Maryland Law Review

Volume 73 | Issue 4 Article 10

Deference, Chenery, and FOIA

Margaret B. Kwoka

Articles

DEFERENCE, *CHENERY*, AND FOIA

MARGARET B. KWOKA*

ABSTRACT

Litigation fails to check adequately agency secrecy decisions under the Freedom of Information Act ("FOIA"). To vindicate the public's right to know what its government is up to, the dynamic of FOIA litigation needs fundamental change. This Article builds on previous work documenting that courts routinely defer to agency decisions to withhold records from the public, despite Congress's clear mandate for de novo judicial review. In this Article, a paradox is revealed: while courts do not effectuate true de novo review, they rely on that statutory standard to allow agencies to raise claims of exemption in litigation not relied on in the agency's response to a request for information. As a result, requesters end up in a worse position under de novo review than they would have been if Congress had chosen deferential review in FOIA cases. Given existing practice, FOIA's goal of transparency would be best served by relocating FOIA within a more typical administrative law paradigm. Chiefly, it contends that the observed deference justifies applying the Chenery *principle to FOIA litigation, which would preclude agencies from asserting exemption claims for the first time in litigation. This Article demonstrates that not only can the application of* Chenery *be justified doctrinally and theoretically, but also that the benefits of constraining agency litigation positions outweigh potential costs,*

* Assistant Professor, University of Denver Sturm College of Law. I owe my thanks to the University of Denver Sturm College of Law for its support, and to many great colleagues who provided feedback on my ideas and comments on earlier drafts, including Jack Beerman, Alan Chen, Bernard Chao, César Cuauhtémoc García Hernández, Linda Jellum, Raizel Liebler, Kevin Lynch, Justin Pidot, Richard Peltz-Steele, David Rubenstein, Derigan Silver, Kevin Stack, and Adrian Vermeule. For excellent research assistance I am indebted to Matthew Martin.

rendering FOIA litigation a more fundamentally fair process that better advances the goals of FOIA.

INTRODUCTION

FOIA represents one of the strongest government accountability measures Congress has ever adopted, granting every person the right to access government records subject to only a small set of enumerated exemptions.[1] FOIA was the first law of its kind, but it has sparked an international wave of open records laws adopted in countries as disparate as France,[2]

1. 5 U.S.C. § 552 (2012).

2. Loi 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal (Fr.) [Act No. 78-753 on various measures for improved relations between the Civil Service and the public and on various arrangements of administrative, social and fiscal nature], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 18, 1978, p. 2851, *available at* http://www.legislationline.org/download/action/download/id/4542/file/Loi_n%C2%B0_78-753_measures_for_relations_Civil%20Service_and_public_am_2011_fr.pdf.

Mexico,[3] and China,[4] and in international institutions such as the European Union[5] and the United Nations.[6] Access to information has been re-conceptualized as a human right[7] and proclaimed fundamental to a democracy.[8]

Despite the importance of access to information, Congress recognized the need to protect other important interests such as privacy, national security, and trade secrets, and accordingly provided statutory exemptions from mandatory disclosure.[9] When an agency invokes an exemption to deny access to requested records, the requester is entitled to challenge that decision in court.[10] Despite these important competing interests, Congress believed the goal of maximum transparency was so important that it mandated de novo judicial review of any case challenging the government's withholding of records from the public.[11] As such, FOIA litigation is one of the few instances in which judges reviewing agency actions owe no deference to the agency's position.[12] FOIA's strong review provision was meant to serve as a check on agency power and to protect the public's right to information.[13]

---

3. Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [Federal Transparency and Access to Public Government Information Law], Diario Oficial de la Federación [DO], 11 de Junio de 2002 (Mex.), *available at* http://www.freedominfo.org/wp-content/uploads/documents/mexico_ley.pdf.

4. Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli [Regulations of the People's Republic of China on Open Government Information] (promulgated by the St. Council, Apr. 5, 2007, effective May 1, 2008), *translated in* THE CHINA LAW CENTER, YALE LAW SCHOOL (Feb. 2009), *available at* http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-OGI-Regs-English.pdf.

5. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, art. 255(1), Nov. 10, 1997, 1997 O.J. (C 340), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:340:FULL:EN:PDF.

6. U.N. Hum. Res. Comm., General Comment 34, Article 19: Freedom of Opinion and Expression, ¶¶ 18–19, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

7. *See, e.g.*, CHERYL ANN BISHOP, ACCESS TO INFORMATION AS A HUMAN RIGHT 208 (2012); Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 214 (2006).

8. *See* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 1–2 (1976) ("[T]he right to know . . . is necessary for collective decision-making in a democratic society.").

9. *See* 5 U.S.C. § 552(b) (2012) (listing exemptions to disclosure).

10. 5 U.S.C. § 552(a)(4)(A) (2012).

11. 5 U.S.C. § 552(a)(4)(A) (2012); 111 CONG. REC. APP A946-48 (1965) (statement of H.R. Rep. Fascell); *see also* H.R. REP. NO. 1497, at 30 (1966) ("The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion.").

12. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 712–13 (2002).

13. 112 CONG. REC. 13,659 (1966) (statement of Rep. Gallagher) ("One of the most important provisions of the bill is subsection C, which grants authority to the Federal district courts to order production of records improperly withheld. This means that for the first time in the Gov-

Not only does FOIA's *de novo* review provision render FOIA litigation an outlier in administrative law with respect to standards of review, but it also renders inapplicable other fundamental principles of administrative law.[14] Most importantly, courts have unanimously concluded that FOIA litigation is exempt from a longstanding administrative review doctrine—the *Chenery* principle.[15] Under *SEC v. Chenery Corp.*,[16] most agency actions challenged in court must stand or fall on the justifications offered by the agency at the time the decision was made, rather than any post-hoc rationalizations.[17] *Chenery* has the effect of constraining courts' deference to agency actions, affording deference only to the agency professionals' contemporaneous judgments.[18] No consideration, much less deference, is owed any new arguments lawyers might make in the course of litigation.[19] In FOIA cases, however, because *Chenery* does not apply, the agency's lawyers, almost always housed not in the defending agency but in the Department of Justice ("DOJ"), are free to advance any arguments they see fit, whether or not they were relied on during the administrative process.[20]

While the standards employed in FOIA litigation seem clear and the exceptional treatment of these cases is facially reasonable, the reality of FOIA litigation reveals a much more complex—and ultimately problematic—picture of judicial review under FOIA. Despite the formal de novo standard of review, courts routinely give great deference to agencies' positions in FOIA litigation: courts both explicitly defer to certain types of government representations that are critical to the determination of whether the public has a right of access to records and implicitly defer to agencies by giving them special procedural advantages such as displacing discovery and making trials effectively unavailable.[21] Perhaps, even more surprisingly, empirical evidence suggests that courts may be giving substantially *more* deference to agencies in FOIA cases than in other types of litigation, as evidenced by a significantly higher affirmance rate of agency FOIA withhold-

ernment's history, a citizen will no longer be at the end of the road when his request for a Government document arbitrarily has been turned down by some bureaucrat.").

14. *See infra* Part I.B.

15. *See infra* Part II.B.

16. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947); SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

17. *Chenery II*, 332 U.S. at 196; *Chenery I*, 318 U.S. at 87.

18. *See infra* Part III.A.

19. *See infra* Part III.A.

20. *See* 5 U.S.C. § 552(a)(4)(B) (2012); *see also* Wash. Post Co. v. U.S. Dep't of Health & Human Servs., 795 F.2d 205, 210 (D.C. Cir. 1986) (Starr, J., dissenting) (noting that FOIA litigators may advance exemptions never contemplated by agency experts).

21. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 211–35 (2013).

ing decisions than other agency actions, which are explicitly entitled to deferential review.[22]

When courts' practical deference in FOIA cases is combined with their refusal to apply the *Chenery* principle to FOIA review, it results in a perverse litigation dynamic: agencies get the benefit of deference, but are not constrained by *Chenery*'s requirement that they rely on the reasons they articulated to the requesters in the first instance. Instead, courts in FOIA cases are applying the same deferential principles to any argument advanced, whether it is rooted in the justification the agency relied on at the time of the decision or whether it was first advanced by the lawyers representing the agency in litigation. Requesters, however, are getting the worst of both worlds. They have an uphill battle to convince the court of their positions, and the rationale they are fighting may have changed by the time the litigation crystallizes.

FOIA litigation, therefore, exists in the vacuum between the ideal Congress set out for it—true de novo review—and the judicial review regime applied to the vast majority of agency actions, which incorporates both deference doctrines and the constraint of the *Chenery* principle. Certainly, restoring true de novo judicial review in FOIA cases would implement the intent of Congress to protect the right of the public to access the maximum possible amount of government information without infringing on the important interests protected by the exemptions to disclosure.[23] FOIA's history and precedent, however, suggest serious barriers to this remedy: Congress has tried before to restore de novo review without significant success; judges and litigants feel constrained by precedent; courts exhibit understandable reluctance to second-guess certain types of agency representations; and much of the deference given is difficult to identify, much less correct.[24] Given the constraints that impede achieving true de novo review, the next best alternative for FOIA litigation is not the current regime under which courts act as if de novo review is possible but fall short.[25] Rather, the next best alternative is to shift our thinking wholesale to a more typical administrative review scenario.[26]

This Article posits that reconceptualizing FOIA litigation as within the normal administrative law paradigm offers an avenue to fixing FOIA litiga-

22. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010) (reporting affirmance rates across agencies, standards of review, and types of cases as falling between sixty and seventy percent); Verkuil, *supra* note 12, at 719 (reporting a ninety percent affirmance rate in FOIA cases).

23. *See* Kwoka, *supra* note 21, at 196–200 (documenting the legislative history evidencing Congress's intent to provide strong judicial oversight).

24. *See infra* Part I.

25. *See infra* Part I.

26. *See infra* Part II.B.

tion.[27] Under this reconceptualization, because courts are in practice already deferring to agency decisions to withhold records under FOIA, the *Chenery* principle would apply to constrain the rationales that receive deferential treatment to those articulated by the agency at the time the decision was made and by the agency professionals responsible for the administration of transparency laws.[28] To develop this proposal, Part I describes the paradox of FOIA litigation: while FOIA's status as an exception to typical administrative law review principles was meant to ensure more stringent judicial oversight concerning agency secrecy, in practice it has resulted in deeply unbalanced litigation strongly favoring such secrecy. Part II employs the theoretical justifications for *Chenery*, including the inextricable link between *Chenery* and deference to agency actions, to demonstrate that *Chenery*'s application to FOIA cases is justified. Lastly, Part III explores how *Chenery* would operate in FOIA litigation to maximize government transparency as intended by Congress, both in litigation and at the administrative level.

I. THE FOIA LITIGATION PARADOX

FOIA affords every person the right to request and receive copies of any government agency's records, subject only to nine exemptions enumerated in the statute.[29] Those exemptions protect certain important public and private interests, including national security, law enforcement investigations, personal privacy, confidential commercial or financial information, and agency deliberations.[30] If an agency wants to respond to a FOIA request by withholding some or all of the requested records pursuant to one of the exemptions, it must send the requester a denial letter that states the reasons for the denial and explains the right of a requester to administratively appeal the denial.[31] If the requester follows the appeals process and is again denied, she may then bring a lawsuit challenging the denial in federal district court.[32] Alternatively, if the agency fails to timely respond either to the initial request or the administrative appeal, the requester may proceed di-

27. *See infra* note 190 and accompanying text.

28. *See infra* Part III.

29. 5 U.S.C. § 552(a)(3)(A) (2012); *see also infra* note 30 and accompanying text.

30. *See id.* § 552(b)(1)–(9) (exempting from mandatory disclosure records that are (1) properly classified under an executive order, (2) related solely to internal personnel rules, (3) exempt from disclosure by another statute, (4) trade secrets or confidential commercial information, (5) not discoverable in ordinary civil litigation against the agency, (6) going to cause an unwarranted invasion of personal privacy if disclosed, (7) within certain categories of law enforcement records, (8) related to certain banking matters, and (9) regarding the location of wells).

31. *Id.* § 552(a)(6)(A).

