

195. See *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017).

196. See, e.g., *Stewart v. U.S. Dep’t of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009) (exempting consultant records and reasoning that a holding to the contrary would “impinge on agency discretion to seek advice”); *Nat’l Inst. of Military Justice v. U.S. Dep’t of Def.*, 512 F.3d 677, 681 (D.C. Cir. 2008) (finding that its previous cases “compel[led]” it to continue exempting third-party documents).

197. See *Hunton & Williams v. U.S. Dep’t of Justice*, 590 F.3d 272, 277-78 (4th Cir. 2010) (holding that *Klamath* did not apply when a submitter’s interests mirrored an agency’s interests).

198. *Nat’l Inst. of Military Justice v. U.S. Dep’t of Def.*, No. 06-5242, 2008 WL 1990366, at \*2 (D.C. Cir. Apr. 30, 2008) (Tatel, J., concurring in denial of petition for rehearing en banc).

199. 5 U.S.C. § 552(b)(2) (2018).

200. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc).

Early opinions invoking High 2 either relied entirely on policy-based reasoning<sup>201</sup> or openly admitted to rewriting FOIA to be “consonant with reasonableness” and “common sense.”<sup>202</sup> Over its four-decade existence, High 2 expanded as the equities demanded.<sup>203</sup> It eventually reached entirely civilian matters, such as rubrics for evaluating job applicants<sup>204</sup> and blueprints to a federal research campus.<sup>205</sup>

High 2 finally reached the Supreme Court in *Milner v. Department of the Navy*, where an eight-member majority castigated the interpretation and refused to take its underlying reasoning “seriously.”<sup>206</sup> The *Milner* Court observed that “the only way to arrive at High 2 [was] by taking a red pen to the statute—‘cutting out some’ words and ‘pasting in others’ until little of the actual provision remains.”<sup>207</sup> It came close to acknowledging High 2’s common law origins, stating that the doctrine arose out of the feeling “certain sensitive information *should* be exempt from disclosure.”<sup>208</sup>

But the common law’s pull prevailed. The Court could not help but “recognize the strength of the [government’s] interest in protecting” its records.<sup>209</sup> Unprompted, it discussed the “other tools at hand to shield . . . sensitive materials,” listing three unraised exemptions.<sup>210</sup> Although the Court did not issue a holding on these exemptions, lower courts did. Several seized on *Milner*’s language and expanded other exemptions to incorporate affected records, heavily cabining *Milner*’s practical impact.<sup>211</sup>

Of course, *Klamath* and *Milner* do not necessarily mean that the Supreme Court will always avoid major FOIA decisions. The Court has granted certiorari

201. The first court to reach the High 2 holding offered only that disclosure “would be comparable to requiring one football team to give its ‘play-book’ to the opposing team before a game.” *Cuneo v. Laird*, 338 F. Supp. 504, 506 (D.D.C. 1972).

202. *Crooker*, 670 F.2d at 1056, 1074.

203. Rulings under Exemption 2 were often contradictory. For example, courts held that disclosing the FBI’s file numbering system might compromise its investigatory techniques, *Coleman v. FBI*, 13 F. Supp. 2d 75, 79 (D.D.C. 1998), but that disclosing the Secret Service’s file numbering system held no such threat, *Fitzgibbon v. U.S. Secret Serv.*, 747 F. Supp. 51, 57 (D.D.C. 1990).

204. *Nat’l Treasury Emps. Union v. U.S. Customs Serv.*, 802 F.2d 525 (D.C. Cir. 1986).

205. *Elliott v. U.S. Dep’t of Agric.*, 596 F.3d 842 (D.C. Cir. 2010).

206. 562 U.S. 562, 574 n.6 (2011).

207. *Id.* at 573 (quoting *Elliott*, 596 F.3d at 845).

208. *Id.* at 580.

209. *Id.*

210. *Id.*

211. Notably, multiple circuits counterbalanced *Milner* by weakening Exemption 7’s “law enforcement purposes” provision, *see supra* Section I.B.3, to require only that agencies prove some amorphous connection to “security.” *See, e.g., ACLU v. FBI*, 881 F.3d 776, 780 (9th Cir. 2018); *Pub. Emps. for Envtl. Responsibility v. Int’l Boundary & Water Comm’n*, 740 F.3d 195, 199 (D.C. Cir. 2014); *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1193 (10th Cir. 2011); *see also, e.g., Raheer v. Fed. Bureau of Prisons*, No. CV-09-526, 2011 WL 2014875, at \*11 (D. Or. May 24, 2011) (holding that the Bureau of Prisons compiled its housing contract policies for law-enforcement purposes). Agencies quickly took advantage of these decisions. As Exemption 2’s popularity plunged, their use of Exemption 7 increased dramatically. *See* Max Galka, *Transparent Censorship: An In-Depth Look at FOIA in 2015*, FOIA MAPPER (Apr. 11, 2016), <https://foiamapper.com/annual-foia-reports-2015> [<https://perma.cc/59F5-CLEK>].

to review Exemption 4's *National Parks* test<sup>212</sup> and has signaled that it might make a larger decision there.<sup>213</sup> But such a result, however welcomed by textualists, would likely not be the start of a broader trend if the APA is any guide. Both FOIA and the APA embody what Gillian Metzger calls a "pattern of judicial common law development punctuated by periodic resistance."<sup>214</sup> While threatened, *Chevron* remains at the center of APA litigation.<sup>215</sup> Many other non-statutory doctrines, such as extensive rulemaking requirements, also play central roles in administrative proceedings.<sup>216</sup> As with FOIA, the Supreme Court occasionally challenges administrative common law in the APA, but more often allows its development in lower courts.<sup>217</sup> Most famously, the Supreme Court declared in *Vermont Yankee Nuclear Power Corp. v. NRDC* that the APA imposed the "maximum procedural requirements" that courts could demand of agencies.<sup>218</sup> But as Metzger notes, "*Vermont Yankee* has not prevented substantial judicial expansion of § 553's minimal procedural demands."<sup>219</sup> More recent decisions are similarly limited.<sup>220</sup>

The rise of textualism suggests that courts would gradually challenge administrative common law doctrines, either by recognizing them as untenable or reacting to new legislation and Supreme Court holdings. But while some commentators have claimed that the Court's recent decisions represent a broader shift away from administrative common law,<sup>221</sup> the dominant view is that the

212. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 915, 915 (2019) (mem.) (granting certiorari); see also *supra* Section I.B (discussing the *National Parks* test).

213. See Bernard Bell, *Oh SNAP: The Battle Over "Food Stamp" Redemption Data that May Radically Reshape FOIA Exemption 4 (Part I)*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 6, 2018), <http://yalejreg.com/nc/oh-snap-the-battle-over-food-stamp-redemption-data-that-may-radically-reshape-foia-exemption-4-part-i/> [https://perma.cc/K7P6-DYVK]; see also N.H. Right to Life v. U.S. Dep't of Health & Human Servs., 136 S. Ct. 383, 384-85 (2015) (mem.) (Thomas, J., dissenting from the denial of certiorari) (criticizing *National Parks* and listing interpretive inconsistencies among the lower courts).

214. Metzger, *supra* note 22, at 1305.

215. See Brinkerhoff & Listwa, *supra* note 21, at 146-49.

216. See, e.g., Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 532-45 (2018) (arguing that many rulemaking requirements are improper administrative common law); see also Alec Webley, *Seeing Through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and "Fake News"*, 70 ADMIN. L. REV. 1, 13-21 (2018) (discussing the preamble requirement's common law development).

217. For example, the Court overturned decades of common law surrounding exhaustion in *Darby v. Cisneros* by referencing statutory language that courts had "almost completely ignored." 509 U.S. 137, 145 (1993). However, the statutory demand was minimal, mandating only that agencies promulgate a rule that stays their decisions during internal appeals. 5 U.S.C. § 704 (2018). Like *Milner*, this holding was largely toothless and "did not set off a movement toward statutory administrative law." Beerman, *supra* note 22, at 29; see also Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31 (2015) (discussing the Supreme Court's tendency to implicitly preserve administrative common law).

218. 435 U.S. 519, 524 (1978).

