De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*

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* J.D. Candidate 2006, University of San Diego School of Law. B.A. 2002, Albertson College of Idaho.

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I. INTRODUCTION

The Freedom of Information Act (FOIA) was enacted in 1966 to increase transparency in government operations by creating a public right of access to government information.[1] Since its enactment, the power of FOIA has been eroded so that the Act is no longer able to serve its purpose as intended by Congress. FOIA's procedures were designed to replace the government's practice of arbitrarily denying access to information simply by labeling it as "top secret," "classified," or as a threat to "national security."[2] However, government agencies continue to deny requests for information, using FOIA exemptions instead.[3] The courts have facilitated the abuse of these exemptions by granting excessive deference to agency decisions to withhold information.[4] If FOIA is to be an effective means for enabling the public to monitor its government, courts must conduct a more thorough review of agency decisions to withhold requested information.

This Comment argues that courts should adhere to the de novo standard of review prescribed by Congress in the FOIA statute,[5] and that this standard is necessary for FOIA to provide the public with the affirmative right to access government information. Part I of this paper examines the reasons why FOIA requires the de novo standard of

1. Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (codified as amended at 5 U.S.C. § 552 (2000)). Before FOIA, the only laws governing public access to government information were section 3 of the Administrative Procedure Act (APA), ch. 324., § 3, 60 Stat. 237, 238 (1946) (codified as amended at 5 U.S.C § 551 (2000)), and the Housekeeping Act, ch. 14, 1 Stat. 68, 68-69 (1789). The Housekeeping Act was amended in 1958 to state that it "does not authorize withholding information from the public or limiting the availability of records to the public." Pub. L. No. 85-619, 72 Stat. 547, 547 (1958) (codified as amended at 5 U.S.C. § 301 (2000)).

2. CHARLES S. STEINBERG, THE INFORMATION ESTABLISHMENT 16-17 (1980).

3. Agencies can utilize Exemptions 1, 3, and 7 of FOIA to deny access to information classified by Executive order because it is exempted according to another statute, and because releasing the information could interfere with law enforcement proceedings, respectively. *See* 5 U.S.C. § 552(b)(1), (3), (7)(A) (2000).

4. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003) ("It is . . . well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview.").

5. *See* 5 U.S.C. § 552(a)(4)(B) (2000) (providing that "the court shall determine the matter de novo" in a case "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant").

review, and why courts ignore the requirement. Part II discusses various standards of review used by courts reviewing agency actions outside FOIA litigation. Specifically, it compares the review of agency adjudications and rulemakings to review under FOIA. Part III analyzes the actual standards of review that are employed in cases involving Exemptions 1, 3, and 7(A) of FOIA and discusses how the de novo standard of review should be applied. Finally, Part IV provides suggestions for strengthening and clarifying the role of courts in reviewing agency determinations that information should be withheld for national security reasons.

II. BACKGROUND

A. Judicial Review of Agency Actions

The Administrative Procedures Act (APA) entitles a person to seek judicial review of agency actions.[6] The APA also lists the standards of review that are generally applied to agency actions.[7] The "arbitrary and capricious" standard is the baseline standard of review for all agency actions.[8] That is, all agency actions that are subject to judicial review are subject to review under this standard unless the APA or some other applicable statute provides a more stringent standard of review. The APA requires application of the "substantial evidence test" in review of formal adjudications and formal rulemakings[9] and de novo review in very limited circumstances.[10] This leaves only informal adjudications and informal rulemakings subject to the "arbitrary and capricious" standard of review.

6. 5 U.S.C. § 702 (2000) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

7. 5 U.S.C. § 706 (2000).

8. 5 U.S.C. § 706(2)(A). Agency action must be set aside if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it fails to meet requirements of law. *Id.*

9. Formal adjudications and formal rulemakings differ from their informal counterparts in that the procedural safeguards provided in 5 U.S.C. § 556 and § 557 apply to formal adjudications and formal rulemakings. These statutes require that notice be given to the parties, that a trial-like proceeding take place, and that this proceeding be "on the record" such that meaningful and more thorough judicial review can take place. *See generally* 5 U.S.C. §§ 554, 556, 557 (2000).

10. 5 U.S.C. § 706(2)(E), (F).

The standards prescribed in the APA are preempted when another statute or the Constitution requires the court to use a different standard of review.[11] For example, FOIA requires de novo review of agency decisions to deny FOIA requests.[12]

In FOIA cases, the issue before the court is whether the information withheld by the agency properly falls under the claimed FOIA exemption.[13] Thus, under de novo review, courts should determine whether the requested material falls under the claimed exemption without any deference to the decision by the agency.[14] The court should examine the record created in the agency's determination, but then make its own determination as if the agency had not decided the matter.[15] However, courts do not conduct de novo review in practice. Rather, courts explicitly and substantially defer to agency determinations regarding the applicability of FOIA exemptions.[16] For example, consider the opinion of the D.C. Circuit Court of Appeals in *Center for National Security Studies v. United States Department of Justice,* where the court stated:

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11. The Constitution provides a baseline for the adequate procedural safeguards of individual rights in agency actions through the Due Process Clause. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

12. 5 U.S.C. § 552(a)(4)(B) (2000).

13. FOIA includes exemptions for nine categories of information. These exemptions were included in recognition of the government interest in keeping certain types of information secret. The exemptions stated briefly are as follows: (1) data classified under Executive order in the interest of national defense or foreign policy; (2) data relating to the internal personnel rules and practices of the agency; (3) data exempted from disclosure by statute; (4) trade secrets or financial information obtained from an individual on a confidential basis; (5) interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files which would constitute an invasion of privacy; (7) investigatory files compiled for purposes of law enforcement; (8) data relating to use by an agency responsible for the regulation of financial institutions (banks, for example); and (9) data concerning the geology and geography of oil wells. 5 U.S.C. § 552(b).

14. Epstein v. Resor, 421 F.2d 930, 933 (9th Cir. 1970) (stating that de novo judicial review under FOIA requires a consideration of "whether the conditions of exemption in truth exist").

15. "When the agency action resulted from a proceeding in which a statute or the Constitution requires that the facts shall be subject to trial de novo, the court makes its own, independent findings of fact and determines whether the agency action is warranted thereby." Sec. of Admin. L. & Reg. Prac. of the A.B.A., *A Blackletter Statement of Federal Administrative Law,* 54 ADMIN. L. REV. 17, 41 (2002) [hereinafter *Blackletter Statement*].

16. *See, e.g.*, Pub. Citizen v. Dep't of State, 276 F.3d 634, 644-45 (D.C. Cir. 2002) (upholding summary judgment in favor of agency where the agency provided a reasonably detailed affidavit that was not called into question by contrary evidence in the record or evidence of the agency's bad faith).

> We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated . . . . Given this weight of authority counseling deference in national security matters, we owe deference to the government's judgments contained in its affidavits. Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one.[17]

The pervasiveness of this level of deference is illustrated by the estimated ten percent reversal rate of agency decisions over FOIA's thirty-five year history.[18] This percentage does not conclusively demonstrate that courts are conducting a more deferential review than the de novo standard would require, but it certainly suggests that they are. It would be reasonable to hypothesize that if de novo review were employed, fifty percent of FOIA request denials would be reversed.[19]

B. Judicial Deference in the FOIA Context

By granting deference to agency decisions to withhold information under FOIA, courts reject Congress's determination that de novo review should be required in the FOIA context. This section examines and criticizes the possible justifications that courts might have for granting this deference.