32. *Id.* § 552(a)(4)(B).

rectly to federal court as if she received a final denial from the agency.[33] Either way, once in court, the principle issue in FOIA cases is whether withheld records (or portions thereof) fall within one of the exemptions to disclosure or whether the requester has a right to access them under FOIA.[34]

FOIA litigation currently stands as an anomaly in administrative law in at least two principle respects. First, rather than any of the myriad deferential standards usually associated with review of agency actions—be it deference afforded under the principles announced in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council*,[35] *Skidmore v. Swift & Co*,[36] *Auer v. Robbins*,[37] or deference under statutory standards such as arbitrary and capricious, substantial evidence, or other iterations—for FOIA cases the statute itself provides that "the court shall determine the matter de novo."[38] Thus, in reviewing a denial under FOIA, courts owe agencies no deference with respect to the agency's fact-finding, legal interpretations, or application of law to facts.[39] Rather, courts must look at the matter as if deciding it in the first instance.[40] Second, because of this standard of review, another nearly ubiquitous administrative law doctrine fails to be invoked: the *Chenery* principle.[41] Under the *Chenery* principle, agencies' decisions can only be affirmed on the grounds articulated by the agency at the time the decision was made.[42] Unlike in other administrative cases, in FOIA cases an agency may advance any argument in litigation to defend its position, whether or not relied upon at the time of the denial.[43]

The paradox of FOIA litigation becomes clear, however, when the myth of de novo review is revealed.[44] Because courts in effect have created a unique system of deference in FOIA cases, requesters fail to reap the benefit of the de novo review standard on the books.[45] Meanwhile, agencies take advantage of the opportunity to raise any and all arguments in favor of affirmance, often changing their justifications as the dispute proceeds.[46] As

33. *Id.* § 552(a)(4)(C)(1).

34. *See id.* § 552(a)(4).

35. 467 U.S. 837 (1984).

36. 323 U.S. 134 (1944).

37. 519 U.S. 452 (1991).

38. 5 U.S.C. § 552(a)(4)(B); *see also* Zaring, *supra* note 22, at 160 (describing various deferential standards of review employed in administrative law and noting that de novo review is not "at the heart of administrative law").

39. 5 U.S.C. § 552(a)(4)(B).

40. *Id.*

41. Louis v. Dep't of Labor, 419 F.3d 970, 977 (9th Cir. 2005).

42. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 87 (1943).

43. *See infra* Parts II.B–C.

44. *See infra* Part I.A.

45. *See infra* Part I.B.

46. *See infra* Part I.C.

this Article demonstrates, the end result grossly distorts the litigation in favor of agency secrecy and fails to provide the meaningful judicial check on agencies' FOIA decisions that Congress intended.[47]

A. The Myth of De Novo Review

Without question, de novo review is the standard on the books.[48] Moreover, the legislative history of FOIA shows that Congress was thoughtful and deliberate when it chose de novo review, wanting courts to have meaningful oversight over agency secrecy decisions and to act as a protector of the public's right to maximum access to information.[49] In fact, many in Congress believed the strong judicial review provision was one of FOIA's most important features.[50]

Under a conventional understanding of standards of review, the expectation is that fewer agency actions scrutinized de novo should be affirmed than those agency actions treated deferentially.[51] After all, when courts defer to agencies, some number of cases should be affirmed even though the court itself would have come out a different way had it addressed the question in the first instance.[52] This distinction is precisely why Congress understood its choice of de novo review in FOIA cases to be meaningful.[53]

Despite the clarity of Congress's choice of standard of review in FOIA cases, empirical evidence suggests that courts are not actually applying a true de novo standard in reviewing agency decisions to withhold records. In the leading study, which examined all district court FOIA decisions over a ten-year period, agency denials of information under FOIA were affirmed in a full ninety percent of cases decided, despite the stringent de novo

47. *See infra* Part I.C.

48. 5 U.S.C. § 552(a)(4) (2012).

49. For a detailed account of the legislative history of the standard of review provision in FOIA, see Kwoka, *supra* note 21, at 196–200.

50. *See supra* note 13.

51. Dickinson v. Zurko, 527 U.S. 150, 162 (1999); Verkuil, *supra* note 12, at 692; Zaring, *supra* note 22, at 136–38.

52. *See* Zaring, *supra* note 22, at 136–38 (describing the presumed distinctions between standards of review).

53. *See* Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 31 n.42 (D.C. Cir. 1988) (observing that de novo review "exerts a profound effect upon the amount of respect the court must yield to agency determinations"), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990); Rizzo v. Tyler, 438 F. Supp. 895, 899 (S.D.N.Y. 1977) (noting that de novo review "reflects Congress's intent to provide greater judicial scrutiny over an agency's FOIA determinations than over other agency rulings"); 120 CONG. REC. 36, 626 (1974) (statement of Rep. Reid) ("The courts, in my view, have a duty to look behind any claim of exemption, which all too often in the past has been used to cover up inefficiency or embarrassment even in foreign policy matters which, many times, are fully known by other countries but not printable in our own—supposedly the most democratic and most open in the world.").

standard of review.[54] By contrast, other agency actions, almost always reviewed deferentially by the courts, are affirmed only sixty to seventy percent of the time.[55] This result is, of course, the precise opposite of what one would expect based on our understanding of how standards of review should affect case outcomes.[56] The ninety percent affirmance rate in FOIA cases is inconsistent with the de novo review in which courts claim to engage in these cases.[57]

As I have argued elsewhere, the reality of FOIA litigation exposes strong deference that has crept into FOIA jurisprudence.[58] I divided this system of deference into two sets of practices, which I labeled "spoken" and "unspoken" deference.[59] The spoken deference category encompasses instances in which courts expressly defer to agency positions on a relevant question in a FOIA case.[60] Unspoken deference refers to seemingly neutral procedural rulings exercised routinely as a matter of discretion in FOIA litigation, but which cumulatively have the effect of preventing meaningful challenges to the government's positions in FOIA litigation and thus preventing true de novo review.[61]

One example of spoken deference arises in litigation over agency claims that records are exempt from FOIA's mandatory disclosure provisions because they have been properly classified to protect national security interests.[62] While national security is an area in which the judiciary has historically deferred to the political branches, Congress's de novo review provision in FOIA was meant to apply equally to national security based

54. Verkuil, supra note 12, at 713.

55. *See* Zaring, *supra* note 22, at 169 ("For *Chevron* review, *Skidmore* review, and arbitrary and capricious review, the studies suggest that, at least as the judiciary is currently comprised, agencies win between 60 and 70% of their appeals with few exceptions.").

56. Verkuil, *supra* note 12, at 713.

57. *See id.* at 730 ("FOIA cases are hard if not impossible to explain in terms of outcomes analysis if de novo is to be a meaningful standard of review."); *see also* Zaring, *supra* note 22, at 176 n.134 (noting that Verkuil's finding is "surprising" in light of his own research indicating that agencies are affirmed at approximately the same rates across types of decisions, standards of review, and agencies involved). Leading theories of dispute resolution, including predispute selection effects and settlement rates, likewise cannot explain the astronomical affirmance rate in FOIA cases. Kwoka, *supra* note 21, at 206–11.

58. *See generally* Kwoka, *supra* note 21 (arguing that courts generally defer to the government despite reciting a de novo standard of review in FOIA cases).

59. *Id.* at 211.

60. *Id.*

61. *Id.*

62. These claims are made under FOIA's exemption 1, which exempts 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 . . . ." 5 U.S.C. § 552(b)(1) (2012).

claims of exemption as it does to other exemption claims.[63] In 1974 amendments to FOIA, Congress even legislatively overruled the Supreme Court's invocation of deference to national security based FOIA denials by amending the exemption based on classification to make clear the courts were to review whether withheld records are classified properly.[64]

Despite the clarity of Congress's intent, courts have routinely deferred to agency FOIA denials based on national security, declaring that courts must affirm a national security denial so long as the record "'logically falls into the category of the exemption indicated,' and there is no evidence of bad faith on the part of the agency."[65] One recent U.S. Court of Appeals for the Second Circuit decision was even more blunt: "[T]his Court must adopt a deferential posture in FOIA cases regarding the uniquely executive purview of national security."[66] Commentators agree that national security claims are not truly reviewed de novo by the courts,[67] and DOJ has issued guidance to agencies declaring that, "courts generally have heavily deferred to agency expertise in national security cases."[68] Supporting this view, one DOJ report found not a single ultimately successful challenge to an agency's national security exemption claim under FOIA,[69] and a later empirical study revealed that there was likewise no successful challenge over a ten-year period studied in the 1990s.[70]

---

63. The standard of review provision in FOIA is the same for all claims of exemption. *Id.* § 552(a)(4)(B).

64. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2012)); *see also* EPA v. Mink, 410 U.S. 73, 81 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (amending the 1967 Freedom of Information Act). In fact, Congress's conviction on this point was so strong that Congress overrode President Ford's veto of the legislation reinstating de novo review of national security claims under FOIA. *See* Ray v. Turner, 587 F.2d 1187, 1190–91 (D.C. Cir. 1978) ("In 1974 Congress overrode a presidential veto and amended the FOIA for the express purpose of changing this aspect of the *Mink* case."); 120 CONG. REC. 36, 243 (1974) (veto message from President Ford).

65. Maynard v. CIA, 986 F.2d 547, 555–56 (1st Cir. 1993).

66. ACLU v. U.S. Dep't of Justice, 681 F.3d 61, 76 (2d Cir. 2012) (internal quotation marks omitted).

67. *See, e.g.*, Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 165 (2006) ("In a subtle but telling shift of nomenclature, the D.C. Circuit . . . called the standard of review in [national security] cases [under FOIA] 'the substantial weight standard' rather than the de novo standard of review mandated by Congress."); Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1208 (2004) (explaining that, in regard to national security claims under FOIA, "[courts] effectively apply something less" than "de novo review").

68. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 147 (2009) [hereinafter GUIDE TO FOIA].

69. U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 83–86 (2000).

70. Verkuil, *supra* note 12, at 715 n.159.

National security is not the only realm in which spoken deference arises under FOIA. Courts engage in spoken deference in assessing agency claims under at least two other of the Act's nine exemptions to disclosure.[71] First, when invoking the law enforcement exemption, courts have routinely deferred to agencies' claims that records were "compiled for law enforcement purposes," a threshold inquiry under the exemption.[72] This deference is granted to agencies whose primary activities are law enforcement related[73] and, in some circuits, the agency's status as a law enforcement agency itself is accepted as conclusive proof that the records meet this requirement.[74] Second, although not yet embraced by a precedential opinion, some district courts have deferred to agencies' representations about their own decisionmaking process as part of the review of the agency's claim that records are exempt under the deliberative process privilege.[75] Where a record falls within the decisionmaking process (as part of deliberations versus justifying a final decision) is a critical inquiry concerning whether the privilege applies.[76] As each of these examples shows, spoken deference applies

71. In addition to exemptions 1, 5, and 7, some courts have deferred to agency positions taken under exemption 3, which exempts records covered under other statutes, on the theory that the agencies are charged with interpreting those other statutes and those interpretations are entitled to either *Chevron* or *Skidmore* deference. *See, e.g.*, Landmark Legal Found. v. IRS, 267 F.3d 1132, 1137 (D.C. Cir. 2001) (applying *Skidmore* deference to the IRS's nonbinding interpretation of an exemption 3 statute); Lehrfeld v. Richardson, 132 F.3d 1463, 1467 (D.C. Cir. 1998) (applying *Chevron* deference to a binding regulation interpreting an exemption 3 statute). Whether this interpretation of exemption 3 in conjunction with the other referenced statutes is correct is still an open question. *See* A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 144 (2d Cir. 1994) (documenting a circuit split).

72. 5 U.S.C. § 552(b)(7) (2012) (exempting "records or information compiled for law enforcement purposes" when release of the records would produce one of the enumerated harms listed under the exemption).

73. Pratt v. Webster, 673 F.2d 408, 418 (D.C. Cir. 1982) (applying a presumption that an agency operates within its delegated purpose and, therefore, requiring "less exacting proof" that records were compiled for law enforcement purposes from agencies whose primary function is law enforcement); *see also* Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002) (noting that *Pratt* adopts a "deferential" approach to law enforcement agencies).