219. Metzger, *supra* note 22, at 1305.

220. See Beerman, *supra* note 22, at 29.

221. See Duffy, *supra* note 25, at 120; Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 605 (2016).

method is still thriving.<sup>222</sup> In both FOIA and the rest of the APA, courts tacitly maintain the common law.

### III. Some Implications of FOIA's Common Law

Viewing FOIA's modern jurisprudence as a subset of administrative common law provides an explanation for the gap between FOIA's generally pro-disclosure text and its pro-government outcomes. FOIA's common law also holds broader implications for debates over both transparency and administrative common law. This Part explores four of them. It first leverages the administrative common law debate to critique FOIA doctrine. It then explores the role that well-entrenched precedent and the gravitational pull of the APA have played in the development of FOIA doctrine. It next examines how Congress could overcome the inertial force of administrative common law. Finally, it takes advantage of the active involvement of both Congress and the judiciary in FOIA to critique foundational assumptions within the larger administrative common law debate.

#### A. *A Methodological Critique of FOIA Doctrine*

Framing FOIA jurisprudence as an extension of administrative common law provides a firm baseline for assessing its legitimacy. Commentators have long debated administrative common law's propriety, developing a robust body of justifications and critiques.<sup>223</sup> Unsurprisingly, the arguments of administrative common law's critics apply with equal force to FOIA. For instance, if administrative common law is an unconstitutional aggregation of policymaking power in the judiciary,<sup>224</sup> then so is FOIA's common law. But curiously, the arguments of administrative common law's defenders do not easily map onto FOIA's common law. Even under their interpretive framework, FOIA is not an appropriate forum for federal common law. To this end, the balance of this Section considers FOIA's common law in relation to the four major justifications for administrative common law that its proponents have offered.

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222. See, e.g., Beerman, *supra* note 22, at 29; Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1244-47 (2014); Metzger, *supra* note 22, at 1305.

223. Compare Duffy, *supra* note 25 (contending that statutory fidelity trumps administrative common law), and Kovacs, *supra* note 23 (arguing that administrative common law is illegitimate insofar as it conflicts with or ignores the APA), with Bremer, *supra* note 222 (contending that administrative common law ensures that constitutional values apply to the administrative state), and Metzger, *supra* note 22 (framing administrative common law as a justifiable area of federal common law).

224. See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1320 (2014); Duffy, *supra* note 25, at 161; see also Merrill, *supra* note 23, at 23 ("Institutionalization of lawmaking by federal courts would represent a major shift in policymaking power away from Congress and toward the federal judiciary, in violation of the constitutional scheme.").

## 1. FOIA's Text

The first and most important distinction between FOIA and the rest of the APA is textual detail. Administrative common law's supporters rest much of their case on the argument that the APA contains broad, open-ended language like "arbitrary" and "capricious" that demands judicial construction.<sup>225</sup> As a practical matter, some commentators question whether interpreting vague text in the APA risks creating even more administrative common law.<sup>226</sup> Metzger goes further, positing that "Congress's failure to remove ambiguity and its continued reliance on general statutes may indicate that it expects courts to develop administrative common law, at least within certain overall statutory parameters."<sup>227</sup> And even administrative common law's opponents concede that their concern is primarily with doctrine that defies statutory text.<sup>228</sup>

But even assuming that courts have broad latitude to construe statutory text, it is uncontroversial that they should not go to war with statutory commands. This issue becomes more pronounced in the federal common law context, where it is undisputed that a court "must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule" it seeks to implement.<sup>229</sup> Challenging or ignoring statutory text is necessarily inconsistent with this baseline.

Unlike much of the APA, FOIA is textually detailed. It also tells the judiciary how to approach ambiguity—in favor of disclosure.<sup>230</sup> And yet, courts have neutered many of its provisions. Some courts were openly functional or policy-focused, not referencing FOIA's text.<sup>231</sup> Others rewrote provisions to ensure they were "consonant with reasonableness"<sup>232</sup> or "[a] moment's reflection,"<sup>233</sup> pursued expansive notions of the absurdity canon,<sup>234</sup> or pointed to

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225. *E.g.*, Metzger, *supra* note 22, at 1326; *see also* 5 U.S.C. § 706(2)(A) (2018) (empowering courts to vacate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

226. *See* Bernick, *supra* note 41, at 861 (noting this position among commentators).

227. Metzger, *supra* note 22, at 1327-28.

228. *See, e.g.*, Kovacs, *supra* note 23, at 1211; *see also* Duffy, *supra* note 25, at 153 (concluding that Congress wanted to provide courts "with a range of interpretive flexibility" when it adopted the "open-ended" arbitrary and capricious language in the APA).

229. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887 (1986).

230. *See supra* notes 5-8.

231. *See, e.g.*, *Cuneo v. Laird*, 338 F. Supp. 504, 506 (D.D.C. 1972).

232. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1056 (D.C. Cir. 1981).

233. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987).

234. *E.g.*, *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978) ("It would be anomalous indeed to attribute to Congress the intention to . . . increase the risk of physical harm to those engaged in law enforcement and significantly assist those engaged in criminal activity . . .").

generalized statements from individual legislators or executive officials.<sup>235</sup> In the final approach, courts in later decisions explicitly relied on policy concerns to expand doctrines far beyond even what their friends in legislative history could have conceivably supported.<sup>236</sup> One dissenting judge aptly described the judiciary's approach to much of FOIA:

There is an inherent hazard in the process by which our courts flesh out the meaning of a statute. Over time, judges adding another link to the precedential chain may become so intent on exploring the implications of the last preceding case that they lose sight of the statute itself . . . .<sup>237</sup>

Even if the judiciary properly adopted pro-government precedent where it has discretion,<sup>238</sup> much of FOIA's common law sits in direct tension with statutory text.

## 2. FOIA's Origins

The judiciary's early decision to frame the APA as a "restatement" was critical to the survival of pre-APA equity doctrines.<sup>239</sup> It created the perception that the statute was "subservient to judge-made doctrine."<sup>240</sup> While courts have

235. *E.g.*, *Irons v. Bell*, 596 F.2d 468, 474-75 (1st Cir. 1979); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768-70 (D.C. Cir. 1974).

236. *See supra* Section II.B. A clear example can be seen in the judiciary's approach to the aforementioned Exemption 2 doctrine. *See supra* notes 197-211. The early courts that adapted the High 2 interpretation relied on a passage from a House Report that construed Exemption 2 as encompassing "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners." H.R. REP. NO. 89-1497, at 10 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427. For reasons beyond this Article's scope, commentators and early courts called the House Report an "abuse of legislative history." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 810 (1968); *see also* *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 768 (D.C. Cir. 1978) (en banc) (describing the House Report's gloss as "the product of last minute chicanery"). Regardless, the first courts to embrace the report hewed roughly close to its language, withholding only investigation manuals. *E.g.*, *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980). But even assuming that legislative history is relevant to statutory interpretation, the judiciary's expansion of Exemption 2 into a wide range of basic civilian matters went far beyond any conceivable support in legislative history. *See supra* notes 203-205 and accompanying text.

237. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 287-88 (D.C. Cir. 1987) (Buckley, J., dissenting in part).

238. *See supra* notes 170, 173.

239. *See, e.g.*, *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955); *see also* *United States ex rel. Lindenau et al. v. Watkins*, 73 F. Supp. 216, 219 (S.D.N.Y. 1947) ("In other words, the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final actions of administrative agencies, nor does it create any new remedies if an adequate remedy is in existence."). *But see* *Unger v. United States*, 79 F. Supp. 281, 286 (E.D. Ill. 1948) (concluding that "Congress thought they were doing more than codifying existing law" when enacting the APA).

240. *Duffy*, *supra* note 25, at 119. As Kathryn Kovacs notes, "[c]onservatives sold the law as imposing important new restrictions on agencies, while liberals viewed the law as simply restating pre-existing common law." Kovacs, *supra* note 23, at 1208. However, "[b]y and large, the liberals won" and courts treated the APA a restatement that licensed common law. *Id.*

largely retreated from this view,<sup>241</sup> the administrative common law debate historically centered on whether the APA was truly a restatement or actually attempted to displace the law but was stymied by agency lobbying.