1. Criticisms of the Justifications of Deference

a. Expertise

The main reason cited by courts for increased deference toward agency decisions is the high level of expertise that agencies have in their field. This reason is most often cited in cases involving national security.[20] Because the agency's expertise exceeds that of the courts in

17. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003).

18. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002) (substantiating the estimation with a survey of all FOIA cases decided from 1990 to 1999, which revealed that just over ten percent of cases were reversed).

19. *Id.*

20. *See, e.g.*, CIA v. Sims, 471 U.S. 159, 179 (1985) (deferring to the decision of the Director of the CIA that disclosure of the names and institutional affiliations of certain researchers in a government sponsored behavior modification program would reveal intelligence sources and methods (Exemption 3), the Court stated "[t]he decisions of the Director, who must of course be familiar with 'the whole

the agency's field, courts argue, an agency's determination about the applicability of the exemptions to the requested information should not be second-guessed.[21]

This reasoning is valid. Judges conducting the review of agency decisions are generalists, while those making decisions and setting policies within the agency are typically specialists. But the expertise of the agency is only one factor worth considering in determining how courts should review agency decisions under FOIA. Other factors should include the strong ability of judges to make appropriate determinations under FOIA,[22] the relative independence of judges in making such determinations,[23] the low probability that agencies will always voluntarily comply with FOIA, and the importance of the civil rights that are at stake in FOIA litigation.[24] These factors are discussed in further depth below.

Congress has indicated its faith in the ability of the judiciary to make these judgments by specifically authorizing courts to review agency decisions under FOIA and to substitute their judgment for that of the agency when they deem it appropriate. Statements made in congressional floor debates also indicate Congress's faith in the ability of the judiciary to effectively review, and if necessary, reverse agency decisions to withhold information.[25] Whether or not the judiciary considers itself able to make such determinations, courts are required to follow Congress's mandate.

b. Economy

Another reason that may account for the failure of courts to make a thorough review of claimed FOIA exemptions is one of judicial

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picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests . . . at stake.").

21. *See id.*

22. Congressman Moss did "not think we have to make dummies out of [judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret." 120 CONG. REC. 6811 (1974), *reprinted in* SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS, HOUSE COMMITTEE ON GOVERNMENT OPERATIONS & SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, 94th Cong., 1st Sess., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Pub. L. No. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 257 (Jt. Comm. Print 1975) [hereinafter *Source Book*].

23. Federal judges are appointed for life and thus not subject to political pressures. *See* U.S. CONST. art. III, § 1 ("Judges . . . shall hold their Offices during good Behaviour . . . ."). Also, a judge, unlike an agency official, does not have a bureaucratic interest in protecting his decision.

24. *See* discussion *infra* Part II.B.2.b.

25. *See supra* note 22 and accompanying text.

economy. It takes much less time and effort for courts to review agency decisions under FOIA by simply conducting a superficial review of agency affidavits submitted in support of their decision. However, review in this manner is not sufficient. Effective review requires that courts take the time to look beyond the reasons stated by the agency to determine if they are bona fide and sufficient to qualify for exemption under FOIA.[26] As Judge Patricia Wald stated, effective review according to the statutory command of Congress involves "insisting on affidavits setting out the security concerns, looking at the documentary material in camera if necessary, transmitting to the security agencies, most of whom do not like the FOIA one whit, the message that they are being held to account."[27]

c. Hostility of Judges Toward FOIA

Another reason may be that the courts favor the policy of national security over that of open government. Under this theory, courts are reluctant to question the agency assertions that release of certain information would threaten national security. Some judges have been very open with their distaste for FOIA. In a 1982 article, then D.C. Circuit Court Judge Antonin Scalia called FOIA "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored."[28] Perhaps this is a sentiment that is widely felt, but generally left unspoken. If this is the case, it is not likely to change in a post-September 11 environment.[29]

In assigning the authority of courts to review agency decisions under FOIA, Congress did not leave it to courts to balance the competing policies embodied in FOIA and its exceptions. In creating FOIA, Congress made known their view that government secrecy, and dependent functionality, was worth sacrificing to some extent to enable the public to monitor its government. Congress indicated that in limited circumstances government secrecy should be maintained, but these

26. *See* Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760 (1988) ("The Act specifically requires courts to assure themselves *de novo* that the material withheld by the government under a national security excuse *is* legitimately classified.").

27. *Id.* at 761.

28. Antonin Scalia, *The Freedom of Information Act Has No Clothes,* REG. Mar./Apr., at 14, 15 (1982).

29. *See* discussion *infra* Parts II.B.2.c, III.C.

circumstances are restricted to the specific categories of information included in the exemptions. As stated in *A. Michael's Piano, Inc. v. FTC*, "Congress established . . . a general, firm philosophy of full agency disclosure, and provided de novo review by federal courts so that citizens and the press could obtain agency information wrongfully withheld."[30] Therefore, in FOIA litigation, courts are not asked to weigh competing policies because Congress has already done so.

2. Arguments Against Judicial Deference in the FOIA Context

a. Intent of Congress

The deference that courts extend is contrary to the intent of Congress. In the Senate Report that accompanied the enactment of FOIA in 1966, de novo review is described as essential to prevent courts reviewing agency actions from instituting "meaningless judicial sanctioning of agency discretion."[31] Congress did not trust agencies to voluntarily comply with FOIA in all cases and gave the judiciary authority to monitor their compliance.

The de novo review requirement of FOIA is consistent with the idea that Congress did not trust agencies to voluntarily comply with FOIA in every case. Experience has shown that this distrust is often deserved. For example, in *Cuneo v. Rumsfeld*, the government withheld the Defense Department's Defense Contract Audit Manual from a FOIA requester, claiming it was exempt.[32] The requestor brought the case to court and eight years of litigation ensued as the government maintained its position. It was not until faced with the possibility of a special master to review the requested material to determine if it was in fact exempt from FOIA that the government finally agreed to release the information.[33] Even protracted litigation is not enough to force certain agencies to provide information that they have no right to withhold under FOIA.

b. The Importance of the Right Created by FOIA

The affirmative right of access to government information is a particularly important right to the functioning of a democracy.[34] Without this right, the public would only have access to the information which the

30. A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 141 (2d Cir. 1994).
31. S. REP. NO. 89-813, at 8 (1965).
32. Cuneo v. Rumsfeld, 553 F.2d 1360, 1362 (D.C. Cir. 1977).
33. *Id.* at 1365.
34. *See supra* text accompanying note 1.

government chose to release. The government would be unaccountable for waste and abuse that harms the public, because the public would have no access to first-hand knowledge of it. FOIA was enacted in recognition of this right.[35]

The Supreme Court has not found a right of access to particular government information implicit in the freedom of expression and freedom of the press guarantees of the First Amendment.[36] However, some argue that the Court should acknowledge such a right.[37] These arguments are based on the notion that the same policy of promoting transparency in government to allow citizens to make informed decisions that is behind FOIA is also in part behind the rights granted to individuals by the First Amendment.[38] For example, just as providing access to criminal trials gives the public an invaluable and irreplaceable opportunity to monitor its government, so too does allowing access to information about the detention of individuals in terrorist investigations. FOIA is Congress's way of providing access to government information while avoiding the constitutional implications.