74. *See, e.g.*, Jordan v. U.S. Dep't of Justice, 668 F.3d 1188, 1195 (10th Cir. 2011) (adopting the so-called "per se" rule that any records compiled by an agency whose primary function is law enforcement were compiled for law enforcement purposes). In addition to deferring to agencies' representations about whether records were compiled for law enforcement purposes, the D.C. Circuit has deferred to agency positions with respect to other inquiries relevant under exemption 7. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (deferring to the agency's representations that release of records would interfere with a law enforcement investigation with potential national security implications).

75. *See, e.g.*, Chem. Mfrs. Ass'n v. Consumer Prods. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) ("There should be considerable deference to the [agency's] judgment as to what constitutes . . . part of the agency give-and-take—of the deliberative process—by which the decision itself is made." (internal quotation marks omitted)); *see also* 5 U.S.C. § 552(b)(5).

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

not only to *a* relevant question, but often *the* relevant question that will determine if a claimed exemption to disclosure applies or whether the records must be released.

While spoken deference affects a substantial subset of the claims agencies might invoke to withhold records under FOIA, unspoken deference affects them all. Through a series of procedural decisions that have become the norm in FOIA litigation, the government has gained great litigation advantages.[77] Many of these practices were developed in response to some unique features of FOIA litigation, namely that the government-defendant bears the burden to prove that an exemption to disclosure applies[78] and that there is an inherent information imbalance between the parties insofar as the government has access to the disputed records and the requester does not.[79] Despite courts' seemingly benign intentions, these procedural practices have the effect of deferring to the government's secrecy positions in FOIA litigation.[80]

First, courts have largely replaced the default system of civil discovery in FOIA cases, having categorically declared it to be inappropriate in FOIA cases because of the nature of the information imbalance.[81] In its stead, courts have operated under a presumption that the only discovery necessary in FOIA litigation is the government's production of an affidavit known as the *Vaughn* index, which lists the withheld records, claimed exemptions, and short justifications.[82] These indices, however, have become exercises in boilerplate affidavit writing and, in any event, do not allow the requester to probe the veracity of the government's representations through cross examination or multiple depositions.[83] As a result, unless the government's affidavit is facially flawed or inadequate, and so long as the requester cannot produce evidence of actual bad faith on the part of the government (as is usually the case), the contents of the affidavit will be accepted as true by the

77. *See infra* notes 81–92 and accompanying text.

78. 5 U.S.C. § 552(a)(4) (2012).

79. For a full accounting of unspoken deference and its origins, see Kwoka, *supra* note 21, at 221–35.

80. *See infra* notes 94–95.

81. *See* Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (explaining that "[d]iscovery is generally unavailable in FOIA actions").

82. *See* Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996) ("*Vaughn* indices are sometimes necessary because ordinary rules of discovery cannot be followed in FOIA cases where the issue is whether one party is entitled to non-disclosed documents."); Goland v. CIA, 607 F.2d 339, 352 & n.77 (D.C. Cir. 1978) (using the *Vaughn* procedure to justify the denial of further discovery). Courts sometimes articulate possible scenarios that would justify discovery, but those scenarios are extremely unlikely to actually arise in real FOIA litigation. *See* Kwoka, *supra* note 21, at 227–28.

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

court.[84] Thus, the inability to mount a serious challenge results in judicial deference to the government's assertions about the justifications for secrecy.

Second, courts have altered the normal procedures concerning summary judgment in a way that insulates the government's assertions from de novo scrutiny.[85] In FOIA litigation, rather than using summary judgment to weed out cases without genuine disputes of material fact, courts employ summary judgment to decide essentially *all* cases, as a routine matter.[86] This use of summary judgment is neither warranted nor neutral.[87] Factual disputes that affect the outcome of the case—not pertaining to the contents of the requested records themselves—do arise with frequency in FOIA cases.[88] These disputes include why a document was prepared, how it was used, with whom it was shared, or disputes about the predicted effects of releasing the document such as whether release would interfere with an ongoing investigation or would contribute to the public's understanding of the operations of government.[89] Refusing to allow cases to go to trial on these questions, and instead resolving factual disputes at the summary judgment stage, ends up depriving the requester of meaningful opportunities to focus the judge's attention on the important aspects of the dispute, cross-examine the government's witnesses, and otherwise test the strength of the government's case.[90]

What is more, courts have routinely adopted a practice of allowing the government a second crack at summary judgment when it fails to adequately oppose a plaintiff's summary judgment motion the first time around, even though the government bears the burden to demonstrate sufficient evi-

84. Kwoka, *supra* note 21, at 226.

85. Interestingly, many of the same procedural distortions have been documented in the adjudication of qualified immunity defenses to constitutional tort actions, including limiting discovery, altering burdens of proof, deciding questions of fact, and allowing serial motions for summary judgment. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 84–98 (1998).

86. Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 259–60 (2011) (reporting empirical findings that FOIA cases are almost never resolved at trial, representing 0.71% of all FOIA dispositions as compared with 3.44% of dispositions in other civil cases, and that FOIA cases are overwhelmingly resolved on motion, representing 38.09% of all FOIA dispositions as compared with 12.08% of dispositions in other civil cases); *see also* Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.").

87. Kwoka, *supra* note 86, at 227–44 (detailing the myriad factual disputes that FOIA cases regularly present).

88. *Id.*

89. *Id.*

90. *Id.* at 264–67, 273–76 (demonstrating that plaintiffs may fare better at trial than on summary judgment using interviews with attorneys who have conducted FOIA trials and some empirical evidence concerning outcomes of past FOIA trials).

dence to sustain its claim.[91] In any other context, a party who bears the burden of proof and who fails to produce sufficient evidence from which a reasonable fact-finder could find in his favor in opposition to a summary judgment motion would have a judgment entered against him.[92] Allowing the government multiple bites of the summary judgment apple and resolving genuine factual disputes on summary judgment motions are practices that not only fail to incentivize the government to put forth its best case in the first instance, thus dragging out the litigation, but also deprive the requester of meaningful procedural opportunities, and even of the judgments to which they are entitled under normal litigation rules.

The end result of this collection of practices is deference to the government in FOIA litigation, but it is not easily classifiable into one of the types of deference used in other areas of administrative law. Certainly, it is not *Chevron* type deference, as no particular agency is charged with interpreting ambiguities in FOIA[93] and, in any case, FOIA denial letters lack the "force of law" necessary to entitle them to such deference.[94] Some aspects of FOIA deference resemble arbitrary and capricious review used with respect to fact-finding in informal agency adjudications,[95] insofar as courts openly defer to agencies' factual representations or accept representations in *Vaughn* indices, but "arbitrary or capricious" has never been articulated as a standard in FOIA cases. Indeed, many of the deference doctrines under FOIA seem even more forceful than arbitrary or capricious review, because the courts in some FOIA cases accept the agencies' factual representations absolutely so long as there is no evidence of bad faith, which may be more akin to the deference courts give to agencies' interpretations of their own regulations under *Auer*.[96] On the other hand, the types of procedural advantages that agencies enjoy in FOIA litigation have no analog in other

91. *See, e.g.*, Elec. Frontier Found. v. U.S. Dep't of Justice, 826 F. Supp. 2d. 157, 175 (D.D.C. 2011) (allowing the government to submit a renewed motion for summary judgment); Clemente v. FBI, 741 F. Supp. 2d 64, 89 (D.D.C. 2010) (same); Schoenman v. FBI, 604 F. Supp. 2d 174, 204 (D.D.C. 2009) (same).

92. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (granting defendant's motion for summary judgment based on plaintiff's lack of sufficient evidence).

93. *See* Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (setting out a deference standard that applies when an agency interprets a statute it administers).

94. *See* United States v. Mead Corp., 533 U.S. 218, 226 (2001) (noting that some informal rulings "'do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review'").

95. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (applying arbitrary and capricious review to an informal adjudication), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

96. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (explaining that agencies' interpretations of their own regulations are "controlling unless 'plainly erroneous or inconsistent with the regulation'").

parts of administrative law. Instead, FOIA jurisprudence appears to have created its own deference doctrine through a collection of practices that have the end result of deferring to the agencies' positions.

While a facial anomaly, deference under FOIA can also be understood as just one more in a long line of variants on deference used in the context of administrative law.[97] Recent scholarship has called into serious question whether there is a meaningful difference between the multitude of standards of review employed in administrative law, each of which purports to embody a different sort of deference.[98] Empirical evidence suggests that, across the board, courts exhibit a similar level of deference to agencies irrespective of the formal deferential standard employed.[99] The seemingly new variant on deference to agencies exhibited in FOIA case law may only amount to new vocabulary for the same type of deferential treatment of agencies courts employ in other contexts.

B. Courts' Refusal to Apply Chenery *to FOIA Cases*

In addition to FOIA's formal de novo review standard, FOIA stands as an exception to the norms of administrative law in another crucial way: as an exception to the application of the *Chenery* principle.[100] There is no disagreement among the courts about the application of *Chenery* to FOIA litigation: it does not apply.[101] In fact, *Chenery*'s inapplicability to FOIA cases is so uncontroversial that there are few arguments advanced or challenges made asserting the application of *Chenery* under FOIA and few decisions dealing with the question in depth. In short, *Chenery*'s inextricable link to deference doctrines virtually mandates, in the view of the courts, that it not apply when courts review agency decisions to withhold records under FOIA under a de novo standard.

---

97. For a summary of the variants of deference used in administrative law review, see Zaring, *supra* note 22, at 143–53.

98. *See, e.g.*, *id.* at 153–69 (arguing that six different standards of review in administrative law all boil down to a review for reasonableness of the agency action); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1271 (1997) (noting that the D.C. Circuit recognizes little meaningful difference between *Chevron* step two and *State Farm*); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (noting that review of agency factfinding under "the substantial evidence standard" is essentially the same as arbitrary and capricious review); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598–99, 604 n.28 (2009) (arguing that the single question *Chevron* really asks is whether the agency's statutory interpretation is reasonable, and that this question is not very different from "hard look" review under *State Farm*).

99. Zaring, *supra* note 22, at 169.

100. For an overview of the *Chenery* principle, see *infra* Part II.A.

101. *See infra* text accompanying notes 102–112.

The Ninth Circuit has provided one of the rare in-depth discussions rejecting a claim that *Chenery* should apply to FOIA. In *Louis v. United States Department of Labor*,[102] the court considered a challenge to an agency's decision to withhold records under the Privacy Act,[103] a complimentary law to FOIA that contains many parallel provisions regarding disclosure obligations and identical provisions for judicial review of agency decisions to keep records secret.[104] The Department of Labor ("DOL") had promulgated a rule invoking a provision of the Privacy Act that allows an agency to refuse disclosure of certain systems of records.[105] When the plaintiff requested certain records, the DOL relied on that rule to deny the request.[106] Once the plaintiff sued, however, the DOL raised the alternative argument that it was entitled to withhold the records under the deliberative process privilege, which is a basis for invoking one of the Privacy Act exemptions to disclosure.[107]

Reviewing the district court's grant of summary judgment to the agency, the Ninth Circuit first invalidated the Department's rule on the ground that the agency had failed to comply with the Administrative Procedure Act's ("APA") notice and comment requirements.[108] Then, the district court considered the deliberative process claim, raised for the first time in the district court proceeding. The plaintiff argued that the agency was not entitled to rely on a new theory to justify withholding the record because doing so would violate *Chenery*.[109] The court concluded that *Chenery* did not apply to Privacy Act or FOIA claims precisely because decisions made under these acts are reviewed de novo and the agency's determination is entitled to no deference.[110] *Chenery*, the court said, "was premised on the policy that courts should not substitute their judgment for that of the agency" when reviewing decisions that Congress "exclusively entrusted to an administrative agency."[111] The court went on to explain that decisions under the Privacy Act and FOIA are not entrusted to a particular agency, but rather are mandated to be reviewed by courts de novo.[112]

---

102. 419 F.3d 970, 977–79 (9th Cir. 2005).

103. *Id.* at 972.

104. *Compare* 5 U.S.C. § 552 (2012) (FOIA), *with* 5 U.S.C. § 552(a) (2012) (the Privacy Act).