This approach is out of place in FOIA. Even assuming that Congress's ostensible expectations are relevant to the rest of the APA, FOIA is different. There is no serious contention, by courts or otherwise, that it merely restated the pre-APA framework of agency control over disclosure or reenacted the APA's toothless public disclosure regime. Rather, FOIA represented a sea change in the law. In stark contrast to the preexisting regime, it demanded that courts control information disclosure, an area previously subject to executive discretion.<sup>242</sup> And while it adopted many of the government's preexisting privileges, it situated them within a pro-plaintiff framework and imposed additional requirements.<sup>243</sup> Congress has also frequently amended FOIA, including two overrides of Supreme Court decisions, signaling its continued desire to control the terms of information disclosure.<sup>244</sup> As the Supreme Court observed, "In FOIA . . . a new conception of Government conduct was enacted into law, 'a general philosophy of full agency disclosure.'"<sup>245</sup> Indeed, FOIA is credited with sparking a global revolution in favor of government transparency.<sup>246</sup>

So one of the foundational justifications for classifying administrative law as an enclave of federal common law does not apply in FOIA. In fact, the opposite is true. A central tenet of federal common law is that a court's authority dissipates "when Congress addresses a question previously governed by a decision rested on federal common law."<sup>247</sup> This displacement occurs when Congress passes a statute that simply "speaks directly to the question."<sup>248</sup> Congress has repeatedly spoken, often in great detail, on the question of information disclosure. Federal common law cannot survive in such an environment.

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241. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (rejecting the restatement view as applied to the APA's judicial review provisions). Still, this approach has been resistant to challenge. See *Old Town Trolley Tours of Wash., Inc. v. Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 205 (D.C. Cir. 1997) (reasserting the restatement view of the APA's judicial review provisions).

242. See *supra* Section II.A.

243. See *id.*

244. See 1 O'REILLY, *supra* note 9, §§ 3:8-3:12, at 51-63.

245. *Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 16 (2001) (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)).

246. See 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, 562 (2002) (describing how states and other countries have used FOIA as a model for their own transparency legislation).

247. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).

248. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (alterations omitted) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

## 3. FOIA's Institutional Concerns

Administrative common law's defenders also advance that the method is the inevitable product of "systemic and constitutional pressures."<sup>249</sup> This functionalist argument rests on three observations: First, an expansive presidential power over agencies is "the central dynamic of contemporary national governance," reflecting the President's role as the politically accountable actor for the executive branch.<sup>250</sup> Second, because of the high institutional cost of passing legislation, Congress is an inefficient body to correct the executive when it endorses unauthorized goals.<sup>251</sup> And third, the judiciary fills the role of "mediating the needs of both political branches for control of agency decisionmaking."<sup>252</sup> Administrative common law is the product of this mediation, ensuring "that congressional instructions are honored while preserving room for presidential policy control."<sup>253</sup> Under this view, many administrative common law doctrines, such as *Chevron* and hard look review, simply set the appropriate balance between the political branches.<sup>254</sup>

But this account does not fit with FOIA. Considering its frequent amendments to the statute, Congress is not "inefficient" in correcting the other two branches. More important are its particular commands. FOIA provides different, more restrictive instructions to both the executive and judicial branches. For the executive, there is nearly no policy discretion to withhold non-exempt information.<sup>255</sup> Unless responsive information falls within one of nine "specifically stated" exceptions, an agency must disclose it.<sup>256</sup> Congress has also directed courts to employ substantive, searching, de novo review that construes ambiguity in favor of disclosure.<sup>257</sup> FOIA's common law aggressively resists these instructions.

In short, there should be little for courts to balance. Instead, Congress has given direct commands to the other two branches for managing information disclosure. And even setting this concern aside, the executive branch's overwhelming win rate suggests that the judiciary gives little weight to Congress's side of the "balance."

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249. Metzger, *supra* note 22, at 1321.  
250. *Id.* at 1332.  
251. *Id.* at 1322-32.  
252. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007).  
253. Metzger, *supra* note 22, at 1335.  
254. *See id.* at 1334-36.  
255. With limited exceptions, agencies can waive exemptions. *See* 1 O'REILLY, *supra* note 9, § 9.36, at 1075-77.  
256. 5 U.S.C. § 552(d) (2018).  
257. *See supra* notes 1-12 and accompanying text.

## 4. FOIA and Constitutional Common Law

Some commentators defend administrative common law as a form of constitutional common law—a contested class of judge-created doctrines that draw “inspiration and authority from, but [are] not required by, various constitutional provisions.”<sup>258</sup> As applied to administrative law, proponents primarily assert that the method promotes separation-of-powers values.<sup>259</sup> That is, administrative common law compensates for the Constitution’s silence on administrative agencies, which now wield outsized policymaking and adjudicatory authority.<sup>260</sup> For example, the “reasoned decisionmaking” requirement facilitates the ability of all three branches to police agency action, ostensibly mitigating nondelegation concerns.<sup>261</sup> Under this view, administrative common law doctrines work in tandem with statutes and executive policies to ensure that the administrative state is “politically responsive, procedurally legitimate, and respectful of individual rights.”<sup>262</sup>

Setting aside the serious first-order objections to constitutional common law,<sup>263</sup> it is undisputed that this authority is at least “subject to amendment, modification, or even reversal by Congress.”<sup>264</sup> Administrative common law’s defenders thus acknowledge that judge-made doctrines must submit to statutory commands.<sup>265</sup> Although, Metzger argues that a higher threshold for statutory displacement should exist because of administrative common law’s “constitutionally inspired” nature.<sup>266</sup>

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258. Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

259. See Bremer, *supra* note 222, at 1222-29; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 506 (2010); see also Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2062-74 (2008) (detailing judicial doctrines used to incentivize federalism values when agency action could have preemptive effects).

260. See Bremer, *supra* note 222, at 1222-29.

261. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990).

262. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 285 (2012).

263. See, e.g., Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 475 (2010) (arguing that the “primary role” of courts “should be one of enforcing the authority of the legislature,” not pioneering constitutional common law); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1127-31 (1978) (concluding that the Constitution does not authorize constitutional common law).

264. Monaghan, *supra* note 258, at 3; accord Metzger, *supra* note 22, at 1341.

265. See, e.g., Bremer, *supra* note 222, at 1268 (noting that administrative common law doctrines “are ‘subject to the paramount authority of Congress’ and should be informed by judicial consideration of relevant executive policies and practices” (quoting *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981))); Metzger, *supra* note 22, at 1353 (“Some judicial moves may be deemed unsupported because they simply conflict too much with governing statutes, even acknowledging the legitimacy of judicial development in general.”).

266. Metzger, *supra* note 22, at 1351.

As with the APA, FOIA implicates very real constitutional tensions that have been litigated since the founding.<sup>267</sup> Even the Supreme Court's strongest statement against unchecked executive secrecy, *United States v. Nixon*, recognized that executive privilege was "inextricably rooted in the separation of powers under the Constitution."<sup>268</sup> *Nixon* also took pains to clarify that the executive still may have absolute authority to protect diplomatic, national security, and military information.<sup>269</sup> These concerns (and others) feature prominently in FOIA litigation and commentary.<sup>270</sup>

And as with the APA, FOIA is of course not immune from constitutional scrutiny. If agencies actually challenged FOIA's provisions on constitutional grounds, courts could justifiably scrutinize and possibly refuse to enforce statutory text. But agencies have not done so. And FOIA is too detailed to support constitutional common law. As discussed, much of FOIA's common law simply ignores clear textual commands. Moreover, Congress has repeatedly amended FOIA to spur more disclosure, sometimes in response to judicial decisions.<sup>271</sup> These amendments have not affected the government's outsized win rate or spurred the judiciary to reconsider the appropriate interbranch balance over transparency.

The tension between congressional commands and the judiciary's tacit constitutional concerns is most pronounced in the national security context. In its first Exemption 1 case under FOIA, the Supreme Court held that it would not

267. See, e.g., *United States v. Burr*, 25 F. Cas. 30, 34-35 (C.C.D. Va. 1807) (Marshall, C.J.) (rejecting President Thomas Jefferson's claim of a constitutionally mandated executive privilege).