35. While FOIA was enacted in 1966, it did not become a powerful means of access to government information until it was amended in 1974. These amendments were enacted at a time when trust in government was very low, and deservedly so. President Nixon was forced to resign in the wake of Watergate and public anger over the Vietnam War was at its peak. As stated by then Circuit Judge Antonin Scalia, "[the 1974 amendments] can in fact only be understood as the product of the extraordinary era that produced them—when 'public interest law,' 'consumerism,' and 'investigative journalism' were at their zenith, public trust in the government at its nadir, and the executive branch and Congress functioning more like two separate governments than two branches of the same." Scalia, *supra* note 28, at 15.

36. Pell v. Procunier*,* 417 U.S. 817, 833-35 (1974) (holding that the Constitution does not impose upon the government the affirmative duty to make available to journalists sources of information not available to members of the public generally); *see also* Saxbe v. Wash. Post Co.*,* 417 U.S. 843, 850 (1974) (same); *cf.* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.").

37. *See generally* Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know,* 1976 WASH. U. L.Q. 1, 14 (1976) (arguing that the Supreme Court should recognize that the right to know already held to be in the First Amendment includes the affirmative right of access to government information, and that recognition of a constitutional right would allow further development of that right, and most importantly, it would close gaps left by the statute).

38. *See generally* ALEXANDER MEIKEJOHN, POLITICAL FREEDOM (1960).

c. Hostility of the Executive Towards FOIA

Another reason that courts should conduct a thorough review of agency decisions under FOIA is the hostility towards FOIA and its principles that the executive branch often exhibits. This hostility has existed ever since the act was first conceived.[39] The Ford Administration strongly opposed the enactment of the 1974 FOIA Amendments,[40] and the executive branch remains averse to open government today.[41] In 2001, Attorney General John Ashcroft issued a memorandum stating that any decision to withhold information that has a "sound legal basis" and does not "present an unwarranted risk of adverse impact" on the work of other agencies will be defended by the Department of Justice.[42] This replaced the prodisclosure "foreseeable harm" standard established by Attorney

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39. FOIA was passed despite strong protest from the executive branch, led by the Department of Justice, which argued that the costs to the public of enacting FOIA greatly outweighed any public benefit that would be produced. JAMES T. O'REILLY, 1 FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW 2-8, 2-9 (1990). For more information on specific agency objections, see *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME L. REV. 417, 418 n.6 (1965) and Blanchard, *A History of the Federal Records Law*, U. MO. FREEDOM OF INFO. CENT. REP. NO. 189 (1967), *cited in* O'REILLY, *supra*.

40. President Ford vetoed the bill containing the 1974 Amendments stating that they gave too much power to the courts to review agency decisions under FOIA. President Ford told the House of Representatives that "[a] determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable." *Source Book*, *supra* note 22, at 483-85.

41. Deputy Defense Secretary Paul Wolfowitz wrote a memorandum stating:

> It is clear that . . . the security of information critical to the national security will remain at risk for an indefinite period.
>
> It is therefore vital that the Defense Department employees, as well as persons in other organizations that support DOD, exercise great caution in discussing information related to DOD work, regardless of their duties. . . . Classified information may be discussed only in authorized spaces and with persons having a specific need to know and the proper security clearance. Unclassified information may likewise require protection because it can often be compiled to reveal sensitive conclusions. Much of the information we use to conduct DOD's operations must be withheld from public release because of its sensitivity. If in doubt, do not release or discuss official information except with other DoD personnel.

Paul Wolfowitz, Deputy Sec'y of Def., Memorandum for Sec'ys of the Military Dep'ts (Oct. 18, 2001), http://www.fas.org/sgp/news/2001/10/wolfowitz.html.

42. John Ashcroft, Att'y Gen. of the United States, Memorandum for Heads of All Fed. Dep'ts and Agencies (Oct. 12, 2001), www.usdoj.gov/04foia/011012.htm [hereinafter *Ashcroft Memorandum*]. The memorandum also encourages all federal agencies to consider not just the values embodied in FOIA, but the protection of values and interests such as national security, the effectiveness of law enforcement agencies and personal privacy as well. *Id.*

General Janet Reno under President Clinton.[43] This new standard is a clear shift towards a policy of nondisclosure by the Bush Administration. The importance of judicial review of agency decisions in ensuring that FOIA fulfills its purpose is magnified where the policy of the Executive is contrary to this purpose.

III. STANDARDS OF REVIEW

A. Law Versus Fact Distinction

The determination of whether certain information is included under an exemption of FOIA can be viewed as a three part analysis involving questions of law, questions of fact, and mixed questions of law and fact. First, the language of the exemption must be interpreted to determine what is meant to be excluded. For example, under Exemption 4—which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"[44]—a question arises as to what is a "trade secret." These words must be interpreted before the exemption can be properly applied. Second, facts about the nature of the information sought must be gathered. Again using the case of Exemption 4, it must be determined whether the information sought is secret, whether it is commercially valuable, whether it can be used for the production of any product, among other things. Finally, the interpreted law must be applied to the gathered facts and a conclusion made as to whether the exemption applies.

In general, when reviewing administrative agency decisions, courts give more deference to agencies' factual determinations than to agencies' legal determinations.[45] In the case of legal determinations, the

43. Janet Reno, Att'y Gen. of the United States, Memorandum For Heads of Dep'ts and Agencies Re: The Freedom of Information Act (Oct. 4, 1993), http://usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm. Exemptions would be defended by the Department of Justice only where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." *Id.* Further, even where an item might arguably fall within an exemption, "it ought not to be withheld . . . unless it need be." *Id.*

44. 5 U.S.C. § 552(b)(4) (2000).

45. A major exception to this general rule is *Chevron* deference. In *Chevron U.S.A, Inc. v. Natural Res. Def. Council*, the Supreme Court held that courts must defer to the agency interpretations of statutes where Congress clearly left the interpretation power to the agency either explicitly or implicitly by use of broad language. 467 U.S. 837, 842-44 (1984). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless

courts have both the constitutional authority and the expertise to make such determinations.[46] On the other hand, the agencies are considered to have expertise in factfinding in their particular field.[47]

In the case of FOIA, Congress specifically overrode the principle of deferring to agencies' factual determinations by requiring de novo review. Agency findings are rarely subject to such thorough review.[48] Use of the less stringent standards "ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional."[49] A comparison of the circumstances under which the less thorough forms of review are required to the circumstances of FOIA cases illustrates the need for de novo review of agency decisions to withhold information under FOIA.

B. Arbitrary and Capricious Standard

The arbitrary and capricious test is supposed to be the narrowest[50] standard of review defined by Congress.[51] In an abstract sense, it is equivalent to a "pass/fail" standard.[52] However, in application, the arbitrary and capricious standard is difficult to distinguish from the

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they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* Where the legislative delegation to the agency is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44. Regarding the issue of judicial review under FOIA, Congress used specific language designating de novo review as the appropriate standard, thus *Chevron* deference does not apply.

46. "It is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Another reason is one of economy. In the case of a legal determination, one court decision can clear up the issue and provide precedent for similar cases in the future. In contrast, questions of fact are more particular in nature and thus vary from case to case. It would be a substantial burden for courts to retry every case already tried by an agency, and thus deference is said to be warranted. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 446 (2d ed. 2001).