105. *Louis*, 419 F.3d at 973–74.

106. *Id.*

107. *Id.* at 973.

108. *Id.* at 977.

109. *Id.*

110. A second rationale was articulated that is specific to the Privacy Act. *Id.* at 977. The court concluded that the agency could not be said to have passively waived the argument given the structure of the particular records request provision in the Privacy Act, as opposed to FOIA. *Id.*

111. *Id.* at 977–78.

112. *Id.* at 978.

Other decisions have likewise relied on the de novo nature of judicial review under FOIA to reject claims that *Chenery* should apply. One court explained that:

> Although plaintiff's assertion [that *Chenery* precludes the agency from raising a new exemption claim in court that was not relied on in the administrative denial] may have merit when the court engages in limited judicial review under the arbitrary and capricious or substantial evidence standards of the APA, neither the cases cited nor the rationale of limited judicial intrusion into agency decision-making support the application of that principle to de novo determinations of FOIA requests.[113]

Another court noted that, "unlike in other administrative-law contexts, the [agency's] failure to consistently assert the applicability of FOIA exemption 6 at the agency level does not bar it from relying on that exemption here."[114]

An examination of so-called reverse FOIA cases makes it even more apparent that de novo review is the defining feature of FOIA litigation courts rely on to preclude the application of *Chenery* in regular FOIA cases. Reverse FOIA cases are cases in which the agency has decided to release records in response to a FOIA request, but a third-party sues to prevent disclosure to protect their own interest in the records.[115] FOIA only allows an action to compel disclosure, not to compel secrecy, and thus reverse FOIA cases must be brought under the APA.[116] Courts review decisions to release records challenged in reverse FOIA cases under an arbitrary and capricious standard in accordance with the APA.[117] Precisely because de novo review does not apply to these cases, courts have not hesitated to apply the *Chenery* principle.[118] For instance, in one reverse-FOIA suit, the United

113. Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983) (internal citation omitted). Although the court relied on exemption 5 of FOIA at the administrative level, only attorney-client and deliberative process privileges were cited, rather than the work-product privilege the agency later raised in court. *Id.* at 547 & n.2.

114. Kalwasinski v. Fed. Bureau of Prisons, No. 08 Civ. 9593, 2010 U.S. Dist. LEXIS 62659, at *21 n.6 (S.D.N.Y. Mar. 12, 2010).

115. *See* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987) (noting that "Reverse-FOIA actions," in which an information submitter sues to challenge an agency's decision to release records requested under FOIA, are commonplace and are brought under the APA).

116. Chrysler Corp. v. Brown, 441 U.S. 281, 317 (1979).

117. United Techs. Corp. v. U.S. Dep't of Def., 601 F.3d 557, 559 (D.C. Cir. 2010); Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008).

118. Data Prompt, Inc. v. Cisneros, No. 94-5133, 1995 WL 225725, at *2 (D.C. Cir. Apr. 5, 1995) ("Without deciding whether [the newly invoked regulation] would permit the same decision [to disclose the requested records], we reject appellee's argument as an impermissible post-hoc rationalization. An agency's administrative decision must stand or fall upon the reasoning advanced by the agency therein."); Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n, 750 F.2d

States Court of Appeals for the District of Columbia reversed and remanded an agency decision to disclose records when the agency's initial decision rested on an out-of-date regulation, even though in litigation the agency provided a current regulation that it claimed justified the same result.[119] Thus, when de novo review does not apply, even in the FOIA context, *Chenery* is properly invoked.[120] It is not without some irony that *Chenery* constrains agencies' decisions to release records, increasing the likelihood that decisions to promote maximum transparency in line with FOIA's purpose will be overturned, but not to agency decisions to keep records secret.

It is tempting to think that the doctrine of waiver in litigation would serve to mitigate any unfairness. Certainly, even though the *Chenery* principle does not apply, courts have acknowledged that the government in a FOIA case waives a claim of exemption by failing to timely raise it in the course of the judicial proceedings.[121] Nonetheless, given its limited application and acknowledged exceptions, the waiver doctrine is no substitute for *Chenery* in the FOIA context.[122]

The D.C. Circuit's decision in *Jordan v. United States Department of Justice*[123] provides a good illustration. There, the court considered an exemption claim that was not raised by the agency at the administrative level,

---

1394, 1403–04 (7th Cir. 1984) ("We can give no weight to Messier's separate affidavit that was submitted to the district court. . . . [W]hile giving reasons why exemption 4 should not be applied, the affidavit does not attribute those reasons to the Commission as of the date of its decision. If we relied on it in reviewing that decision, we would be violating the principle of [*Chenery*]."); Jurewicz v. U.S. Dep't of Agric., 891 F. Supp. 2d 147, 156 (D.D.C. 2012) (citing *Chenery* in refusing to consider an agency's potential reliance on discretion to release records where the agency articulated the only basis for disclosure that no exemption applied), *aff'd*, 741 F.3d 1326 (D.C. Cir 2014); Lykes Bros. Steamship Co. v. Pena, Civ. A. No. 92-2780-TFH, 1993 WL 786964, at *6 (D.D.C. Sept. 2, 1993) (applying *Chenery* to limit inquiry as to whether the agency misapprehended the law).

119. *Data Prompt*, 1995 WL 225725, at *2.

120. Not inconsistent with this approach, the Ninth Circuit has also applied a *Chenery* principle (without citing *Chenery*) to litigation over an agency's refusal to grant a public interest waiver of FOIA processing fees. *See* Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) ("On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter."). The Ninth Circuit later distinguished fee waiver determinations on the grounds that the statutory review provision limits a court's inquiry on such determinations to "'the record before the agency.'" Louis v. U.S. Dep't of Labor, 419 F.3d 970, 978 (9th Cir. 2005) (quoting 5 U.S.C. § 552(a)(4)(A)(vii)). This is akin to the Supreme Court's alternative rationale for invoking the *Chenery* rule in *Overton Park*, relying on the APA provisions requiring review on the "whole record" before the agency. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 n.30 (1971) ("'In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.'" (quoting 5 U.S.C. § 706 (1964)), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

121. *See infra* note 129.

122. *See infra* notes 129–131.

123. 591 F.2d 753 (D.C. Cir. 1978).

the district court level, or in the initial court of appeals proceedings, but rather was relied on for the first time in a petition for rehearing en banc.[124] Citing FOIA's judicial review provision, the court explained that the government has the burden of proof to establish that an exemption applies, thereby requiring the government to specifically state and support each exemption claim in the district court.[125] The court concluded that "[a]n agency cannot prevail on an exemption that it has not raised either at the agency level or in the district court and that it has invoked for the first time in the appellate court."[126] In a subsequent case, the D.C. Circuit refused to allow the government to raise a new claim of exemption for the first time on remand to the district court, explaining that "an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings."[127] Accordingly, the government's new claim of exemption had been waived.[128] Other cases have followed suit, preventing new claims of exemption raised after the initial district court proceedings.[129]

The waiver doctrine, moreover, is subject to exceptions, resulting in courts allowing agencies to raise new arguments even after litigation has been ongoing or has reached the appellate court level in certain instances. In *Jordan*, the D.C. Circuit mentioned two possible situations warranting reliance on a late-invoked exemption: first, there might be a change in the law; and second, there may be an excusable mistake which, if not excused, would lead to disclosure of material whose value is "obviously high," such as national security information.[130] Thus, the waiver doctrine still allows agencies to rely on exemptions not invoked at the agency level so long as

124. *Id.* at 779.

125. *Id.*

126. *Id.*

127. Ryan v. Dep't of Justice, 617 F.2d 781, 792 (D.C. Cir. 1980).

128. *Id.*

129. *See, e.g.*, Am. Immigration Council v. U.S. Dep't of Homeland Sec., 905 F.2d 206, 217 n.2 (D.D.C. 2012) (noting that the agency had waived reliance on a particular exemption when it failed to raise it in its *Vaughn* index and its opening brief, and mentioning it only in a footnote in its reply brief).

130. *Jordan*, 591 F.2d at 780; *see also* August v. FBI, 328 F.3d 697, 702 (D.C. Cir. 2003) (allowing the government to change its position based on human error and the change in policy that resulted); Wash. Post Co. v. Dep't of Health & Human Servs., 795 F.2d 205, 208 (D.C. Cir. 1986) (explaining that *Jordan* recognized two exceptions to the waiver rule, but finding that neither applied in the instant case); Hiken v. Dep't of Def., 872 F. Supp. 2d 936, 940–41 (N.D. Cal. 2012) (allowing the government to change exemption claims based on changes in FOIA law); Judicial Watch v. Dep't of Army, 466 F. Supp. 2d 112, 123–24 (D.D.C. 2006) (allowing an intervenor to raise new exemption claims well into the litigation when failure to do so earlier was fault of the government); Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 580–81 (D.D.C. 1987) (finding that the government was allowed to change its exemption claims well into the litigation based on changed events).

they are raised in the district court level, and it even allows those exemptions to be raised for the first time later in some circumstances.[131]

C. FOIA Litigation Dynamics

What, then, does the failure to apply *Chenery* to FOIA cases mean for FOIA litigation? At base, it means that agencies need not adhere to the reasons for having denied the request for records at the outset, or even on administrative appeal. Once an agency is sued in court, the agencies' lawyers can make any arguments for withholding government documents they think have the most likelihood of success. As one judge explained, "litigators . . . are blissfully free to advance exemptions never contemplated by the experts back home at the agency; the wondrous land of FOIA is a long way from *Chenery* territory."[132]

A review of litigated cases shows that government attorneys take advantage of the flexibility that comes from not being constrained by *Chenery*. For example, in one case, an environmental group requested inundation maps for areas downstream from the Hoover and Glen Canyon dams, including those reflecting flooding that would result from dam failures.[133] The U.S. Bureau of Reclamation denied the request on the sole basis that the records were exempt from disclosure under FOIA's exemption 2, which covers records "'related solely to the internal personnel rules and practices of the agency.'"[134] The environmental group sued. In the district court proceedings, the agency maintained its exemption 2 claim, but added a claim that withholding these records was also permitted under exemption 7(F), which exempts records compiled for law enforcement purposes the release of which "could reasonably be expected to endanger the life or physical safety of any individual."[135] Because *Chenery* did not apply, the

131. *See Jordan*, 591 F.2d at 780.

132. *Wash. Post, Co.*, 795 F.2d at 210 (Starr, J., dissenting); *see also* Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) ("[A]n agency does not waive FOIA exemptions by not raising them during the administrative process.").

133. Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1314 (D. Utah 2003).

134. *Id.* at 1316–1317 (quoting 5 U.S.C. § 552(b)(2)). At the time, many circuits had recognized two types of exemption 2 claims, referred to as "high 2" and "low 2" exemptions. *Id.* at 1317. The government claimed "high 2," which referred to instances in which not only were the records directed internally, but also in which the release of the records would risk circumvention of the law. *Id.*; *see also* Crooker v. Bureau of Alcohol, Tobacco, & Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (recognizing for the first time the "high 2" exemption). The "high 2" exemption has subsequently been rejected by the Supreme Court. *See* Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1262 (2011).

135. 5 U.S.C. § 552(b)(7)(F) (2012); *Living Rivers, Inc.*, 272 F. Supp. 2d at 1316. The government also argued that withholding was permitted under exemption 3, which applies to records that another statute allows the government to withhold.

district court considered the newly raised defense.[136] The district court concluded that exemption 2 did not cover the inundation maps and rejected the government's claims based thereon.[137] The court, however, concluded that the government's withholding was justified by exemption 7(F) because of the government's representations that terrorists might use the maps to plot an attack.[138] Thus, an exemption that had never been claimed by the agency prior to litigation, and which was not particularly related to or reasonably foreseeable from the claims that were made in the administrative decision, ended up defeating the requester's lawsuit in court.