268. 418 U.S. 683, 708 (1974).

269. See *id.* at 706; see also *id.* at 707 ("To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of *nonmilitary and nondiplomatic* discussions would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." (emphasis added)). Some members of the *Nixon* majority espoused this position in prior opinions. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) ("[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. . . . [I]f Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law . . ."); see also *id.* at 757 (Harlan, J., dissenting) (arguing that the Constitution only allows judges to review the executive's decisions regarding national security information to ensure that it followed proper procedures); *Nixon v. Sirica*, 487 F.2d 700, 746 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (calling for an "absolute privilege" for confidential presidential communications due to inherent Vesting Clause authority).

270. See, e.g., *supra* Section I.B.4 (discussing the judiciary's use of institutional competencies to justify deference regimes in FOIA); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1418 (1974) (suggesting that FOIA might become unconstitutional if Congress expanded its disclosure mandates); Fenster, *supra* note 16, at 904 (claiming that expanding FOIA's disclosure demands would raise "significant" constitutional concerns because of the executive's constitutional prerogative over information); see also Lebovic, *supra* note 147, at 24-25 (discussing the separation-of-powers concerns that agencies raised during congressional hearings over FOIA).

271. See Tai, *supra* note 16, at 456-57.

review the adequacy of an agency's decision to classify information.<sup>272</sup> Congress responded by overriding both the Supreme Court and a presidential veto to expressly require courts to substantively review classification decisions *de novo*.<sup>273</sup> Construing the amendment as a congressional "vote of confidence" in the judiciary to "consider and weigh data" concerning national security,<sup>274</sup> the D.C. Circuit initially concluded that these provisions "stood in contrast to, and [were] a rejection of, the alternative suggestion . . . that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision."<sup>275</sup>

Now recall the "logical or plausible" standard of review for Exemption 1 claims.<sup>276</sup> It looks suspiciously like "reasonable basis." As applied, it is effectively abdication, representing a challenge to Congress's override.<sup>277</sup> Courts have also ignored similar attempts by presidents, who FOIA empowers to set classification criteria, to adopt pro-disclosure policies.<sup>278</sup> Discussing the government's most prolific classifier, the Ninth Circuit conceded that it was "only a short step from exempting all CIA records from FOIA."<sup>279</sup> This sentiment largely applies across the government, where successful Exemption 1 challenges are almost nonexistent.<sup>280</sup>

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272. EPA v. Mink, 410 U.S. 73, 84 (1973) (holding that once a court determined that a record was classified, its inquiry was "at an end").

273. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, §§ 1(b)(2), (2), 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552(b)(1) (2018)); *see also supra* notes 9-12 and accompanying text (discussing this amendment).

274. Zweibon v. Mitchell, 516 F.2d 594, 642-43 (D.C. Cir. 1975) (dicta).

275. Ray v. Turner, 587 F.2d 1187, 1193 (D.C. Cir. 1978).

276. *See supra* notes 101-110 and accompanying text.

277. Courts do not take the plaintiff's role in the adversarial process seriously when considering Exemption 1 claims. They "accord[] little or no weight to opinions of persons other than the agency classification authority, including persons who may have previously maintained some knowledge of the subject matter." 1 CORNISH F. HITCHCOCK, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 6:3, at 171 (2019). For example, courts have refused to consider affidavits written by an ambassador who created the requested records, *Rush v. Dep't of State*, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990), and a U.S. Senator who read the information as a member of the Foreign Relations Committee, *Wash. Post Co. v. Dep't of Def.*, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at \*19 (D.D.C. Feb. 24, 1987). Even when an affidavit's author is "eminent and well informed," the affidavit is not "entitled to the deference accorded to those who have the statutory duty to protect intelligence sources and methods." *Berman v. CIA*, 378 F. Supp. 2d 1209, 1218 (E.D. Cal. 2005). Similarly, courts have crabbed in camera review to "exceptional cases." *Kuzma v. IRS*, 775 F.2d 66, 69 (2d Cir. 1985). The primary rationale for this view in the Exemption 1 context is that courts are not in a position to "weigh the repercussions of disclosure" if they even tried. *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977).

278. For example, President Clinton reformulated classification standards to restrict overclassification. *See Exec. Order No. 12,958*, § 1.8(e), 60 Fed. Reg. 19825, 19,828 (Apr. 17, 1995). But as David Pozen notes, "no published opinion . . . remarked on [Clinton's order] as requiring different analysis, or reevaluated . . . precedent in light of it." Pozen, *supra* note 20, at 645 n.83. *See generally* § 552(b)(1) (2018) (requiring the President to establish criteria for classification under Exemption 1 in an executive order, while instructing courts to ensure that the information was "in fact properly classified pursuant to such executive order").

279. *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (alteration and quotation marks omitted).

280. *See, e.g., Verkuil, supra* note 13, at 715 n.159 (finding no ultimately successful challenges to agencies' Exemption 1 defenses during the study period).

It is beyond this Article's scope to examine what de novo review of Exemption 1 claims would look like. It is enough that the current regime—where courts are “prohibited from conducting a detailed analysis of the agency's invocation of Exemption 1”<sup>281</sup>—is impossible to square with FOIA's text and statutory history. Because Congress has spoken clearly on the subject, FOIA's common law is not an appropriate mechanism for relieving the legitimate constitutional tensions that government secrecy implicates.<sup>282</sup>

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FOIA is ultimately a pro-disclosure statute that calls for a pro-disclosure jurisprudence. But as FOIA's common law shows, courts have reached a different conclusion that calls for agency control. The judiciary's policy-focused approach fails to appreciate the balance that Congress set—one that values disclosure over secrecy. While the policies underlying FOIA are certainly up for debate, the methodological approach that courts took when establishing the statute's modern jurisprudence is much less defensible.

#### *B. Understanding FOIA's Pro-Government Outcomes*

FOIA's common law provides a chance to explore why courts have targeted FOIA, a question that has received comparatively little attention in commentary. Existing explanations have been fairly cursory. One critique focused on the uncertainty surrounding disclosure, suggesting that “[r]outine deference towards the government immunizes the courts from criticism if the low probability of large harm occurs.”<sup>283</sup> Others chalked FOIA's outcomes up to judicial views of the statute's merits<sup>284</sup> or structural concerns.<sup>285</sup> Yet another commentator suggested that the unsympathetic nature of FOIA's typical plaintiffs, such as prisoners and business competitors, drives outcomes.<sup>286</sup> He also offered that the disparity might simply be the product of judicial “skepticism, if not resistance” to the statute that produces decisions from a “black box of inarticulate factors.”<sup>287</sup>

While there might be some truth to these explanations, they cannot provide a complete picture. For instance, they do not address the admittedly rare areas of

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281. *E.g.*, *Associated Press v. FBI*, 265 F. Supp. 3d 82, 93 (D.D.C. 2017); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 162 (D.D.C. 2004).

282. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (rejecting the use of constitutional values to impose heightened judicial scrutiny of agency action).

283. Nevelow Mart & Ginsburg, *supra* note 110, at 748.

284. Kwoka, *supra* note 9, at 235-36 (suggesting that FOIA's failures might come from “judges' underlying views about the merits of FOIA as a transparency tool” and accusing courts of “altering the typical discovery process, manipulating the summary judgment standard, and allowing [agencies] to rehabilitate failed motions”); *accord* Slegers, *supra* note 20, at 215-16.

285. Fenster, *supra* note 17, at 64-65 (speculating that courts “clipped FOIA enforcement at the margins because they implicitly agreed with” warnings against intruding on the executive branch's control over information).

286. Verkuil, *supra* note 13, at 716, 718.

287. *Id.* at 718.

FOIA doctrine that depart from text but actually favor disclosure.<sup>288</sup> Of course, FOIA's common law is not a unified explanation either. But it does suggest two additional factors are at play: a preexisting doctrinal baseline and the APA.