47. This expertise is a product of the designation of the agency for the fulfillment of a specific regulatory function and the substantial experience the agency typically has in carrying out that function.

48. FOIA decisions are the most cited examples. "Trial de novo is available when a court reviews an agency's denial of a FOIA request, but is otherwise rare." *Blackletter Statement*, *supra* note 15.

49. Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985).

50. "Narrow" here refers to the scope of review. The narrower the scope of review, the less scrutiny the court is to apply to the prior decision, and the higher the approval rate of prior decisions is expected to be.

51. Verkuil, *supra* note 18, at 687-88. The four standards listed in order from narrowest to widest scope are: arbitrary and capricious, substantial evidence, clearly erroneous, and de novo. *Id.*

52. *Id.* at 688.

substantial evidence standard.[53] Reasonableness is the main consideration in the application of both.[54] As stated by the Supreme Court in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* under the arbitrary and capricious standard an agency's decision should be evaluated to determine if there is a "'rational connection between the facts found and the choice made.'"[55] Most courts are inclined to use this test.[56]

Arbitrary and capricious is the default standard used in judicial review of agency actions.[57] It is typically applied in cases involving informal adjudications and informal agency rulemaking.[58] Adjudication or rulemaking is considered "informal" where the agency is not required by statute to provide the various procedures and safeguards that are required in formal adjudications and formal rulemaking procedures.[59] Decisions in these cases are not based on detailed factual records as they are with formal adjudications. In the case of informal adjudications, no formal record is created, but the administrative record is said to consist of "a file of materials that the agency maintains as the exclusive basis for its

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53. According to the opinion in *Overton Park,* the arbitrary or capricious test is similar to the clearly erroneous test used in civil litigation. That opinion reads:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). This view has been widely rejected, and the standard applied in practice is nearly identical to the substantial evidence standard. *See Blackletter Statement, supra* note 15 ("In any other case [that is, other than review of formal proceedings, which use the substantial evidence test, and cases involving de novo review] the court determines whether the factual premise has *substantial support* in the administrative record viewed as a whole (although the legal standard *nominally* being applied is the arbitrary and capricious test).") (emphasis added).

54. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*,* 745 F.2d 677, 684 (D.C. Cir. 1984).

55. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

56. *See* Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1037 (10th Cir. 1995); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 914 (9th Cir. 1995); Metro. Council of NAACP Branches v. FCC, 46 F.3d 1154, 1160 (D.C. Cir. 1995).

57. 5 U.S.C. § 706(2) (2000).

58. Section 706(2) prescribes de novo review for cases subject to it, and substantial evidence review in cases subject to sections 556 and 557. 5 U.S.C. § 706(2). It reserves the arbitrary and capricious standard for all other cases. The other types of cases left are informal rulemaking and adjudications. *Id*.

59. *Blackletter Statement, supra* note 15, at 29.

decision; or, if no such file is maintained, it consists of all unprivileged materials that were actively considered by the agency or its staff . . . in connection with the action under review."[60]

The advantage provided by use of informal adjudication is efficiency. It avoids the time consuming process of the judicial model and it puts the resolution of the issue under the control of experts.

It may seem intuitive that a stricter standard of review should be applied where the agency has more discretion and acts free from the procedures and safeguards required in other settings. But applying a more stringent standard of review would effectively shift adjudicatory power back into the hands of the judiciary and subject all parties involved to the time consuming processes that informal adjudications and rulemakings are designed to avoid. Thus, less judicial scrutiny is required by Congress in such cases—the arbitrary and capricious standard is used—in order to preserve the efficiency that is the advantage of informal adjudication and rulemaking.

The drawbacks to informal agency proceedings in comparison with their formal counterparts are that the individual or business is put at a major disadvantage to the agency, the parties outside the agency have significantly less input in the process, and fairness is sacrificed in the interest of efficiency and flexibility for the agency. Congress decided that in cases where informal adjudication is available, this sacrifice was an appropriate policy choice. In the case of FOIA, however, Congress has rejected the idea of sacrificing the interests embodied in FOIA for the interest of efficiency. Requiring de novo review puts full adjudicatory power into the hands of the judiciary in any case of an agency's denial of access to information under FOIA that is brought to federal court.

C. Substantial Evidence Review

The substantial evidence review standard is traditionally applied in cases reviewing formal agency decisions.[61] Substantial evidence review requires that the agency's decision be supported by something "more than a mere scintilla" of evidence.[62] Courts must use a reasonableness test: If a reasonable person could make the same decisions as the agency based on the evidence in the record, then the decision should be

60. *Id*. at 41.

61. RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 11.2, at 768 (4th ed. 2002). *See generally* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

62. Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Note that this statement is almost always accompanied in opinions by a statement describing the test as a reasonableness test.

affirmed.[63] In making this determination, courts must examine the entire agency record, taking into consideration evidence on both sides of the issue.[64]

Under the substantial evidence test, the court is bound by the agency's decision unless that decision is found to be unreasonable, and thus fails the test.[65] This test suggests that in the context in which the standard is applied, agency decision making is the superior, but not perfect, mechanism for resolving the issue. If it were perfect, then no judicial review would be necessary. If it were not superior, then de novo review would be necessary.

The substantial evidence standard is applied in cases reviewing agency conclusions made through formal trial-type procedures.[66] These involve review by an administrative law judge of agency action carried out under statutory law that is specifically applicable to that agency.[67] As stated in Aman and Mayton's *Treatise on Administrative Law*:

> The substantial evidence standard applies to facts in such proceedings that are based on a record compiled before an unbiased judge after an evidentiary hearing. The facts involved tend to be retrospective in nature and are best resolved by adducing the kind of evidence designed to prove who did what, when, where and how.[68]

The nature of the issues dealt with in these formal adjudications varies widely from case to case, and thus comparison of one kind of such adjudication with agency decisions under FOIA is not helpful. But comparison on a general level brings certain significant distinctions to

63. *Id.*

64. *Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

65. *See* CHARLES H. KOCH, JR., 3 ADMINISTRATIVE LAW AND PRACTICE § 10.3 (2d ed. 1997) ("Reasonableness review . . . binds the court to the agency's conclusion unless the court finds the conclusion to be unreasonable.").

66. "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . ." 5 U.S.C. § 706(2)(E) (2000). The APA provides for reasonableness review, the substantial evidence standard, where administrative decisions must be made through the trial-type procedures of sections 556 and 557. KOCH, *supra* note 65, § 10.3.

67. Sections 554 through 556 cover the procedure for administrative agency adjudications. *See* 5 U.S.C. §§ 554-556 (2000). Section 554(a) states that the section applies to adjudications required by statute to be determined on the record after an opportunity for an agency hearing. 5 U.S.C. § 554(a).