In another case, a union used FOIA to request payroll reports submitted by a government contractor to the General Services Administration ("GSA").[139] The union was seeking to determine if the contractor's employees were being paid the wage required by federal law.[140] In response to the request, the GSA denied access to the reports citing exemption 4, which covers confidential commercial and financial records.[141] The union administratively appealed, the GSA again denied on the same basis; and then the union brought suit in district court.[142] At that point, the GSA asserted that the reports could also be withheld under exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[143] Although the district court concluded that exemption 4, the trade secrets exemption, only justified the withholding of some of the information contained in the reports, exemption 6, the personal privacy exemption, which had never been raised at the administrative level, justified withholding additional portions of information.[144] Thus, it ordered release only of the information not covered by either exemption.[145]

These are not isolated incidences, but rather, the government routinely raises additional claims of exemption for the first time in litigation.[146] For

136. *Living Rivers, Inc.*, 272 F. Supp. 2d at 1318.

137. *Id.*

138. *Id.* at 1322.

139. Painters Dist. Council #6 v. GSA, No. C85-2971, 1986 U.S. Dist. LEXIS 31056, at *1 (N.D. Ohio July 23, 1986).

140. *Id.*

141. *Id.*; 5 U.S.C. § 552(b)(4) (2012) (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

142. *Painters Dist. Council #6*, 1986 U.S. Dist. LEXIS 31056, at *2.

143. *Id.*

144. *Id.* at *11, *18.

145. *Id.* at *18–19.

146. *See, e.g.*, Stonehill v. IRS, 558 F.3d 534, 537, 541 (D.C. Cir. 2009) (noting that the IRS invoked the deliberative process privilege for the first time in a FOIA district court proceeding, not having raised it at the administrative level); Sciba v. Bd. of Governor of Fed. Reserve Sys., No. Civ.A. 04-1011, 2005 WL 758260, at *1 n.3 (D.D.C. Apr. 1, 2005) (allowing the government

the requester, the playing field resembles a game of Whac-A-Mole,[147] in which new claims of exemption keep popping up even as the initial claims are defeated. First, the requester discovers the agency's initial position in the first denial of the request.[148] The requester has a chance, at that point, to evaluate the strength of the agency's claim and to decide whether it is worth his or her while to administratively appeal the denial.[149] If the requester thinks that he or she has a decent argument that the claimed exemption to disclosure does not apply, he or she will be much more likely to appeal.[150] While there is no fee to appeal within the administrative agency, it certainly consumes the requester's time and energy, and sometimes a requester will employ the help of a lawyer.[151]

---

to raise four additional exemption claims in court not relied upon in the original denial letter); Kay v. FCC, 867 F. Supp. 11, 21–22 (D.D.C. 1994) (allowing the FCC to invoke exemption 7(A) despite failing to do so during the administrative process); Ill. Inst. for Continuing Legal Educ. v. U.S. Dep't of Labor, 545 F. Supp. 1229, 1235–36 (N.D. Ill. 1982) (finding that exemption defenses are not too late if initially raised in the district court).

147. *Whac-A-Mole* is a popular arcade game invented in the 1970s by Aaron Fechter, comprising an arcade cabinet with five holes, a plastic mole, and a mallet. The purpose of the game is to bash the moles back into their holes by hitting them on the head with the mallet, as they pop up randomly. *See* Rockafiremovie, *The Whac-A-Mole Story*, YOUTUBE (Mar. 20, 2010), http://www.youtube.com/watch?v=Agjaa1DyKyA. The term "whac-a-mole" is used colloquially as a metaphor to refer to a futile exercise, including within a variety of legal contexts ranging from copyright violations to regulatory action by federal agencies, courts, and Congress. *See* Transcript of Oral Argument at 47, Riley v. Kennedy, 533 U.S. 406 (2007) (No. 07-77), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-77.pdf ("[T]he purpose of section 5 [of the Voting Rights Act] . . . was to prevent a sort of game of Whac-A-Mole in which the States would keep changing the practice. And the idea of that freeze was to hold it in place so that it could be challenged as a constitutional matter before the State switched again."); A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement*, 7 J. FOOD L. & POL'Y 135, 155 (2011) ("[T]he issue of acai berry weight-loss supplements illustrates the regulatory game of Whac-a-Mole that often plays out in enforcement actions against online sellers: shut one website down, and another immediately pops up somewhere else."); Brad A. Greenberg, *More than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1052 (2012) ("[A]s Douglas Lichtman has said, that default forces copyright holders to play Whac-A-Mole—searching for and knocking down infringing content like springing moles in the popular arcade game—while permitting YouTube to get rich selling ads on the same infringing content.").

148. *See* 5 U.S.C. § 552(a)(6)(A)(i) (2012) (requiring the government to "notify the person making such request of such determination and the reasons therefore").

149. *See* Kristin Adair & Catherine Nielsen, *Effective FOIA Requesting for Everyone: A National Security Archive Guide*, NAT'L SECURITY ARCHIVE, 30 (Jan. 29, 2009), http://www.gwu.edu/~nsarchiv/nsa/foia/foia_guide/foia_guide_full.pdf (discussing the litigation process of administrative requests).

150. *Id.*

151. *See id.* (noting that hiring an attorney may make an impact if the litigant is not familiar with case law and court procedures); *see also* 5 U.S.C. § 552(a)(6)(A)(ii) (providing for administrative appeals).

As is the case with respect to other types of agency decisions, once administratively appealed, the requester could discover that the agency has a new position concerning why it will not release the records.[152] Perhaps it has abandoned its initial position entirely or just added an additional claimed basis for withholding. Either way, the requester likely had no way of anticipating this new claim. Thus, any arguments the requester might have made to counter the new claim are not going to be considered by the agency in the first instance. If the new claim is strong, the requester may have wasted his or her time—as well as the agency's time—by administratively appealing the decision. If the new claim is weak, the requester is now at the stage where the next remedy is available only by suing in district court, and the requester cannot take advantage of the comparatively simple and efficient administrative appeals process to bring the agency's error to its attention.[153]

Filing a lawsuit in court, of course, is no minor inconvenience. In addition to a substantial filing fee,[154] the assistance of a lawyer is often critical to any meaningful chance of success.[155] Once in litigation, the costs only escalate because effective FOIA litigation requires not only filing pleadings, but typically also litigation over *Vaughn* indices—the specialized affidavits used by the government to justify withholdings in FOIA cases[156]—and summary judgment motions.[157] Even a pro se litigant must dedicate substantial time to preparing and filing courts papers, far more than making an initial request or even filing an administrative appeal.[158] Unlike other cases

152. *See, e.g.*, Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1111 (D.C. Cir. 2007) (noting that the U.S. Postal Service denied a FOIA request citing two exemptions, and denied the administrative appeal citing a third); People for the Ethical Treatment of Animals v. NIH Dep't of Health & Human Servs., 853 F. Supp. 2d 146, 150 (D.D.C. 2012) (finding that, after PETA filed a timely administrative appeal, the agency issued a final decision in which it explained for the first time the basis of its withholdings under certain FOIA exemptions).

153. 5 U.S.C. § 552 (a)(4)(B). Although a requester has exhausted administrative remedies by filing an administrative appeal, there is nothing precluding an agency from considering a request for reconsideration of an appeal denial. *See* Lakin v. U.S. Dep't of Justice, 917 F. Supp. 2d 142, 143 (D.D.C. 2013) (noting that after the Office of Information Policy closed the appeal, plaintiff requested that denial of his appeal be reconsidered, which the agency denied before filing suit in district court).

154. *See* 28 U.S.C. § 1914(a) (2013) (fixing the filing fee for a civil action at $350).

155. *See* Adair & Nielsen, *supra* note 149, at 52 (explaining the benefits of a lawyer in FOIA litigation); *see generally* Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439 (2009) (analyzing the major problems facing *pro se* litigants and noting low success rates of cases brought by *pro se* plaintiffs).

156. The *Vaughn* index is so named after a D.C. Circuit case establishing the procedure, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

157. *See* Kwoka, *supra* note 21, at 227 (stating that summary judgment is the presumptive method for resolving a FOIA case).

158. *See* Adair & Nielsen, *supra* note 149, at 52–53 (detailing the FOIA litigation process and the considerations in bringing a lawsuit).

of administrative review where *Chenery* applies, however, at this time the game of Whac-A-Mole may continue. It may be only at the point of getting the government's affidavits or summary judgment motion that the requester discovers the agency has yet another claim of exemption or argument for withholding.[159] Again, perhaps the new claim is more meritorious or at least more difficult for the requester to defeat, and if the requester had this information, it might have impacted the requester's litigation strategy or even the decision to sue. Moreover, if the new claim is weak and can be defeated, both the agency and requester may have already wasted litigation resources on earlier claims, only to now face the crux of the issues in the case. In some cases, the requester's limited resources may even be exhausted trying to defeat successive agency claims of exemption, leading to an undeserved agency victory.[160]

The agency's change of position is made worse because, for several reasons, a requester will rarely be able to anticipate whether there is another potentially meritorious exemption claim that might arise. First, often the requester is not in a position to know much about the contents of the records.[161] As the examples above illustrate, the claims of exemption are often made on very different grounds. In one case, personal privacy claims were made after the fact when the initial claim was about commercial information.[162] In another, a claim regarding law enforcement concerns was raised after the initial exemption cited pertained to internally directed agency documents.[163]

---

159. *See, e.g.*, Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106, 113 (D.D.C. 2007) (finding without merit plaintiff's argument that because the FCC raised an exemption claim in its summary judgment papers, rather than in its initial responsive pleading, that it was waived); Defendant's Consolidated Reply in Support of Summary Judgment and Opposition to Plaintiff's Cross Motion for Summary Judgment at 4, Hodes v. U.S. Dep't of Housing & Urban Dev., 532 F. Supp. 2d 108 (D.D.C. 2008) (No. 07-0161-CKK) (stating that defendant did not cite exemption 3 in its FOIA response letter, nor when upholding denial of plaintiff's FOIA request, but only in its motion for summary judgment).

160. Although attorneys' fees are available to FOIA plaintiffs who substantially prevail at the discretion of the district court, judicial gloss on this provision has made winning fees an uphill battle for plaintiffs. *See* 5 U.S.C. § 552(a)(4)(E)(i) (2012) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."); Judicial Watch, Inc. v. FBI, 522 F.3d 364, 371 (D.C. Cir. 2008) (explaining that plaintiff must demonstrate both eligibility for fees and entitlement to them under a four factor test). As such, and given the improbability of prevailing, attorneys' fees alone often are not enough of an incentive for the plaintiff and attorney to proceed.

161. The court, however, always has the option of reviewing sensitive documents *in camera*. 5 U.S.C. § 552(a)(4)(B).

162. Painters Dist. Council #6 v. GSA, No. C85-2971, 1986 U.S. Dist. LEXIS 31056, at *2 (N.D. Ohio July 23, 1986).

163. Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1316 (D. Utah 2003).

Second, even though there are only nine enumerated exemptions to disclosure under FOIA,[164] FOIA's exemption 3 covers records "specifically exempted from disclosure by [another] statute," so long as that other statute meets certain criteria.[165] What those other statutes are is not only unknown to the requester, but often, unknowable. The DOJ has compiled a list of statutes that qualify as exemption 3 statutes, which contains sixty-eight such statutory provisions, ranging from statutes as specific as one covering certain information obtained by the National Vaccine Injury Compensation Program to those as general as certain Federal Rules of Criminal Procedure.[166] Moreover, as the DOJ explains in its report, the list does not include "any statute which has not yet been considered by a court as a possible Exemption 3 statute," meaning there are an indeterminate number of possible statutes that an agency might claim qualify as exemption 3 statutes, but which have not yet been the subject of litigation.[167] Complicating the situation, some of the statutes that are included on the list have "been found to qualify under Exemption 3 by one court and found not to qualify by another."[168] A requester cannot reasonably be expected to anticipate all possible exemption 3 claims, or to evaluate whether a statute even qualifies as an exemption 3 statute where no court has ruled or where even courts cannot agree.[169]

Finally, even when a record falls within an exemption to disclosure under FOIA, the government often retains the power to release the record as a matter of discretion.[170] Given that fact, an agency's failure to assert even an obvious exemption could easily, and justifiably, be interpreted as the

164. 5 U.S.C. § 552(b).

165. *Id.* § 552(b)(3). In full, exemption 3 states that FOIA does not apply to records that are:

> (3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

Id.