### 1. Precedent

Courts did not interpret FOIA on a blank slate. As Part I discussed, many of its linchpin doctrines originated in pre-FOIA disputes over government secrecy. FOIA's pro-government outcomes are thus a testament to the power of common law precedent. Of course, precedent cannot justify FOIA's common law. But it can provide a descriptive lens for understanding FOIA jurisprudence. The common law exerts a potent gravitational pull on statutory interpretation. One of the most well-established canons of statutory construction instructs that "statutes will not be interpreted as changing the common law unless they effect the change with clarity."<sup>289</sup> Many of the motivations underlying this common law bias still exist when statutes do "effect the change with clarity." Among other traditional justifications, precedent offers efficiency, consistency, and predictability, features that judges are quick to extol.<sup>290</sup> These factors exert a powerful draw on decisionmakers, even when reliance on precedent is unwarranted.<sup>291</sup>

Congress set precedential values on a collision course with FOIA. Before the statute's enactment, courts adjudicating discovery disputes against agencies had reached a comfortable institutional equilibrium for information disclosure.<sup>292</sup> This balance of course favored the government. FOIA presented judges with the unappealing task of scrapping their baseline and constructing a

288. See, e.g., *supra* Section I.B.2.

289. SCALIA & GARNER, *supra* note 7, at 318; see also ESKRIDGE, *supra* note 44, at 348 ("Under the *common law canon*, courts will assume that legislatures act against the background of the common law and that relevant common law doctrines will be incorporated into the statute . . ."). Although, this canon is not without longstanding criticism. See, e.g., Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 388 (1908) ("It is not difficult to show . . . that [the canon] is not necessary to and inherent in a legal system; that it is not an ancient and fundamental doctrine of the common law; that it had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and that it is wholly inapplicable to and out of place in American law of today.").

290. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 125 (1995) (observing that deciding cases without precedent would increase the judicial effort required to decide cases); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) ("Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that an "obvious advantage" of clear precedents is "predictability" and opining that "[t]here are times when even a bad rule is better than no rule at all"); see also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

291. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 598 (1987).

292. See CROSS, *supra* note 58, at 201 ("Practically all the court decisions on the production of or access to federal records relate to 'disclosure' or non-disclosure in court for evidence or other judicial purposes.").

new jurisprudence for information disclosure. This task demanded a considerable amount of judicial resources. More gravely, it risked destabilizing the existing equilibrium, on which the executive branch had developed significant reliance interests. Rather than construct a new balance, judges simply dusted off the existing doctrinal baseline and situated it within FOIA.

FOIA's jurisprudence can thus be explained in part by path dependence. As Justice Scalia observed, "[t]he chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases."<sup>293</sup> The first judges to interpret FOIA stood alone against longstanding practice. When faced with demands to release sensitive but unprotected records, they sought refuge in prior holdings.<sup>294</sup> And once a court made an initial interpretation, others could simply cite that decision rather than re-explain the tensions between FOIA's text and diverging doctrine.<sup>295</sup>

## 2. The APA

Just as FOIA was not enacted on a blank slate, it did not develop in isolation. While courts often present it as a discrete statutory scheme, FOIA is formally a part of the APA. And the rest of the APA has clearly influenced FOIA's development.

This effect is clearest in FOIA's deference doctrines.<sup>296</sup> Rather than depart from convention by applying true *de novo* review, courts quickly adopted a strong deference regime for classified information (Exemption 1) that mirrored *Curtiss-Wright* deference, which applies to agency decisions implicating the military and foreign affairs.<sup>297</sup> And as deference regimes in traditional APA litigation became more defined, FOIA doctrine followed suit.<sup>298</sup> For example,

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293. Scalia, *supra* note 290, at 1180.

294. See, e.g., *supra* notes 196-198 and accompanying text (discussing lower court decisions to maintain their expansive interpretations of Exemption 5 notwithstanding potentially conflicting Supreme Court precedent); see also Easterbrook, *supra* note 290, at 425 (noting that precedent "increases the judge's power of decision" because the judge can simply cite to precedent while "hiding" the actual reasoning underlying a decision).

295. For example, the first court to expand Exemption 5 to third-party records did so with an offhanded comment in a footnote. See *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). Multiple circuits adopted *Soucie*'s holding by citing to this footnote. See *supra* note 54.

296. See *supra* Section I.B.4.

297. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."). *Curtiss-Wright* evolved into a form of near-absolute deference to the executive branch on military and foreign affairs decisions. See Eskridge & Baer, *supra* note 15, at 1100-01. More generally, Exemption 1 deference reflects the well-established state secrets privilege. See *Totten v. United States*, 92 U.S. 105, 107 (1876) ("It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.").

298. See Brinkerhoff & Listwa, *supra* note 21, at 149-51 (noting the parallels between deference doctrines in FOIA and the APA).

the first court to adopt the “considerable deference” standard for Exemption 5 claims justified its decision by citing two then-recent non-FOIA cases involving challenges to administrative decisions.<sup>299</sup>

A subtler but similar story can be told with FOIA's procedures. As noted, courts have tacitly recreated a version of the appellate review model in FOIA. FOIA doctrine joins the rest of the APA in employing strong presumptions against discovery and in favor of summary judgment, a review of a limited record, and the near-nonexistence of trials. Courts sustain the appellate model in FOIA by using agency affidavits as a substitute for the agency “record” and by giving the government multiple attempts at summary judgment (with new affidavits as a new “record”) as a substitute for remand.<sup>300</sup>

Consider also the policy-centered approach that underlies much of FOIA's common law. As with administrative common law, FOIA's common law implicitly endorses a “restatement” view that judges can evolve doctrine beyond (or around) statutory text.<sup>301</sup> Judges justified many of their interpretations by openly embracing prudential values such as “common sense,” “reasonableness,” “a practical approach,” “[a] moment's reflection,” and an aversion to “unnecessarily wooden” interpretations.<sup>302</sup> This embrace came notwithstanding the undisputed view that FOIA did not authorize a restatement approach to interpretation.

Even more broadly, courts gave the executive a vaunted role in interpreting FOIA, just as they had done with the APA. Following the passage of both statutes, the Attorney General released manuals that interpreted the acts in aggressively pro-executive ways.<sup>303</sup> Despite considerable criticism over their self-interested nature,<sup>304</sup> both manuals had an outsized influence on the

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299. *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (first citing *Allen v. Wright*, 468 U.S. 737, 760 (1984); and then citing *Women's Equity Action League v. Bell*, 743 F.2d 42, 43 (D.C. Cir. 1984)). The court's only other justification for its novel deference regime was that “[c]ourts are being reminded more and more about the deference that they owe to administrative agencies in regard to the way these agencies conduct their business.” *Chem. Mfrs. Ass'n*, 600 F. Supp. at 118.

300. *See supra* Section II.C.

301. *See supra* Section III.A.2.

302. *E.g.*, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 478 (1989) (“practical approach”); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (“[a] moment's reflection”); *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982) (“unnecessarily wooden”); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1056 (D.C. Cir. 1981) (*en banc*) (“reasonableness”); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (“common sense”).

303. *See* RAMSEY CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967); TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947); *see also* Davis, *supra* note 236, at 763 (discussing the FOIA manual's pro-executive valence); Duffy, *supra* note 25, at 119 (discussing the APA manual's pro-executive valence).

304. *See, e.g.*, 1 O'REILLY, *supra* note 9, § 3.4, at 35 (“It has been generally acknowledged that the efforts of [the FOIA manual's] drafters served to resist efforts to open up agency information practices.”); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1683 (1996) (calling the APA manual “a

development of pro-executive administrative common law.<sup>305</sup> Indeed, the Supreme Court determined that both should receive deference as interpretive aids.<sup>306</sup>

The APA's influence on FOIA looks like Eskridge and Ferejohn's description of the "colonizing effects" of a "superstatute."<sup>307</sup> That is, certain well-entrenched statutes "form a normative backdrop, influencing the way [other] statutes are read and applied."<sup>308</sup> To be sure, commentators heavily contest Eskridge and Ferejohn's normative argument that superstatutes justify a dynamic view of statutory interpretation.<sup>309</sup> But their descriptive conclusion that superstatutes exist and exert influence beyond their four corners is uncontroversial.<sup>310</sup>

Commentators have long observed that the APA functions as "a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished."<sup>311</sup> A compelling case can be made that as the "'fundamental charter' of the 'Fourth Branch' of the government,"<sup>312</sup> the APA exerted a gravitational pull on FOIA's development. FOIA threatened to undermine many of administrative law's foundational conventions, such as agency autonomy over policy implementation. To avert such a collision, the judiciary simply "impaired" those provisions of FOIA that came in conflict.<sup>313</sup> By doing so, it catalyzed the development of FOIA's common law.