68. AMAN, JR. & MAYTON, *supra* note 46, § 13.5.

light. First, FOIA decisions at the agency level are not trial-type proceedings. An agency can simply deny a person's FOIA request. The requester is then entitled to a written appeal to the head of the agency, but the agency has the power again to simply deny the request.[69] Thus, a formal record is not created at the agency level in FOIA cases. The agency has engaged in factfinding only to the extent that it has—at least ostensibly—searched for and found the information requested, considered possible consequences of its release, and decided that it is exempted from FOIA. These "factual determinations" are passed on to the court in FOIA litigation through pleadings and affidavits submitted by agency officials. The nature of the factfinding that occurs in FOIA cases is thus different from the factfinding that occurs in formal adjudications in that it is not conducted under an impartial administrative law judge, it is not extensive, it is not adversarial, and it is not formally recorded. It is before the court that a FOIA litigant first has the opportunity to present his or her case in a trial-like setting. Requiring de novo review thus allows the plaintiff a chance to have a full and fair trial unavailable at the agency level.

IV. JUDICIAL REVIEW IN CASES INVOLVING EXEMPTIONS 1, 3, AND 7(A) OF FOIA

This section examines the type of review that courts actually conduct in cases involving Exemptions 1, 3, and 7(A). Agencies deny FOIA requests based on national security reasons most often under Exemption 1, and courts regularly defer to agency judgment despite a congressional mandate to the contrary. Deference to agency decisions seems appropriate in cases involving Exemption 3, and subsection B argues that some deference should be granted. Finally, the courts have erroneously extended the application of deference in cases involving Exemptions 1 and 3 to cases involving Exemption 7(A).

A. Exemption 1

In the interest of promoting national security, agencies are given the power to classify certain information as secret and thus withhold it from the public.[70] The first exemption to FOIA exempts information that has

69. 5 U.S.C. § 552(a)(6)(A)(i), (ii) (2000).

70. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995). The agency's decision to withhold the information under FOIA's Exemption 1 is reviewed under the Executive order used to make the classification decision, regardless of any Executive order that is arguably more applicable. Halpern v. FBI, 181 F.3d 279, 289 (1999) (citing Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980), and Diamond v. FBI, 707 F.2d 75, 78 & n.4 (2d Cir. 1983)).

been properly classified pursuant to an Executive order.[71] Information can be classified before or after a FOIA request is made. In reviewing an agency's decision to withhold information under this exemption, the main issue that courts address is whether the information is properly classified under the Executive order.[72]

FOIA does not indicate that any deference should be granted to the agency's decision to withhold information under Exemption 1. It states that agency decisions should be reviewed de novo[73] and that the agency has the burden of proof for showing that the information falls under the exemption.[74] Despite this language, in cases brought before federal courts following the enactment of FOIA, courts deferred to agency judgments regarding classification of information.[75] In *EPA v. Mink*, the Supreme Court held that a court's only role in reviewing denials of FOIA requests under Exemption 1 was to determine if the information had in fact been classified according to an Executive order by the agency.[76] It held that courts were not to examine the propriety of the classification and that in camera inspection allowing courts to examine

71. "This section does not apply to matters 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 . . . ." 5 U.S.C. § 552(b)(1).

72. *See, e.g.*, Pub. Citizen Inc. v. Dep't of State, 100 F. Supp. 2d 10, 22 (D.C. Cir. 2000); King v. U.S. Dep't of Justice, 830 F.2d 210, 214 (D.C. Cir. 1987).

73. 5 U.S.C. § 552(a)(4)(B).

74. *Id.*

75. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question. . . . [This] simply recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the "aptitude, facilities, nor responsibility" to review these essentially political decisions.

Epstein v. Resor, 421 F.2d 930, 933 (9th Cir. 1970) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)); *see also* EPA v. Mink, 410 U.S. 73, 81-84 (1973) (holding that the language and the legislative history of FOIA show that Congress did not intend FOIA to "subject executive security classifications to judicial review at the insistence of anyone who might seek to question them"); Soucie v. David, 448 F.2d 1067, 1079 n.48 (D.C. Cir. 1971) (acknowledging that other exemptions require de novo review, but stating that review of Exemption 1 decisions are "limited to determining that the administrative decision was not arbitrary and capricious").

76. *Mink,* 410 U.S. at 84.

the information was not permitted.[77] However, Congress disagreed, and that holding was overruled the following year by amendments to FOIA.[78]

The 1974 Amendments to FOIA included changes designed to clarify the role of courts in FOIA litigation and stop the rubberstamping of agency decisions.[79] In addition to reiterating that courts should review agency decisions de novo, the amendments authorized courts to review requested information in camera as part of their de novo review.[80] This allowed courts to be less dependent on agency affidavits in examining the propriety of the classification of the information.[81]

Despite these efforts by Congress to guide courts towards de novo review, courts remain overly deferential to agency expertise regarding the classification of information. The typical approach taken by courts is to grant summary judgment to the agency where

> (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency.[82]

Emphasis is placed on the agency affidavits, and in camera review is generally avoided.[83]

Courts cite a report from a House-Senate conference committee as the authority supporting deference to agencies.[84] The report states that "substantial weight" should be accorded to an agency's affidavit "concerning the details of the classified status of the disputed record."[85] Courts place much less emphasis or completely ignore other statements made in that same report as well as statements made in other contexts

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77. *Id*.

78. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552 (2000)).

79. A complete description of all the changes included in the amendments can be found in *Source Book*, *supra* note 22, at 122.

80. *Id.* at 127.

81. Without in camera review, the only information about the character of the information being withheld is provided by the government agency in affidavits submitted in support of their decisions to withhold the information. Also, in camera review allows a court to "separate the secret from the supposedly nonsecret and order disclosure of the latter." *Mink*, 410 U.S. at 84 (holding that in camera review was not authorized for this purpose), *superseded by* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552 (2000)).

82. King v. U.S. Dep't of Justice, 830 F.2d 210, 217-18 (D.C. Cir. 1987) (citations omitted); *see also* Maynard v. CIA, 986 F.2d 547, 556 (1st Cir. 1993) (citing Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977) and *King*, 830 F.2d at 217).

83. *See, e.g.*, Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982).

84. *See, e.g.*, McGehee *v.* Casey*,* 718 F.2d 1137, 1148 (D.C. Cir. 1983).

85. H.R. REP. NO. 93-1380, at 229 (1974) (Conf. Rep.), *reprinted in Source Book*, *supra* note 22, at 229.

that also comprise the legislative history of the 1974 Amendments. For example, a Senate report states that a court's inquiry should "review not only . . . the superficial evidence—a 'Secret' stamp on a document or set of records—but also . . . the inherent justification for the use of such a stamp."[86] A House report states that a court "may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order."[87]

It seems clear, at least according to the conference committee report, that Congress intended courts to take notice of, and grant substantial weight to, agency affidavits in their review of agency decisions under Exemption 1. However, it is also clear that the role that Congress intended for courts involves more than merely approving classifications that appear logical. The de novo review requirement, in camera review authorization, and the requirements of the FOIA Amendments make clear that Congress intended a different level of deference than the one currently in use.[88]

B. Exemption 3 and the National Security Act

Exemption 3 of FOIA allows courts to withhold information that is:

> [S]pecifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[89]

Agencies usually use the National Security Act of 1947[90] as the qualifying statute when invoking this exemption to withhold information for national security reasons.[91] In such cases, agencies often argue that

86. *Id*. at 182.
87. *Id*. at 127.
88. This was the level of deference applied in *Mink* that was expressly overruled by the 1974 Amendments. *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552 (2000)), and *supra* text accompanying note 78.
89. 5 U.S.C. § 552(b)(3).
90. 50 U.S.C. §§ 401-442 (2000).
91. *See, e.g.*, Weiner v. FBI, 943 F.2d 972, 983 (9th Cir. 1991) (invoking provisions of the National Security Act to qualify for FOIA's Exemption 3). The CIA Act of 1949 is also sometimes invoked. It states, "In the interests of the security of the foreign intelligence activities . . . the Agency shall be exempted from the provisions of . . . any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency . . . ." 50 U.S.C. § 403g.

disclosure of the requested information will compromise intelligence sources and methods.[92]

FOIA does not indicate that Exemption 3 is to be treated any differently than the other eight exemptions. However, some courts have granted a higher level of deference under this exemption. In his concurring opinion in *EPA v. Mink*, Justice Stewart stated that "the only 'matter' to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be."[93] Justice Stewart compared Exemptions 1 and 3 and concluded that they were equally rigid.