166. U.S. DEP'T OF JUSTICE, STATUTES FOUND TO QUALIFY UNDER EXEMPTION 3 OF FOIA (2012), *available at* http://www.justice.gov/oip/exemption3.pdf.

167. *Id.* at 1.

168. *Id.*

169. *See id.* (listing numerous statutes that qualify as possible exemption 3 claims).

170. *See* Nate Jones, *Document Friday: Cheat Sheet for Discretionary FOIA Releases*, NAT'L SECURITY ARCHIVE (Mar. 18, 2011) http://nsarchive.wordpress.com/2011/03/18/document-friday-cheat-sheet-for-discretionary-foia-releases/ (displaying a Department of Interior memo asserting that four of the nine exemptions are eligible for discretionary release); *see also* Mobil Oil Corp. v. U.S. EPA, 879 F.2d 698, 700 (9th Cir. 1989) (summarizing the law under FOIA concerning when agencies' prior disclosure of records waives the right to claim exemption from disclosure).

agency's discretionary decision not to invoke it.[171] With little to no way of predicting what an agency may later bring up as an alternative grounds for withholding records, requesters are in the very difficult position of having to evaluate the value of pursuing additional remedies under FOIA without being able to even guess at the likelihood of success.[172]

This aspect of FOIA litigation is not only frustrating for the requester, it also risks wasted agency resources. While at first blush it may seem to save the agency time in not having to state all alternative bases for withholding in the initial denial, there remain potential unaccounted for costs.[173] For instance, as described above, not asserting all rationales the agency may ultimately rely on could lead requesters to believe they have a better chance than they really do on administrative appeal or by filing a lawsuit, and thus could encourage more appeals and litigation against the agency.[174] In addition, if an agency does not assert a particular exemption or argument until litigation has commenced, it did not receive the benefit of any counterarguments the requester might have made at the administrative level, which could have persuaded the agency to come to a different conclusion and prevented the lawsuit in the first place.

D. Conclusion

As FOIA litigation currently stands, the agencies, in effect, have their cake and eat it too: they enjoy deferential treatment for their positions by the courts, and they are not constrained in what positions they may take that will receive this privileged treatment.[175] An agency—or more to the point its lawyers, who usually do not work within the agency—can come up with any rationale for its past actions withholding records and those rationales will be treated deferentially by the courts.[176] In nearly every other context

171. *See* David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1789 (2008) (arguing that the FOIA process as currently structured invites further disputes because of agency delay and lack of specificity in response).

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1021 (2007) (describing *Chenery* as a "constraint [that] polices the conditions for judicial deference to agency action"). One scholar has made the flip side of this argument: that *Chenery* has been used, at least in one context, as a way of avoiding the deference actually owed. *See* Matthew Ginsburg, *"A Nigh Endless Game of Battledore and Shuttlecock": The D.C. Circuit's Misuse of* Chenery *Remands in NLRB Cases*, 86 NEB. L. REV. 595, 609 (2008) (suggesting "that the D.C. Circuit is using *Chenery* to avoid extending the deference it owes to the [NLRB]"). In the FOIA context, *Chenery* could be used to cabin the deference currently extended but not owed to the agencies' positions.

176. *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1043 (2011) (stating that under a rule that allows post hoc rationalizations, lawyers

in which courts defer to agency actions, *Chenery* constrains the court's ability to defer by dictating the position the court must consider: only that which was articulated at the time the decision was made.[177] The deference in FOIA litigation, unconstrained by *Chenery*, distorts the proceedings such that agencies are at an even greater advantage under the purportedly de novo review of FOIA litigation than when other types of actions are challenged and reviewed deferentially.[178] Under this regime, FOIA decisions are affirmed at a shockingly high rate, a pattern that flips FOIA's maximum transparency goal on its head.[179]

II. RELOCATING FOIA IN ADMINISTRATIVE LAW

Documenting the judicial deference that produces a striking ninety percent affirmance rate in FOIA cases[180] undermines any claim that courts engage in true de novo review of FOIA cases. As I have argued elsewhere, strategies exist by which Congress, courts, and litigants all could work toward correcting the standard of review in FOIA cases and restoring true de novo judicial review of agency decisions to withhold records from the public.[181] Realistically, however, it is imperative to acknowledge that these strategies may have limited success. Congress tried course-correction in this area once before without managing to truly reverse the deference trends in the courts;[182] courts and litigants, for their part, are accustomed to FOIA litigation as it typically proceeds and revisiting old precedents is not a priority.[183]

Perhaps even more of a barrier to restoring true de novo review is an intangible sentiment that Congress has asked the courts to perform a function the courts feel neither qualified nor comfortable performing: second-guessing agencies' factual representations in areas traditionally in the purview of the executive branch, such as national security.[184] Moreover, overburdened courts have little patience for the type of page-by-page, or even

---

formulate reasons that are presented to the court and that can be completely different from what was proffered by the agency).

177. *Id.* at 1042.

178. *Id.*

179. *See* Verkuil, *supra* note 12, at 713 (reporting a ninety percent affirmance rate in FOIA cases).

180. *Id.*

181. Kwoka, *supra* note 21, at 239–42.

182. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2012)); *see* 5 U.S.C. § 706 (2012).

183. *See supra* note 175 and accompanying text.

184. *See* Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760–61 (1988) ("Probing even a little into national security matters [in a FOIA case] is not an easy or a pleasant job.").

line-by-line, review of records *in camera* that FOIA permits (but does not require) them to perform.[185] It has been suggested that courts view FOIA generally as having questionable value.[186]

If courts are unable or unwilling to enforce FOIA rights the way Congress envisioned, it poses a separation of powers problem in which the courts are failing to respect a co-equal branch's legitimate exercise of its constitutional powers to legislate.[187] It is not, however, a problem that is easily solved by simply pointing out that judges should perform a function they feel ill-equipped to perform or about which they may be acting on unconscious beliefs about the merits of FOIA as a transparency tool.[188] Indeed, while FOIA jurisprudence has gone awry, much of its deviation from the norm arose from judges trying to *improve* FOIA litigation as a check on agencies, not to diminish it.[189] While a true de novo regime might be optimal, in many ways, FOIA's almost fifty-year experiment with de novo review has simply failed.

As a result, other solutions should be explored, particularly with the goal of cabining the overwhelming deference in FOIA cases.[190] *Chenery*

---

185. 5 U.S.C. § 552(a)(4)(B) (authorizing *in camera* review); *see also* Fuchs, *supra* note 67, at 173 (showing that *in camera* inspection has "fallen into disfavor in recent years").

186. *See* Verkuil, *supra* note 12, at 715–16 (citing courts' "skepticism," if not "resistance," toward FOIA).

187. Kwoka, *supra* note 21, at 235.

188. As David Dyzenhaus has argued, in cases where the judiciary may feel ill-equipped to rule, "rather than find what the executive does is beyond the reach of law, judges will find that, given the situation, they should, as a matter of law, defer to the executive's judgment about what is required." DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 19 (2006). Dyzenhaus describes the resulting review as a legal "grey hole," defined as "a legal space in which there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases." *Id.* at 42. Dyzenhaus claims that "grey holes cause more harm to the rule of law than black holes [which represents an absence of judicial review, because] . . . the procedural rights available to the detainee cloak the lack of substance." *Id.* at 50. This describes the current state of play in review of FOIA decisions, in which procedural rights mask the lack of meaningful review, and the rule of law would be better served by honestly describing the standard of review judges can actually employ.

189. The *Vaughn* index is a prime example of a tool judges believed would help the requester, but which has turned out to tilt the playing field even farther in favor of the agency. *See supra* note 82 and accompanying text.

190. My approach is consistent with an economic theory of "second best optimum":

> [I]f there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian [optimal] conditions, the other Paretian [optimal] conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Paretian optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Paretian [optimal] conditions. The optimum situation finally attained may be termed a second best optimum because it is achieved subject to a constraint which, by definition, prevents the attainment of a Paretian optimum.

offers a solution in this regard.[191] Reconceptualizing FOIA litigation as not an exception to basic administrative law principles, but rather subject to both the deference to and constraints on agencies in typical administrative litigation, would acknowledge the reality of deference in FOIA litigation and cabin its effects.[192] *Chenery*'s use in FOIA litigation, however, must be doctrinally and theoretically justified. When the reality of FOIA litigation—rather than the formal standards—is considered, the theories underlying *Chenery*, its practical operation, and the statutory scheme under FOIA all support its application.

A. The Chenery *Principle*

The origins of the *Chenery* principle are not entirely clear: while some ascribe constitutional dimensions to *Chenery*, others see it as part and parcel with statutory mandates, and still others understand *Chenery* as allocat-

---

R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956). Other scholars have applied this theory in the judicial context. *See, e.g.*, Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 29 & n.120 (2012) (demonstrating that, in the absence of true checks and balances, courts use a second-best approach to check their own power in ascertaining their jurisdiction to hear a case). As to FOIA litigation, the optimum might be true de novo review, without the application of the *Chenery* principle. Given that the optimal condition of de novo review is constrained by courts' ability to realistically second-guess certain agency representations and deference is thus used in practice, the "second best optimum" is not achieved by retaining the other condition of the optimum: inapplicability of *Chenery*. This Article contends that the second best optimum is achieved by departing from the condition of *Chenery*'s inapplicability as well and instead looking at FOIA litigation under the paradigm of typical administrative law litigation.

191. It is, by no means, the only solution to the problems posed in FOIA litigation. *See, e.g.*, Danae J. Aitchison, Comment, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 249–51 (1993) (suggesting that Congress should provide the courts with more explicit power to evaluate so-called Glomar responses in FOIA cases, in which the government refuses to admit or deny the existence of responsive records); 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, 235 (2006) (proposing that FOIA decisions could be moved closer to de novo review either by mandatory *in camera* review or through the use of plaintiffs' experts or court appointed independent experts).

192. The idea of the "second best" in the administrative law context has also been theorized. *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994). McCutchen contends that the administrative state is inherently inconsistent with the separation of powers principles in the Constitution, and argues that the Supreme Court should tolerate unconstitutional structures that are institutionalized but should also allow the creation of compensating institutions that move the balance of powers closer toward the constitutional optimum. *Id.* at 2–3, 11, 22. In short, the theories of second best solutions accept the initial "wrong," in this case deference to agencies in FOIA litigation, and look for a compensating or countervailing change in the state of play that will move the state of play closer to the ideal, even if the compensation itself is of questionable permissibility.

ing power among agency actors.[193] In every account of *Chenery*, however, there is an inherent and uncontroverted link between the application of the *Chenery* principle and the deference courts owe to an agency's position.[194] Not only are deference and *Chenery* linked, but, as this section will demonstrate, *Chenery* operates as a necessary and justified constraint on the deference the judiciary gives to the administrative state.[195]

1. Origins

The *Chenery* principle was announced in 1943 in *Securities and Exchange Commission v. Chenery Corp.* ("*Chenery*" or "*Chenery I*").[196] The dispute in *Chenery* arose under the Public Utility Holding Company Act ("PUHCA"), which required reorganization of public utility companies to be approved by the SEC.[197] The SEC denied approval of a particular plan because it permitted officers and directors of the company to execute trades on the company's securities during reorganization.[198] The SEC reasoned that such trades would violate the fiduciary duties of the officers and directors.[199] Reviewing this order, the Supreme Court concluded that the SEC wrongly found a fiduciary violation in the stock purchases since the purchases were not based on insider trading, preferential treatment, or secret dealings.[200]

The Court refused, however, to consider the SEC's alternative rationale, advanced for the first time in litigation, that even if there were no breach of fiduciary duty, the SEC had the discretionary power under the PUHCA to find a reorganization plan that permitted fiduciaries to trade in the company's stock either contrary to the public interest or not fair and equitable as required under PUHCA.[201] The Court explained that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[202] Since the rationale

193. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 417, 419 (1971) (relying in part on language from APA to justify the *Chenery* principle), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); Magill & Vermeule, *supra* note 176, at 1043 (arguing that *Chenery*'s effect is to reallocate power horizontally within agencies); Stack, *supra* note 175, at 982 (arguing that *Chenery* is an arm of the nondelegation doctrine).