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transparently one-sided, post hoc interpretation of a done deal"); *see also* Lebovic, *supra* note 147, at 14 (discussing the FOIA manual's role as part of a broader strategy of executive resistance to disclosure).

305. For example, the "restatement" view of the APA originated in the Attorney General's APA manual. *See* Duffy, *supra* note 25, at 119.

306. *See, e.g.*, *FCC v. AT&T Inc.*, 562 U.S. 397, 409 (2011) (noting that it had historically viewed the FOIA manual as "a reliable guide in interpreting FOIA"); *Vt. Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (recognizing the deference that it had historically given the APA manual).

307. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1235 (2001).

308. *Id.* at 1265-66.

309. *See, e.g.*, Paul Frymer, *Statutes, Courts, and Democracy in America*, 47 TULSA L. REV. 229, 237-39 (2011) (reviewing WILLIAM N. ESKRIDGE JR. & JOHN FEREOHNS, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010)).

310. Even superstatute theory's critics acknowledge that "there is, clearly, some category of superstatutes with more than ordinary force and stature." Adrian Vermeule, *Superstatutes*, NEW REPUBLIC (Oct. 26, 2010), <https://newrepublic.com/article/78604/superstatutes> [<https://perma.cc/R9VV-SYBA>]; *see also id.* ("Assemble a hundred legal scholars and ask them if there are superstatutes, and the vote will be near-unanimous that there are.").

311. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363. Other commentators have reached the same conclusion. *See, e.g.*, Fenster, *supra* note 17, at 62 ("The Administrative Procedure Act, of which FOIA is a part, is one such [super]statute."); Vermeule, *supra* note 310 (observing that the APA would appear on "most lists" of superstatutes). For a thorough analysis of the APA's status as a superstatute, *see* Kovacs, *supra* note 23, at 1223-37.

312. Kovacs, *supra* note 23, at 1208 (quoting Jack M. Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 874 (2007)).

313. *See* Eskridge & Ferejohn, *supra* note 307, at 1260.

*C. Assessing Congress's Ability to Overcome FOIA's Common Law*

The entrenched nature of FOIA's common law challenges the idea that Congress could easily displace administrative common law. Congress's frequent amendments to FOIA have not altered judicial outcomes.<sup>314</sup> Even today, FOIA has not meaningfully dislodged agency dominance over information disclosure, raising interbranch tensions over lawmaking authority. These tensions might soon expand beyond FOIA. Congress has recently showed an interest in amending not only FOIA but other sections of the APA, raising the specter of a second interbranch showdown over administrative common law.<sup>315</sup> To this end, this Section explores the capacity of Congress to override deeply entrenched judicial common law by examining the existing debate over FOIA reform and the effect of FOIA's prior amendments.<sup>316</sup>

FOIA's common law shows that direct statutory commands are not enough to overpower judicial inertia. Congress's previous amendments to FOIA include requiring attorney fee payments for prevailing plaintiffs,<sup>317</sup> strengthening exemption requirements,<sup>318</sup> providing additional tools for courts to review redactions in camera,<sup>319</sup> imposing fee-waiver mandates on agencies that miss deadlines,<sup>320</sup> and requiring that agencies prove harm from disclosure before withholding information.<sup>321</sup> While these reforms likely affect agency disclosures and judicial decisions at the margins, the judiciary's continued resistance to FOIA's text shows that they have not been panaceas.<sup>322</sup> Simply imposing

314. See 1 O'REILLY, *supra* note 9, §§ 3:8-3:12, at 51-63 (discussing FOIA's major amendments).

315. See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 631 (2017) (discussing recent congressional attempts to reform the APA).

316. A caveat is warranted. This Article is not concerned with the first-order debate over whether FOIA is a desirable approach to transparency. But for context, commentators and policymakers have long debated the appropriate balance between transparency and secrecy. Pro-executive commentators have predictably criticized the statute as an intrusion on other necessary executive functions. Most colorfully, then-Professor Scalia derided FOIA as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Scalia, *supra* note 10, at 15; see also Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 25-39 (2018) (raising similar concerns). Even some transparency advocates have criticized FOIA's requester-based model as an "entitlement program without eligibility criteria" that "may be flawed beyond repair." David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1100, 1136 (2017); see also Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443 (2012) (discussing pro-transparency critiques of the FOIA's model). But of course there is no shortage of praise for the values of transparency. See, e.g., Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1020 (2008).

317. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562 (codified as amended at 5 U.S.C. § 552(a)(4)(E) (2018)).

318. See, e.g., *id.* (codified as amended at § 552(b)(1)).

319. *Id.* (codified as amended at § 552(a)(4)(B)).

320. FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (codified at § 552(a)(4)(A)).

321. *Id.* at 539 (codified at § 552(b)(5)).

322. See, e.g., Tai, *supra* note 16, at 479 (noting the "slim" chances for courts to actually award attorney's fees).

increasingly specific statutory language or persisting in adding more hurdles for agencies, as some have suggested,<sup>323</sup> will not produce meaningful change. Previous reforms did little to address the pro-agency foundations on which courts built FOIA's common law. So FOIA's common law undermined them in much the same way as it undermined FOIA itself.

Even the boldest reforms might not change the calculus if they fail to address the tensions motivating FOIA's common law. Take for example proposals to replace FOIA's requester-based model with an affirmative disclosure regime, which a leading transparency scholar has labeled "the most scalable . . . and the most plausible substitute for the traditional FOIA model."<sup>324</sup> There is nothing inherent in tasking agencies with affirmatively disclosing their records that would change preexisting common law incentives in disclosure disputes. The concerns underlying FOIA's exemptions would remain—the CIA will still need to withhold properly classified information and the SEC will still need to shield confidential corporate information from prying competitors. So courts would face the same question: whether to overturn an agency's secrecy decision. Courts designed pre-FOIA doctrines to answer this precise question. These doctrines transitioned seamlessly to FOIA despite statutory commands for change. The foregoing analysis suggests that courts will yet again default to the longstanding pro-executive baseline under an affirmative disclosure regime.

Legislative reforms can overcome common law inertia only if they address the issues underlying the judiciary's reticence to order disclosure. The most obvious solution would be for Congress to look outside the judiciary altogether. For example, affirmative disclosure could be enforced not by private citizens and courts, but by legislative or administrative forces. While such a reform would attract its own problems, it could relieve existing tensions. Non-judicial actors will not face the same self-doubts over institutional competency that have racked judicial analysis.

An alternative solution would be to retain judicial enforcement but change the question that FOIA asks of judges. Margaret Kwoka has proposed formally applying the *Chenery* principle to FOIA litigation.<sup>325</sup> For context, the *Chenery* principle is the component of the appellate review model that limits judicial review to the justification an agency offered when originally making its decision.<sup>326</sup> Courts formally reject *Chenery* in FOIA but still rely almost exclusively on agency affidavits (substitutes for agency records) and allow the government to have "do-overs" (substitutes for remands).<sup>327</sup> Still, formally adopting the *Chenery* principle—that is, limiting agencies to their original

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323. See, e.g., Kwoka, *supra* note 9, at 241 (arguing for a direct repudiation of FOIA's deference doctrines and presumption against discovery); Slegers, *supra* note 20, at 234-35 (proposing an increase in the use of special masters to examine factual disputes in FOIA litigation).

324. See Pozen, *supra* note 316, at 1149.

325. See Kwoka, *supra* note 185, at 1064-65.

326. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

327. See *supra* Section II.C.

reasoning and remanding insufficient explanations to agency decisionmakers—would fundamentally alter the nature of FOIA litigation. Kwoka contends that the review-and-remand process would have the benefit of a “reversal-lite” approach that rescues judges from actually having to order disclosure.<sup>328</sup> The question would shift from whether to actually order disclosure to whether the agency adequately justified its decision.