The deferential treatment that the Court gave withholding under Exemption 1 in *Mink* was overruled by Congress.[94] However, some courts continued to treat withholding under Exemption 3 with the same unwarranted level of deference.[95] The current treatment of agency decisions to withhold information under Exemption 3 and the National Security Act is somewhat less deferential than that exhibited in *Mink* and is exemplified by the Supreme Court's treatment in *CIA v. Sims*.[96] In *Sims*, the court deferred to the decision of the CIA Director to withhold superficially innocuous information because he believed it could enable an observer to discover intelligence sources.[97] The Court stated that "[t]he decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."[98] The court went on to hold that because the Director's decision was reasonable, summary judgment for the CIA should be affirmed.[99]

This approach is not de novo review. It is a reasonableness review that is not readily distinguishable from the standards of review employed

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92. *See, e.g.*, CIA v. Hunt, 981 F.2d 1116, 1118 (9th Cir. 1992).

93. EPA v. Mink, 410 U.S. 73, 95 n.* (1973) (Stewart, J., concurring), *overruled on other grounds by* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552).

94. 88 Stat. at 1561.

95. Knight v. U.S. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (holding that the CIA's determination to withhold information under the National Security Act and Exemption 3 is unreviewable absent a showing of bad faith); Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978) (affirming summary judgment for CIA) ("Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.").

96. 471 U.S. 159, 168 (1985).

97. *Id.* at 178-79 (citing Gardels v. CIA, 689 F.2d 1100, 1103-04 (D.C. Cir. 1982) and Halperin v. CIA, 629 F.2d 144, 147 (D.C. Cir. 1980)).

98. *Id.* at 179.

99. *Id.* at 179-80.

in judicial review of other types of agency decisions.[100] However, it is in the case of Exemption 3, more than with Exemptions 1 and 7(A), that a case for a high degree of deference to agency decisions can best be made. In the case of Exemption 3, Congress has already granted the Director of the CIA discretion to determine what information should be withheld to protect informational sources and methods. This is comparable to *Chevron* deference, whereby courts grant deference to agency determinations of questions of law that arise out of the interpretation of statutes geared specifically towards that agency.[101]

While Congress did not indicate any intent to create a different standard of review for agency denials of information under Exemption 3, a different standard seems appropriate. A major justification for de novo review of FOIA cases is that no agency has expertise in FOIA, and thus courts should maintain substantial adjudicatory control over FOIA cases. However, with Exemption 3, the agency does not need to interpret and apply FOIA directly, but rather a statute that applies specifically to that agency or its field of expertise. In such cases, a reasonableness standard is sufficient to limit agency discretion while allowing for the advantages of agency expertise.

C. Exemption 7(A)

Exemption 7(A) of FOIA states that section (a) of FOIA does not apply to records or information compiled for law enforcement if the production of such could reasonably be expected to interfere with enforcement proceedings.[102] The purpose of this exemption, as stated in congressional reports, is to "prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have."[103]

In *Center for National Security Studies v. United States Department of Justice,* the D.C. Circuit deferred to the agency's assertion that release of the information would interfere with government investigations.[104] Prior to this case, various circuits and the D.C. Circuit had rejected the idea of extending the deference applied to Exemption 1 and Exemption 3 cases

100. That is, the "substantial evidence" and "arbitrary and capricious" standards discussed above which both essentially equate to a reasonableness standard.
101. *See supra* note 45 and accompanying text.
102. 5 U.S.C. § 552(b)(7)(A) (2000).
103. *Source Book*, *supra* note 22, at 332 (statement of Senator Hart).
104. 331 F.3d 918 (D.C. Cir. 2003).

to cases involving Exemption 7(A).[105] In this case, plaintiffs sought information regarding those detained in the investigations following the attacks of September 11.[106] The information sought included the names of the detainees, location and times of their arrests, detention and release, and the names of their attorneys.[107] In their request, plaintiffs cited reports about the mistreatment of detainees, and noted that many detainees were held for several days without any formal charges being filed.[108] The Department of Justice asserted that release of the information would interfere with investigations by allowing witness intimidation and by revealing the scope of the investigations. The District Court rejected these assertions as tenuous and vague. The appellate court reversed, holding that "the government's declarations, viewed in light of the appropriate deference to the executive on issues of national security, satisfy this burden."[109]

This is the first case involving the invocation of Exemption 7(A) to withhold information for "national security" reasons. Exemption 7(A) is typically invoked in cases where the government wishes to withhold the

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105. *See, e.g.*, Ferri v. Bell, 645 F.2d 1213, 1221 (3d Cir. 1981) (denying request for information for FBI records detailing procurement and circulation of surveillance equipment). The *Ferri* court held that in light of a mandate that courts make de novo review and that the agency has the burden of proving that an exemption applies, courts generally should not pay special deference to the agency's findings. *Id*. Drafters expressly state when such deference is proper in the FOIA context, as in the case of Exemption 1. *Cf.* Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988) ("[W]e have not found it appropriate to extend any special deference beyond the Exemption 1 context.").

106. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 921-22. The plaintiffs in this case included:

> the Center for National Security Studies, American Civil Liberties Union, Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian-American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, Multiracial Activist, Nation Magazine, National Association for Criminal Defense Lawyers, National Black Police Association, Inc., Partnership for Civil Justice, Inc., People for the American Way Foundation, Reporters Committee for Freedom of the Press, and the World Organization Against Torture USA.

Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 95 n.1 (D.D.C. 2002).

107. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 918.

108. *Id*. at 922; *see also* Wayne Parry, *Many Arrested but Few Are Charged in Government's Roundup*, Augusta Chronicle, Sept. 11, 2002, *available at* http://chronicle.augusta.com/stories/091102/sep_124-4147.shtml.

109. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926. The court went on to state, "It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role. The judgment of the district court ordering the government to disclose the names of the detainees is reversed." *Id.* at 932.

information for fear that releasing it could give unfair advantage in court to the requester.[110] The implementation of the domestic "war on terror" has to some extent caused a merging of the functions of law enforcement and protection of national security. However, the terms should not be viewed as synonymous in statutory interpretation because of recent events. Congress did not intend that Exemption 7(A) should cover information withheld for national security reasons.

In the case of Exemption 1, Congress indicated its intent that courts give some deference to agency affidavits.[111] Exemption 7(A) comes with no indication that any deference should be granted to agency decisions. For a court to grant deference in this case is to add a "national security" element to Exemption 7(A) that Congress did not enact.