194. *See infra* Part III.A.2.

195. *See infra* Part II.A.1.

196. 318 U.S. 80, 95 (1943).

197. *Id.* at 82.

198. *Id.* at 85.

199. *Id.*

200. *Id.* at 85–86, 93.

201. *Id.* at 90.

202. *Id.* at 87.

on which the SEC had relied was based on legal error, the Supreme Court reversed.[203]

Because *Chenery* concerned an agency adjudication with the hallmarks of formality and predated the APA, the principle announced might have been applied in limited circumstances or abandoned entirely. Indeed, the APA's clearly delineated distinction between formal and informal proceedings,[204] and between adjudications and rulemakings,[205] seemed ready-made for, at a minimum, a judicial review doctrine constrained to formal adjudications. Instead, the *Chenery* principle has grown in scope and is now held to apply to agency actions in almost every context.[206] In *Citizens to Preserve Overton Park v. Volpe*,[207] the Supreme Court extended the *Chenery* principle to informal adjudications such as the Secretary of Transportation's decision to permit construction of a federally-funded highway through a park because there lacked a feasible alternative.[208] In *Overton Park*, the Court cited *Chenery* for the principle that affidavits created during the litigation were "*post hoc* rationalizations" not entitled to consideration.[209] The Court explained that relying on such affidavits would also violate the judicial review provision of the APA, which requires the court to review "the whole record."[210] The Court concluded that the affidavits were not part of the "whole record," which the APA required to be the basis for review.[211] In effect, the Court, without much explanation, located the *Chenery* principle in the APA and extended it to constrain judicial review of both formal and informal adjudications.[212]

The Court has also extended the *Chenery* principle to the review of rulemakings. Informal rulemaking is the default procedure for the creation of binding, legislative rules, and is known more commonly as notice-and-

---

203. *Id.* at 95.

204. *See* 5 U.S.C. § 553 (2012) (enumerating the now-familiar notice and comment procedures for what are known as informal rulemakings, but requiring the more formal procedures in Sections 556 and 557 in those rulemakings specified to be made after a hearing on the record); *id.* § 554 (applying this section, and by reference, the formal procedures provided for in Sections 556 and 557, to those adjudications required to be decided after a hearing on the record, thereby distinguishing between formal and informal adjudications).

205. *Id.* § 551(4) (providing a definition of a "rule"); *id.* § 551(6), (7) (defining an "order" as the result of an adjudication, and encompassing everything other than a "rule").

206. Stack, *supra* note 175, at 956.

207. 401 U.S. 402 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

208. *Id.* at 417.

209. *Id.* at 419 (internal quotation marks omitted).

210. *Id.* (internal quotation marks omitted); 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

211. *Overton Park*, 401 U.S. at 419 (internal quotation marks omitted).

212. *Id.*

comment rulemaking. In *Motor Vehicle Manufacturers of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[213] the Supreme Court considered the National Highway Traffic Safety Administration's notice-and-comment rule repealing a requirement that all new cars have a passive restraint system consisting either of automatic seat belts or of air bags.[214] The Court described the appropriate review of notice-and-comment rules as what has now been dubbed "hard look"[215] review, a series of inquiries the Court found rooted in the formal arbitrary and capricious standard.[216] Under hard look review, a court must assure itself that an agency's position has not,

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[217]

Importantly, the Court, immediately after articulating this list, announced that the *Chenery* principle applies: "The reviewing court should not attempt itself to make up for such deficiencies [by] . . . supply[ing] a reasoned basis for the agency's action that the agency itself has not given."[218]

The *State Farm* decision even had the occasion to apply *Chenery* in the rulemaking context.[219] One ground on which the Court found the agency's analysis lacking was that, while it documented the problems associated with automatic seatbelts, it failed to consider the obvious alternative to repealing the rule entirely, which was to require airbags in all vehicles.[220] Because the agency had not considered that option, there were no reasons and no rationale in the record for rejecting it, and the Court accordingly refused to consider the agency's explanation proffered during litigation.[221]

2. Link to Deference

Thus established, the *Chenery* principle requires courts in a wide variety of cases reviewing agency actions to limit their inquiry to the permis-

213. 463 U.S. 29 (1983).

214. *Id.* at 38.

215. *See* Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1912–19 (2009) (describing the modern hard look doctrine as "best encapsulated" in *State Farm*).

216. *State Farm*, 463 U.S. at 42–43.

217. *Id.* at 43.

218. *Id.*

219. *Id.*

220. *Id.* at 49.

221. *Id.* at 50.

sibility of the agency's contemporaneous rationale for the decision. But, from where did this principle come? After all, appellate courts are generally free to affirm district court orders on any grounds apparent in the record, even if not relied upon or even ruled on by the district court.[222] When courts review acts of Congress, Congress is not required to explain itself and legislation typically must be upheld unless there is no permissible basis for it.[223] In this sense, then, administrative law is unique: only in the agency context do courts require the governmental action under review to stand or fall based on the reasoning provided at the time the decision was made.[224]

The *Chenery* Court suggested that this administrative exceptionalism arises from the constitutional separation of powers principles.[225] In *Chenery*, the Court explained that it was not up to the judiciary to decide what is contrary to the public interest or what is fair and equitable under the PUHCA.[226] Rather, the Court said, the agency must actually exercise its power, granted by Congress, to make such a determination.[227] To supplant reasons or rely on rationales not provided by the agency itself when it made the decision would, in effect, be overreaching on the part of the judiciary.[228] In fact, judicially provided rationales may not be rationales the agency would have actually adopted, thereby thwarting the outcome the agency would have reached. For this reason, "[i]ts action must be measured by what the [agency] did, not by what it might have done."[229]

After the *Chenery* Court reversed the agency's denial of approval of the reorganization plan, it remanded the case back to the agency for further consideration.[230] The agency, in turn, reconsidered the original matter and again rejected the proposed reorganization plan, but this time on a different rationale.[231] The new decision was again challenged, and the case again

222. *See* Helvering v. Gowran, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); Stack, *supra* note 175, at 955 (noting this general rule). *But see* Richard Murphy, Chenery *Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 826 (2012) (documenting instances where lower courts' failure to provide adequate reasoning to support discretionary decisions results in reversal).

223. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–96 (2012) (upholding the Patient Protection and Affordable Care Act on the rationale that it was an exercise of Congress's power to tax, even though Congress justified the legislation on the Commerce Clause); *see also* Stack, *supra* note 175, at 955 (contrasting this principle to administrative law rules).

224. Stack, *supra* note 175, at 955–56.

225. SEC v. Chenery (*Chenery I*), 318 U.S. 80, 94 (1943).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 93–94.

230. *Id.* at 95.

231. SEC v. Chenery (*Chenery II*), 332 U.S. 194, 196 (1947).

reached the Supreme Court (*Chenery II*).[232] This time the Supreme Court began by rearticulating the *Chenery* principle, calling it a "fundamental rule of administrative law," and warning that a court is "powerless" to affirm an agency action on a basis other than that which was stated by the agency at the time.[233] Further, the Court noted that "[t]o do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."[234] The agency's new rationale, the Court concluded, was adequate to sustain the agency's decision and the Court therefore affirmed the denial of plan approval.[235]

The explanations of the *Chenery* principle in *Chenery I* and *Chenery II* point to a separation of powers rationale, limiting the power of the judiciary when Congress has delegated the relevant authority exclusively to the executive branch.[236] This rationale has been rearticulated at various times by courts and scholars alike.[237] The Supreme Court's somewhat cursory explanation of the rationale behind the *Chenery* principle is, however, hardly a full accounting of the rule's relationship to other administrative law doctrines or to the constitutional foundations of agency authority. Indeed, Kevin Stack notes that despite the fact that *Chenery* remains one of the most common grounds for reversal of agency actions, there is a "curious uncertainty concerning its basis."[238] The separation of powers rationale itself is also somewhat unsatisfying, if not at times downright counterintuitive; it is, after all, a bit ironic to claim courts are more respectful of an agency's special role mandated by Congress when they overturn the agency's action than when they uphold it.[239]

As discussed below, other justifications for *Chenery* have been theorized, including one based on the nondelegation doctrine and another based

---

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 209.

236. *Id.* at 207; SEC v. Chenery (*Chenery I*), 318 U.S. 80, 88 (1943).

237. *See, e.g.*, Global Van Lines, Inc. v. ICC, 714 F.2d 1290, 1298–99 & n.8 (5th Cir. 1983) (noting that "*Chenery I* was based upon the proposition that a 'determination of policy or judgment' that Congress had entrusted to an agency could not be exercised in the first instance by a court"); Time, Inc. v. U.S. Postal Serv., 667 F.2d 329, 334–35 (2d Cir. 1981) (noting that *Chenery II* explained the purpose of the *Chenery* principle as avoiding "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency"); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 367–68 (2003) (noting that "[a]lthough one usually thinks of the doctrine as a limitation on the circumstances in which an agency action can be *upheld*, one of its corollaries is that, as a general rule, a court also may not *reject* an agency action by making its own determinations on an issue that lies within the agency's discretionary authority").

238. Stack, *supra* note 175, at 957.

239. *See* Murphy, *supra* note 222, at 846 (labeling as counterintuitive the *Chenery* Court's claim that upholding the Commission order would infringe on the Commission's authority).

on allocating power within the agency.[240] In the end, these justifications are highly related to one another, and, most importantly for the purposes of *Chenery*'s relationship to FOIA, each justification links *Chenery*'s application to judicial deference to agencies. To be sure, these justifications link *Chenery* specifically to *Chevron* deference, a type of deference not invoked in FOIA cases. As described below, however, the rationale linking *Chenery* to *Chevron* deference can be applied by analogy to link *Chenery* to the observed deference in FOIA cases as a practical reality, even if not as a formal undertaking.

The relationship between deference and the *Chenery* doctrine is longstanding, and can be found even in the separation of powers rationale articulated by the Supreme Court in the *Chenery* cases themselves.[241] In *Chenery II*, the Court explained that the *Chenery* principle applies when a court is "dealing with a determination or judgment which an administrative agency alone is authorized to make."[242] This is an important limitation on *Chenery*'s reach and is, of course, also essentially the same condition necessary for courts to defer to an agency's legal interpretation of an ambiguous statutory provision under *Chevron*.[243] Thus, where *Chenery* does not apply, *Chevron* likewise does not come into play.[244] For example, neither the *Chenery* principle nor *Chevron* deference is invoked when courts review agency interpretations of the APA,[245] the National Environmental Policy Act,[246] the Privacy Act,[247] or, relevant here, FOIA.[248] The reason for these types of exemptions is that these are statutes Congress has not delegated to any particular agency to administer.[249]

240. *See infra* notes 250–269 and accompanying text.

241. *Chenery II*, 332 U.S., at 207 (deferring to the Securities and Exchange Commission's conclusion disapproving of a federal water company's reorganization since the Commission made "an informed, expert judgment on the problem").

242. *Id.* at 196.

243. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining that when a statute is silent or ambiguous with respect to a specific issue, the court must defer to the agency's answer to that issue when it is based upon a permissible construction of the statute).

244. Although there is a large overlap in the conditions for applying *Chenery* and *Chevron*, the overlap is not complete. For a detailed account of some differences at the margins and cases in which only one or the other doctrine applies, see Stack, *supra* note 175, at 1010–13.

245. *See* Baylor Univ. Med. Ctr. v. Heckler, 758 F.2d 1052, 1059–60 (5th Cir. 1985) (declining to apply the *Chenery* principle to the agency's interpretation of the APA requirements).

246. *See* Olmstead Citizens for a Better Cmty. v. United States, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (declining to apply the *Chenery* principle to the agency's interpretation of NEPA).

247. *See* Louis v. U.S. Dep't of Labor, 419 F.3d 970, 977–78 (9th Cir. 2005) (declining to apply the *Chenery* principle to the agency's interpretation of the Privacy Act).

248. *See supra* Part II.B (discussing courts' rationales for not applying the *Chenery* principle to withholding decisions under FOIA).