While judges have never been comfortable affirmatively ordering agency action, they clearly embrace the task of second-guessing agencies and enjoining action. This extends beyond adopting a strong presumption in favor of reviewing and potentially remanding agency decisions.<sup>329</sup> Even in highly specialized or technical areas, courts employ searching reviews that ostensibly ensure agency decisions consider appropriate factors, respond to known critiques, and address alternative approaches.<sup>330</sup> Indeed, some commentators contend that courts have been so willing to review agencies’ decision-making processes that agency action has “ossified” under the weight of excessive judicial review.<sup>331</sup>

On the surface, then, such a proposal might fit with FOIA. Formal adoption would provide a broader mechanism to incentivize agency reason-giving.<sup>332</sup> And the added labor of actually reconsidering a FOIA request might prod agencies to consider more carefully whether to fight disclosure. But this proposal should give cause for concern if adopted in isolation. Because both the executive and judicial branches have historically resisted FOIA’s commands, formally adopting the *Chenery* principle might simply reallocate decisionmaking to another hostile entity, creating new problems.

Consider agency delay. In most other areas of administrative law, agencies actively push for change. They generally have little incentive to delay their internal decisionmaking. But under FOIA, agencies prefer the status quo and thus, delay. Indeed, a major critique of FOIA is the frequent tendency of agencies to delay responding to requests, even for years, effectively reaching a constructive denial without ever issuing a decision.<sup>333</sup> One of the few tools requesters have to force agency action is filing a lawsuit.<sup>334</sup> While initiating litigation is not an ideal solution, adopting the *Chenery* principle wholesale would challenge even this limited remedy.

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328. Kwoka, *supra* note 185, at 1113-17.

329. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

330. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

331. *See* Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 171 (2017); *see also* Kirby M. Smith, *In-House Regulators: Documenting the Impact of Regulation on Internal Firm Structure*, 36 YALE J. ON REG. BULL. 22, 27 (2018) (concluding that hard look review has made “the status quo sticky”).

332. *See* Kwoka, *supra* note 185, at 1113-17.

333. *See* H. COMM. ON OVERSIGHT & GOV’T REFORM, *supra* note 17, at 34; Tai, *supra* note 16, at 465-68.

334. If an agency fails to respond to a FOIA request within the twenty-day deadline, the requester can appeal the decision as a constructive denial. 5 U.S.C. § 552 (a)(6)(C)(i) (2018).

To start, *Chenery* presumes that a court actually has an agency record to review, which is a problem when agencies are the parties creating delay. The current practice of suing to force action would simply task a court with reviewing an agency record that does not exist. There would be no reconsideration on remand but rather a first attempt at review, preceded only by the expense and effort of filing a lawsuit. And even if a proper remand occurs, there is also no guarantee that an agency would reach a new decision within a reasonable period of time after remand. The process could compound existing delays.

Congress would need to take additional measures to catalyze agency action. For example, it could retain the “constructive denial” provision but also allow courts to retain jurisdiction after remand to secure compliance.<sup>335</sup> They already have this authority when supervising agency record searches.<sup>336</sup> More boldly, Congress could further integrate FOIA into the administrative model by replacing the internal appeals process with an adjudication in front of an administrative law judge, although this shift would be fraught with its own problems.<sup>337</sup> Or it could direct internal appeals to a Freedom of Information Commission, a process that has seen success at the state level.<sup>338</sup> Doing so would create a different “record” for judicial review. It would also place the judiciary in an oversight capacity that does not demand agency-like “expertise.” Further, it would facilitate Congress’s desire for closer examination of agency rationales without the risk of burdening Article III courts with tedious factfinding.

Of course, any major change to FOIA would risk creating other problems. Crafting a new reform proposal is ultimately beyond this Article’s scope. But the foregoing analysis suggests this much: Simply reinforcing the existing framework has not worked. If Congress continues to challenge the other two branches by asserting its authority in this area, its efforts are best directed at undermining the longstanding tensions motivating the judiciary’s reticence to question the executive’s secrecy decisions.

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335. For a discussion of this practice in other areas of administrative law, see Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1590 (2014).

336. 5 U.S.C. § 552(a)(6)(C)(i) (2018).

337. There is no guarantee that an administrative law judge would be any less predisposed toward agencies than courts. See Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL’Y 67, 83 (2018) (arguing that agency control over adjudication procedures and the adjudicators themselves “erodes the decider’s independence”). But see Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 YALE L.J. (forthcoming 2019) (manuscript at 31-36) (defending the role that administrative law judges play in checking agencies).

338. See Laura Danielson, Comment, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 1010; see also Mary M. Cheh, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 U.D.C. L. REV. 335, 350 (2010) (identifying Connecticut’s FOI Commission as a “model for formal administrative dispute resolution of public record laws”). The House considered this option at least once before. See H.R. 4960, 93d Cong. (1973).

*D. Lessons for Administrative Common Law*

FOIA's common law sheds new light on the larger debate over administrative common law. As discussed, administrative common law's defenders offer several ostensibly benign explanations for the judiciary's outsized role in administrative law—courts are simply resolving statutory ambiguities, fulfilling a congressional mandate to treat the APA as a restatement, compensating for congressional inaction and a dynamic executive, or promoting constitutional values.<sup>339</sup>

The arguments are “benign” because each concedes that Congress retains primacy over lawmaking. Every major defender of administrative common law agrees that judge-made doctrine must submit to enacted statutes when the two conflict.<sup>340</sup> This concession is necessary. Even the strongest proponents of “dynamic” interpretation admit that courts must respect legislative overrides to preserve separation-of-powers values.<sup>341</sup> But while it is easy to promise congressional control in the abstract, it is much more difficult to test the proposition as a descriptive matter. Congress has rarely amended the APA, much less overridden an administrative common law doctrine.<sup>342</sup> Beyond the well-worn debates over the APA's original language, it is hard to test judicial fealty to congressional commands.

FOIA is a different story. Congress has amended FOIA more than any other part of the APA. Those amendments, nearly all of which sought to spur more disclosure, have been far more substantive than the limited amendments elsewhere in the statutory regime.<sup>343</sup> And even setting these amendments aside, FOIA's provisions are much more detailed than the rest of the APA. Indeed, Metzger briefly alluded to FOIA's textual detail in her leading defense of administrative common law, citing *Milner* as a possibly justified decision to abrogate common law that conflicts with statutory language.<sup>344</sup>

As this Article has explained, these measures have not meaningfully empowered the judiciary to assume control over transparency decisions. Although courts agree in principle that they can adjudicate FOIA claims, they

339. See *supra* Section III.A.

340. See *supra* note 265.

341. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 122 (1982) (“When a court nullifies a statute or modifies it, and then is reversed by a legislature, the court has misjudged . . .”); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 151 (1994) (“[D]ynamic statutory interpretation, even against legislative expectations, is subject to override . . .”).

342. Christopher Walker has identified five “significant statutory changes” to the APA since its enactment. See Walker, *supra* note 315, at 633-35. Three of these amendments created new regimes for dealing with government information, such as FOIA. *Id.* The fourth resolved a circuit split over whether the APA waived the government's sovereign immunity. The fifth adopted the name “administrative law judges” and added more judges. See *id.*

343. See Tai, *supra* note 16, at 456-57 (“In the aggregate, amendments to FOIA have been far more extensive than all the amendments to the other APA sections combined, and the Act has become much longer than any other section of the original APA.”).

344. Metzger, *supra* note 22, at 1353 & n.318.

maintain an overwhelming agency win rate and regularly question their own institutional competency.<sup>345</sup> FOIA's outcomes suggest that courts have largely decided to abnegate control to the executive branch notwithstanding Congress's commands otherwise.