The terrorist investigations following September 11 obviously have national security implications, but this does not change the text or the purpose of Exemption 7(A). The issue that courts are to examine de novo in such cases is still whether the release of the information will interfere with law enforcement proceedings. Also, the policy reasons for requiring de novo review in FOIA cases, which are discussed in Part II of this Comment,[112] including the importance of the right created by FOIA, the ability of judges to make FOIA determinations, and the hostility of the executive branch towards FOIA, apply in this case as well.

It is difficult to imagine a situation where access to government information could be more important to the public's ability to effectively monitor its government. The information requested would allow plaintiffs to examine the treatment of detainees and the motivation behind their detention.[113] Dangerous consequences can result from a court's willingness to defer to agency decisions in this context.[114] FOIA

110. The Exemption's stated purpose is to prevent this. *See Source Book, supra* note 22, at 332, *and* text accompanying note 103.

111. *See* H.R. REP. NO. 93-1380, at 229 (1974) (Conf. Rep.), *reprinted in Source Book*, *supra* note 22, at 229.

112. *See supra* Part II. The policy reasons include the importance of the rights created by FOIA, the ability of judges to make FOIA determinations, and the hostility of the Executive towards FOIA.

113. This is especially important where, as in this case, the government also has denied the public access to the deportation hearings of many arrested during these same investigations. *See generally* N. Jersey. Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

114. It is interesting that in *Center for National Security Studies*, Judge Sentelle wrote, "In upholding the government's invocation of Exemption 7(A), we observe that

can be a powerful weapon against government excesses in these cases if it is allowed to function properly. However, until courts are willing to conduct thorough review of FOIA decisions, its power will be undermined.

V. SUGGESTED CHANGES: AVAILABLE TOOLS FOR DE NOVO REVIEW

Courts have not only failed to thoroughly review agency decisions, they have blocked the use of the powerful tools they are authorized and encouraged by Congress to use in order to accomplish de novo review. In camera inspection allows courts to examine the information that has been requested so that they can make independent determinations of what harm might result if the information were released, or at least to verify that the harms predicted by the agency are likely to occur.[115] Congress has allowed courts discretion in deciding whether to conduct in camera review of the information.[116] If the court does not review the information in camera, then only the agency has first-hand knowledge of the specific nature of the information. To some extent, this forces the court to defer to the agency's affidavits because they have little else on which to base their decision.

Despite the utility of in camera review, courts can be reluctant to use it in FOIA cases.[117] Courts have held that if an agency's affidavits pass the test created in *King* and reiterated in *Halperin,* then in camera review may be inappropriate and summary judgment may be granted because

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we are in accord with several federal courts that have wisely respected the executive's judgment in prosecuting the national response to terrorism." 331 F.3d at 932; *see also* Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003) (dismissing the habeas corpus petition of a U.S. citizen captured in Afghanistan challenging his military detention and designation as an enemy combatant); Global Relief Found., Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) (upholding against constitutional challenge a portion of the USA PATRIOT Act, 50 U.S.C. § 1702(c) (Supp. I 2001), which authorizes ex parte use of classified evidence in proceedings to freeze the assets of terrorist organizations); *N. Jersey Media Group*, 308 F.3d at 220 (holding that closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism does not violate the First Amendment); Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (reversing district court's order that allowed alleged enemy combatant unmonitored access to counsel). The Supreme Court reversed the two Fourth Circuit cases, and in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), the Sixth Circuit held contrary to the Third Circuit.

115. This is accomplished by the court viewing the actual information that has been withheld.

116. The statute states that courts *may* use in camera review. 5 U.S.C. § 552(a)(4)(B) (2000).

117. Ingle v. Dep't of Justice, 698 F.2d 259, 266 (6th Cir. 1983) (stating that in camera examination is to be the exception, not the rule).

substantial weight is to be accorded to the affidavit.[118] This approach relieves the court of the substantial burden that would come with having to review in detail agency claims of exemption, and it leaves the decision of whether releasing the information could potentially harm national security to an agency specifically assigned the task of protecting national security. However, this approach is not de novo. At best, it is comparable to the reasonableness tests that courts use in reviewing other types of agency decisions.[119]

Congress has rejected this type of judicial review in the FOIA context. The court in *Ray v. Turner* summarized Congress's rejection in stating:

> The legislative history underscores that the intent of Congress regarding de novo review stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document.[120]

One reason courts might seek to avoid in camera review is that the requested information is often voluminous, and conducting in camera review would be burdensome, if not impractical. A solution to this problem would be review of a sample of the requested information. This problem was addressed to some extent in *Vaughn v. Rosen* where the court established that the agency must provide a detailed description of the information being withheld as well as a detailed explanation of the

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118. *See, e.g.*, Pub. Citizen Inc. v. U.S. Dep't of State, 100 F. Supp. 2d 10, 22-23 (D.D.C. 2000) (citing Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980)), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002); King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). The *King* test states that where agency affidavits are reasonably specific in describing the withheld information, the reasons stated for withholding the information establish a logical connection between the information and the claimed exemption, and the affidavits are not controverted by contrary evidence or evidence of bad faith, summary judgment is proper. *King*, 830 F.2d at 217.

119. That is, the substantial evidence test and the arbitrary and capricious test, which are in practice both reasonableness tests.

120. Ray v. Turner, 587 F.2d 1187, 1193 (D.C. Cir. 1978). The court went on to state:

> In proposing a "reasonable basis" standard, the Administration and supporting legislators argued that de novo responsibility and *in camera* inspection could not properly be assigned to judges, in part because of logistical problems, and in part because of their lack of relevant experience and meaningful appreciation of the implications of the material involved.

Id.

reasons for withholding the information.[121] The stated purposes of requiring these "Vaughn indexes" are to "assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and [to] permit the court system effectively and efficiently to evaluate the factual nature of disputed information."[122] This requirement allows courts to conduct a type of review that is closer to de novo than review based only on agency pleadings. At least in this way the court and the plaintiff have a relatively detailed idea about the nature of the information being withheld. However, the limitations of Vaughn indices leave judicial review far short of de novo.[123] Most importantly, because the affidavits are prepared by the agency, the agency can provide descriptions that are favorable to the agency's case. This is not a sufficient substitute for the court's first-hand examination of the materials and judgment regarding the applicability of the exemption. Using these affidavits, the court's review can be characterized as a sufficiency and reasonableness review of the affidavits,[124] not as a de novo review of the agency's decision to withhold information.

Requiring courts to review a sample of the requested information creates similar problems. The agency could turn over as a sample only the portions of the information that it wanted the court to see. For example, if a plaintiff requested information regarding a certain CIA program, the government might offer a sample that included the information most likely to cause harm to national security if released, while withholding the information least likely to do so in hopes that the court would grant summary judgment for the CIA regarding all the information. A possible solution to this would be to take random samples of the entire record. With a random sample it is possible that the court might get only portions of information that are exempted from FOIA while missing portions that are not. However, the chances of this happening are minimal. Further, a sample is likely to at least allow a court to root out cases of agency bad faith.

Special masters are used in order to lighten the burden on courts that choose to examine the requested information in depth. In *Washington*

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121. Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

122. *Id*. at 826.

123. For a thorough discussion of the limitations of the use of *Vaughn* affidavits, see Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67 (1992).

124. The *Vaughn* affidavit in *Washington Post v. United States Department of Defense,* 766 F. Supp. 1, 1 (D.D.C. 1991), stated that releasing any of the information could "cause 'exceptionally grave damage to national security.'" Deyling, *supra* note 123, at 101. It was later discovered that part of the information addressed the fact that milk should not be included in the lunchboxes of pilots who fly long flights because it could spoil. *Id*.

Post v. United States Department of Defense, the judge chose to employ a special master to examine the information and present a report to the court.[125] The special master did not give any opinions on whether the information should be disclosed, but merely summarized the information and provided a description of its nature for the court.[126] The use of special masters was suggested by the court in *Vaughn v. Rosen*[127] and is authorized by Congress.[128]

First-hand examination of the withheld information allows the court to conduct a true de novo review of the agency's decision to withhold. Without first-hand examination, the court is only reviewing the agency's decision through the perspective of the agency presented to the court in its pleadings and affidavits. In camera review should thus be a required part of a court's de novo review of agencies' denials of access to information.

Another means of bringing courts' review of agency FOIA decisions closer to a de novo review is through the use of plaintiffs' experts or court appointed independent experts. Use of such experts would allow the plaintiff a chance to counter agency claims of proper classification or potential harms from disclosure of the information. Without use of such experts, the plaintiff can only submit his or her own ideas about why the information is not exempted, and these are easily countered by agency officials and quickly rejected by courts.[129] The courts rely almost entirely on affidavits submitted by agencies, but then summarily reject affidavits submitted by plaintiffs.[130]

By deferring to agencies in this way, courts have removed the only barrier to excessive agency secrecy.[131] If courts defy congressional

125. *Wash. Post*, 766 F. Supp. at 3.
126. *Id.* at 4.
127. *Vaughn*, 484 F.2d at 828 (stating that special masters may be useful to assume the burden of examining the requested information); *see also* Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977).
128. *Source Book*, *supra* note 22, at 167, 247 (suggesting the possibility of a Freedom of Information Commission).
129. *See, e.g.*, Pub. Citizen Inc. v. Dep't of State, 100 F. Supp. 2d 10, 22-23 (D.D.C. 2000), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002).
130. *See, e.g.*, *Wash. Post,* 766 F. Supp. at 6-7; Hudson River Sloop Clearwater, Inc. v. U.S. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989); Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982).
131. FOIA is the only federal law of its kind. If it is not effectively enforced, then citizens are left without an affirmative right of access to government information. If courts do not effectively enforce FOIA via thorough judicial review of agency decisions to withhold information, citizens have no recourse other than with the agency.

mandate and do not thoroughly review agency decisions to withhold information, then agencies are beholden only to themselves and authorities within the executive branch. Allowing agencies to determine the extent to which they can withhold information can have dangerous consequences. If all that is required is for the government to submit an affidavit that contains a reasonably detailed description of the information requested and a rational link between the information and the exemption, an agency can withhold virtually any information it wants through creative descriptions. By accepting this, courts are granting government agencies the trust that Congress refused to grant them. This permits the government to operate in relative secrecy.

It seems that Congress has provided ideas, but courts have resisted change because of resources and a traditional disposition against the aims of FOIA. Perhaps now it is time for Congress to require courts to use the available tools to conduct more thorough review.

VI. CONCLUSION

The most basic premise of FOIA is a "policy strongly favoring public disclosure of information in the possession of federal agencies."[132] In keeping with this policy, FOIA exemptions should be "'narrowly construed with doubts resolved in favor of disclosure.'"[133] Furthermore, and perhaps most importantly, de novo review is required.[134] It is through this review that federal agencies are supposed to be held accountable to the requirements of FOIA. However, because courts have failed to conduct actual de novo review in FOIA cases involving national security concerns, this procedural safeguard has been disabled. This treatment is not likely to improve in this post-September 11 environment.[135] Thus, it seems that new legislation is necessary to ensure that agency decisions under FOIA are effectively reviewed. There is no question that FOIA is worth protecting.[136]

FOIA already states that courts are to review agency decisions de novo, but courts have not followed this requirement. The statute should be amended to more clearly require de novo review in cases involving

132. Halpern v. FBI, 181 F.3d 279, 286 (2d Cir. 1999) (citing FLRA v. U.S. Dep't of Veterans Affairs, 958 F.2d 503, 508 (2d Cir. 1986) and U.S. Dep't of Justice v. Landano, 508 U.S. 165, 170 (1993)).

133. *Halpern,* 181 F.3d at 287 (quoting *FLRA,* 958 F.2d at 508).

134. 5 U.S.C. § 552(a)(2) (2000).

135. *See* discussion *supra* Parts II.B.2.c, III.C.

136. "The Freedom of Information Act has led to the disclosure of waste, fraud, abuse and wrongdoing in the federal government." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(3), 110 Stat. 3048, 3048 (codified as amended at 5 U.S.C. § 552 (2000)).

any of the exemptions. In cases involving Exemptions 1 and 7(A), the court should consider affidavits provided by the agency, as well as affidavits, arguments, and expert evidence submitted by the plaintiff. In this way, something more like an adversarial process will be implemented in FOIA cases, and de novo review, rather than judicial rubberstamping based on one-sided assertions, can occur.

In camera review is already authorized in the statute, but courts have avoided its use. The statute should be amended to require that where there is any doubt as to nature of the information and the reasoning of the agency regarding the applicability of an exemption, the information should be viewed in camera.[137] In cases where the information is so voluminous as to create a significant burden on the court, a special master should be appointed to review the information, summarize it, and make a presentation to the court. This amendment will overrule the test commonly used by courts which holds that summary judgment should be granted where the agency provides reasonably detailed affidavits describing the requested information and establishes a logical link between the information exempted and the exemption invoked, where there is not evidence of bad faith on the part of the agency.[138] The requirement of some showing of bad faith or controverting evidence has acted to eliminate virtually all chance of a plaintiff succeeding in FOIA cases. By empowering the plaintiff to make a case in court, and encouraging judges to evaluate agency claims with firsthand knowledge, this will be prevented.

Finally, Exemption 3 is a special case. FOIA should be amended to require courts to conduct review commensurate with the underlying statute. In the case of the National Security Act,[139] where the CIA is given discretion to determine when information should be withheld to protect information sources and methods, the court should conduct a review for reasonableness.

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137. The court in *Ray v. Turner*, 587 F.2d 1187, 1191 (D.C. Cir. 1978) (citing Pub. L. No. 93-502, 1974 U.S.C.C.A.N. (88 Stat.) 6287) stated that "[w]hile *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate." This amendment will make it "necessary and appropriate" whenever there is any doubt.

138. *See* Maynard v. CIA, 986 F.2d 547, 555-56 (1st Cir. 1992) (citing Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977) and King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987)).

139. 50 U.S.C. § 421 (2000).

These amendments do not change the policy of open government which underlies FOIA. Nor would they act to constrict the affected federal agencies so as to prevent them from fulfilling their functions. Instead, these policies designate a level of deference to be accorded agencies by courts in the FOIA context that strikes an appropriate balance between these two policies. These goals are not mutually exclusive, as members of the executive branch might believe.[140] Rather, both goals are attainable through proper balancing.

NATHAN SLEGERS

140. *See Ashcroft Memorandum*, *supra* note 42.

> It is only through a well-informed citizenry that leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.
>
> The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, [and] protecting sensitive business information . . . .

Id.