One of FOIA's common law's clearest upshots, then, is its challenge to the idea that administrative common law is a justified form of federal common law. Rather than filling in statutory gaps or smoothing latent interbranch tensions, FOIA jurisprudence suggests that courts simply favor administrative common law over statutory text, as the examples in Part I documented. This preference appears even when it is beyond doubt that the two conflict—for example, with judicial resistance to Congress's override of the Supreme Court's Exemption 1 doctrine.<sup>346</sup>

This practice is also apparent in subtler ways, such as through the adoption of additional procedural hurdles or other doctrinal shifts that counterbalance statutory changes. Consider FOIA's sanctions provision, which Congress enacted with great fanfare in 1974.<sup>347</sup> It is expansive, triggering a special counsel investigation when (1) a court orders document production, (2) awards attorney fees, and (3) “issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding.”<sup>348</sup> Plaintiffs have almost never successfully invoked this provision. Indeed, it appears that only three courts have ever found that an agency violated the sanctions provision.<sup>349</sup> Part of this rarity

345. See *supra* notes 13, 106-115 and accompanying text. *But see* Kreimer, *supra* note 316, at 1020 (arguing that FOIA has successfully entrenched a baseline norm of transparency).

346. See *supra* notes 272-280; see also Amir Shachmurove, *Attorneys' Fees Under the Post-2007 Freedom of Information Act: A Onetime Test's Restoration and an Overlooked Touchstone's Adoption*, 85 TENN. L. REV. 571, 633-53 (2018) (arguing that courts have undermined the plain meaning of a congressional override concerning FOIA's attorneys' fees provision). For a discussion of judicial resistance to congressional overrides, see Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 528-36 (2009).

347. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552(a)(4)(F) (2018)). This provision received considerable attention after its enactment. See, e.g., Ralph Nader, *New Opportunities for Open Government: The 1974 Amendments to the Freedom of Information Act and the Federal Advisory Committee Act*, 25 AM. U. L. REV. 1, 2 (1975) (noting the “revolutionary nature” of the sanctions provision); Scalia, *supra* note 10, at 17 (criticizing the sanctions provision as an unprecedented and dangerous remedy); Robert G. Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, 25 AM. U. L. REV. 7, 7 (1975) (calling the sanctions provision “potentially the most important amendment to the Freedom of Information Act (FOIA) and one of the most important congressional enactments in recent years”).

348. § 552(a)(4)(F).

349. See Paul M. Winters, Note, *Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974*, 84 GEO. L.J. 617, 618, 623 (1996) (identifying only two cases that actually found that the government ran afoul of the sanctions provision). This Article found only one additional court invoking the provision since Winters's note. And there, the court did not issue a sanction recommendation due to the plaintiff's noncompliance with local rules. See *Bergeron v. U.S. Dep't of Justice*, No. 3:13-cv-625, 2016 U.S. Dist. LEXIS 40427, at \*3-4 (D. Nev. Mar. 28, 2016); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-235R, FREEDOM OF INFORMATION ACT: FEDERAL COURT DECISIONS HAVE NOT REQUIRED THE OFFICE OF SPECIAL COUNSEL TO INITIATE DISCIPLINARY ACTIONS

is likely due to first-order success of agencies in preventing disclosure. But courts still do not recommend sanctions even when the only question is whether the agency's conduct "raise[s] questions" of arbitrary and capricious action.

Some courts have assumed that the provision requires plaintiffs to raise specific evidence to meet the standard, even when the agency did not provide an explanation for its actions.<sup>350</sup> Others have refused to find for plaintiffs by holding that bad faith or undisputedly unreasonable behavior are not questionably arbitrary and capricious,<sup>351</sup> adding a requirement that the requester's injury must be more than minimal,<sup>352</sup> recognizing an agency's belated attempts to cure unquestionably arbitrary and capricious behavior,<sup>353</sup> or simply declining to recommend sanctions without explanation.<sup>354</sup> These demands appear irreconcilable with a statute that requires an agency's conduct to only "raise questions" of arbitrary and capricious behavior.

In short, the modern state of FOIA jurisprudence suggests that existing theories of administrative common law might overstate the judiciary's willingness to cede ground to Congress. Regardless of its theoretical limits, administrative common law's application in FOIA indicates that future congressional amendments to other parts of the APA might not be honored in practice.

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FOR THE IMPROPER WITHHOLDING OF RECORDS 4 (2018) (finding that no court recommended sanctions in the last decade).

350. See, e.g., *Seay v. U.S. Dep't of Agric.*, No. 3:18-CV-26, 2018 U.S. Dist. LEXIS 181793, at \*23-24 (N.D. Miss. Sep. 5, 2018) (declining to find that the government's conduct raised questions of arbitrary and capricious behavior, even "though the government's failure to promptly disclose the requested documents . . . has largely gone unexplained"); *Lorber v. U.S. Dep't of the Treasury*, No. 14-CV-675, 2016 U.S. Dist. LEXIS 119068, at \*16 (E.D.N.Y. Sept. 1, 2016) (adopting a magistrate judge's recommendation finding that the "Plaintiff had not established" arbitrariness and capriciousness); see also *Maydak v. U.S. Dep't of Justice*, 579 F. Supp. 2d 105, 109 (D.D.C. 2008) (implying that sanctions were unwarranted without "evidence of agency recalcitrance or bad faith").

351. See, e.g., *Hall v. CIA*, 115 F. Supp. 3d 24, 31 (D.D.C. 2015) ("The CIA's lack of reasonableness suggests that the plaintiffs' attorneys should be compensated for their efforts but is not so egregious as to warrant more."); *Hernandez v. U.S. Customs & Border Prot. Agency*, No. 10-4602, 2012 WL 398328, at \*13 (E.D. La. Feb. 6, 2012) (holding that even where an agency was initially unreasonable, a sanction recommendation was not warranted where "on the whole" the agency's conduct did not "rise to the level of arbitrariness or capriciousness"); *Hull v. U.S. Dep't of Labor*, 04-cv-01264, 2006 U.S. Dist. LEXIS 35054, at \*21 (D. Colo. May 30, 2006) ("Despite DOL's own admission of bureaucratic mistakes, Hull did eventually get the documents it requested. DOL did not lie to this court, or disobey or ignore any orders of this court. A judicial decree under FOIA is not warranted."); *Kempker-Cloyd v. U.S. Dep't of Justice*, No. 5:97-cv-253, 1999 U.S. Dist. LEXIS 4813, at \*23 (W.D. Mich. Mar. 12, 1999) ("[T]his Court holds that even if the Defendant did not act in good faith, the record does not reflect arbitrary or capricious action by the Defendant.").

352. See *Miller v. Webster*, No. 77-cv-3331, 1983 U.S. Dist. LEXIS 12271, at \*8-9 (N.D. Ill. Oct. 27, 1983) (invoking *de minimis non curat lex* (the law does not concern itself with trifles)).

353. See *Minute Order, Consumer Fed'n of Am. v. U.S. Dep't of Agric.*, 539 F. Supp. 2d 225 (D.D.C. 2008) (No. 04-cv-01788), ECF No. 65.

354. See, e.g., *Pederson v. Resolution Tr. Corp.*, 847 F. Supp. 851, 858 (D. Colo. 1994).

## Conclusion

This Article has argued that FOIA's modern jurisprudence cannot be properly understood in isolation. Instead, it fits neatly within the administrative common law paradigm. Like the APA, courts grounded many of FOIA's foundational doctrines in functional or structural concerns rather than statutory text. Tellingly, these doctrines were quite similar to pre-FOIA administrative and discovery common law, suggesting that courts treated FOIA like the rest of the APA—a restatement of existing law that ostensibly licensed dynamic interpretation. And because pre-FOIA doctrines both overwhelmingly favored the executive and were procedurally incompatible with FOIA's disclosure model, the ensuing jurisprudential landscape predictably favors the government.

Recognizing FOIA's common law provides a firm baseline for understanding and critiquing the tension between FOIA's text and outcomes. But it also offers broader lessons. It adds context to the administrative common law debate, suggesting that existing accounts do not fully appreciate the judiciary's resilience to congressional commands that conflict with its common law framework. Relatedly, FOIA's common law highlights the perils of looking beyond statutory text in interpretation. By relying on a preexisting common law equilibrium, courts have, at least in the telling of most commentators, reduced a monumental superstatute into a "failure." And in the process, they have undercut Congress's authority to determine what the law should be.