249. Stack, *supra* note 175, at 965–66.

Stack provided a compelling constitutional account of this connection between *Chenery* and *Chevron* in his argument that *Chenery* is rooted in the nondelegation doctrine.[250] According to the nondelegation doctrine, Congress may not delegate away its legislative power, which is vested to it by the Constitution.[251] Modern nondelegation cases articulate the requirement that when Congress delegates power to the agencies, it must provide an "intelligible principle" to guide the agencies and by which courts may measure agencies' actions on review.[252] So long as Congress supplies such an intelligible principle, the delegation does not give away Congress's essential legislative power because Congress, not the agency, has made the critical policy choice.[253]

Stack's review of *Chenery*'s roots, however, was premised on a more nuanced understanding of the nondelegation doctrine. According to his account, *Chenery* is based in early nondelegation cases that articulated the nondelegation doctrine not as a single requirement, but in two parts: first, that Congress set the standard to guide agency action (the origins of the intelligible principle requirement); and second, that an agency expressly state the basis for its action (the origins, according to Stack, of the *Chenery* principle).[254] This two-part articulation reflected a "'contingency' theory" of nondelegation, which, Stack explained, allowed delegations to the executive branch only when the power to take a particular action was conditioned on the occurrence of some "named contingency," and the executive branch expressly found that such contingency was met.[255] Stack illustrated the contingency theory of nondelegation with an early case in which the executive branch deported an individual without making a finding that the person was an "undesirable" resident, even though the statute allowed the executive branch to deport only "undesirable residents of the United States."[256] Absent a finding of the condition—the undesirability of the resident—the executive branch had acted outside its delegated authority and thus unconsti-

250. *Id.* at 1007 (arguing that "[t]he nondelegation account of *Chenery* helps to explain why the demand for reasoned decision-making is part and parcel of the reasonableness inquiry at *Chevron* Step Two"). The nondelegation doctrine stems from the vesting clause in Article I, which vests all "legislative [p]owers" in Congress. U.S. CONST. art. I, § 1; *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (explaining the constitutional dimensions of the nondelegation doctrine).

251. Stack, *supra* note 175, at 982.

252. *Id.* at 958 (quoting J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

253. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (noting that Congress may wish to legislate in an area it had not previously sought to enter because "[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people").

254. Stack, *supra* note 175, at 982.

255. *Id.* at 983 (internal quotation marks omitted).

256. *Id.* at 985 (quoting Mahler v. Eby, 264 U.S. 32, 40 (1924)).

tutionally.[257] Subsequent early cases reaffirmed that an executive finding concerning a necessary condition for taking action was constitutionally required.[258]

Stack's account not only links the *Chenery* principle to nondelegation, but also to judicial deference to agency actions, most importantly *Chevron* deference.[259] Under *Chevron*, a court must defer to an agency interpretation of a statute the agency is charged with administering when the agency is interpreting an ambiguous provision and the agency's interpretation is reasonable.[260] The first part of the inquiry, whether the statutory provision is ambiguous or clear, is known as *Chevron* "Step One," while determining the reasonableness of the agency interpretation is known as "Step Two."[261] According to courts, *Chevron* deference is warranted when Congress leaves the meaning of a statute ambiguous because it intends to delegate to the agency the task of filling in the details by regulation by bringing to bear its expertise in the area.[262]

Stack demonstrated that when courts reach Step Two, it is the reasonableness of the agency's contemporaneous rationale that is to be tested, not a post-hoc rationale offered in litigation.[263] That is, *Chenery* constrains courts' exercise of *Chevron* deference by limiting the agency's position to which deference is owed to that which it took at the time the decision was made.[264] As Stack argued, the nondelegation account of *Chenery*, which preconditions the permissible exercise of agency action upon the agency contemporaneously providing a reason for its action, shows the common origins of both doctrines: ensuring Congress's delegation to the agency was

257. *See id.* at 984–85 (citing to *Mahler* to explain how the Court enforces the contingency theory of delegation by finding that specified contingency conditions are present).

258. *Id.* at 988; Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935) (invalidating the President's ban of "hot oil" in part due to a lack of finding even where the statute did not contain an express finding requirement).

259. Stack, *supra* note 175, at 1005.

260. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

261. *See* Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 659–60 (D.C. Cir. 2011) (explaining that if Congress has not unambiguously foreclosed the agency's statutory interpretation and there is some ambiguity that has left the agency within a range of possibilities, the agency will have survived *Chevron* Step One, leaving the court for *Chevron* Step Two to defer to the agency's interpretation if it offered a reasonable explanation for it).

262. *See Chevron*, 467 U.S. at 843–44 (deferring when "Congress . . . explicitly left a gap for the agency to fill"); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (explaining that *Chevron* deference applies when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

263. Stack, *supra* note 175, at 1006 (citing as an example Kansas City v. Dep't of Hous. & Urban Dev., 923 F.2d 188, 192 (D.C. Cir. 1991)).

264. *Id.* at 1007.

actually exercised by the agency.[265] Stack succinctly described the relationship between the two doctrines: "*Chenery* is the coin with which the agency pays for *Chevron* deference."[266] That is, without *Chenery*, agencies would be free not to articulate a rationale for their actions and courts would balk at deferring to rationales with which the agency may not even agree, as they may have been dreamed up only for the purpose of litigation.[267]

Another account of *Chenery*, while diverging from Stack's in its theoretical underpinnings, also closely links *Chenery* to *Chevron* deference. Elizabeth Magill and Adrian Vermeule reframe major administrative law doctrines, including *Chenery* and *Chevron*, not as primarily allocating power between the branches of government like a nondelegation account does, but rather as allocating power between different actors within the agencies themselves.[268] They identify *Chenery* and *Chevron* as two judicial review doctrines that have a common effect of empowering policy professionals and agency experts over lawyers.[269]

For *Chenery*, requiring the reasons given at the time the decision was made to be the sole grounds on which an agency action can be upheld means that various types of professionals, including technical and policy experts, are involved in the *ex ante* decisionmaking.[270] On this theory, lawyers may be involved, too, but they will not be the only or dominant force.[271] Without *Chenery*, an agency's actions can be defended on any ground once challenged in court, which would empower the lawyers representing the agency to claim a central role, formulating the justifications that will be argued in court and representations that will be made on behalf of the agency.[272] For exactly this reason, Judge Patricia Wald once offered advice to agencies "that it is more important to 'moot' the drafters of their

265. *See id.* at 992 (arguing that the *Chenery* principle's implementation of the express statement requirement promotes political accountability, nonarbitrariness, and regularity).

266. *Id.* at 959.

267. *Id.* at 958–59.

268. *See* Magill & Vermeule, *supra* note 176, at 1035 (arguing that within agencies, administrative law allocates power among professionals like lawyers, scientists, civil servants, and politicians, as well as agency heads, bureaucrats, and line personnel).

269. *See id.* at 1043–44, 1046, 1048 (noting that *Chenery* ensures that non-lawyers always have an *ex ante* role in developing agency positions, and that under *Chevron*, a lawyer's role is constrained to identifying the range of reasonable statutory interpretations while policymaking officials choose within the range). The courts also acknowledge *Chenery* as acting as a constraint on lawyers. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (holding litigation documents an inadequate basis of review under *Chenery*), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

270. Magill & Vermeule, *supra* note 176, at 1043–44.

271. *Id.* at 1044.

272. *Id.* at 1043.

regulations prior to issuance than the lawyers who go to court to defend those regulations."[273]

In conjunction with *Chenery*, *Chevron* has much the same effect. As Magill and Vermeule describe, *Chevron* is premised on the notion that there may not be a single correct statutory interpretation of an ambiguous provision.[274] Rather, the premise is that agencies will exercise their policy expertise to elect one among multiple permissible options.[275] The concept has been recently described as "*Chevron* space," boundaries within which the agency is free to make policy decisions with the force of law and without judicial interference.[276] If *Chevron* does not apply, a court will eventually decide precisely what a statute means and, as a result, the lawyers within the agency will take a central role in advising the agency on the proper meaning of the statute.[277] When, however, an agency's interpretation of a statute will be given *Chevron* deference, policymakers and experts will be empowered to choose the agency's path within the range of possibilities contemplated under the statute.[278] Moreover, under this view, Magill and Vermeule also posit that *Chenery* and *Chevron* are linked insofar as *Chenery* defines exactly what views are entitled to *Chevron* deference.[279]

B. Deference Under FOIA Justifies Chenery

Under the leading theoretical frameworks used to understand the *Chenery* principle, *Chenery* is thus inextricably tied to the doctrine of *Chevron* deference. Of course, *Chevron* deference is never implicated in FOIA cases because FOIA is not administered by any particular agency, but ap-

---

273. Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 639 (1994).

274. *See* Magill & Vermeule, *supra* note 176, at 1046 (discussing "agency interpretation as a choice . . . [between a] range of reasonable interpretations").

275. *Id.*

276. *See* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them* "Chevron *Space" and* "Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012) ("The whole idea of 'agency' is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it.").

277. Magill & Vermeule, *supra* note 176, at 1046–47.

278. *Id.* at 1046.

279. *Id.* at 1048–49. Magill and Vermeule use Justice Scalia's minority view, which would grant *Chevron* deference in a much wider range of scenarios than the current doctrine permits, in order to illuminate how permitting *Chevron* deference to anything less than official pronouncements contemporaneous with the decision eviscerates, in those instances, *Chenery*. *Id.*; *see also* Stack, *supra* note 175, at 1005 (stating that "[t]he clearest point of connection between *Chevron* and *Chenery* is that compliance with the *Chenery* principle operates as a condition for the agency to receive deference in *Chevron*"). For an argument that Scalia's view is no longer the minority, see Peter Strauss, *In Search of Skidmore* 8–9 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 13-355, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287343.

plies equally across the executive branch.[280] Moreover, FOIA denial letters do not have precedential value or the "force of law" as is required to invoke *Chevron* deference.[281] Thus, to extend *Chenery* to the FOIA context would necessarily invoke *Chenery* where *Chevron* does not apply.

Extending *Chenery* beyond circumstances where *Chevron* deference applies, however, has ample precedential support. *Chevron* is a deference doctrine that applies only to agencies' legal interpretations.[282] Other deference doctrines are, instead, rooted in the APA itself and apply to factual determination and discretionary decisions.[283] Judge Henry Friendly, in a foundational treatment of *Chenery*, argued that *Chenery* should apply to limit the inquiry concerning the rationales or reasons for a particular conclusion, but should not apply to mandate reversal every time the agency made an erroneous subsidiary fact finding.[284] Rather, erroneous fact finding, according to Judge Friendly, should be dealt with only substantively under the substantial evidence or other appropriate standard of review.[285] Judge Friendly also urged courts to distinguish between inadequate reasons and the *Chenery* doctrine itself, which concerns impermissible reasons.[286]

These distinctions, however, have not taken root in judicial decisions.[287] While perhaps undertheorized, courts have applied *Chenery* equally when deferential review of fact-finding or discretionary decisionmaking is invoked.[288] For instance, in *Burlington Truck Lines v. United States*,[289] the Supreme Court invoked *Chenery* in refusing to consider factual assertions advanced by an agency in an attempt to justify a discretionary choice of remedy.[290] In that case, *Chevron* deference was never in play; rather, the

280. *See* AT&T, Inc., v. FCC, 582 F.3d 490, 496 (3d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 1177 (2011) (declining to give *Chevron* deference to FCC in FOIA case).

281. *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001) (refusing to apply *Chevron* deference to tariff decisions with no precedential value and without "the force of law").

282. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–34 (2001).

283. 5 U.S.C. § 706(2) (2012).

284. Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, DUKE L.J. 199, 205, 207 (1969).

285. *Id.* at 205–06.

286. *Id.* at 206.

287. *See* Stack, *supra* note 175, at 964 (noting that courts have not "cabined *Chenery*'s application to the particular deficiency at issue in *Chenery*—agency reliance on a legal error").

288. *See* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962) (applying *Chenery* in a case reviewed under the APA's "substantial evidence" and abuse of discretion standards).

289. 371 U.S. 156 (1962).

290. *Id.* at 168; *see also* ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) (explaining that *Chenery* precludes a court from affirming "on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis

APA substantial evidence and abuse of discretion standards governed review.[291] In fact, *Chenery* has been invoked in some of the very same cases that have defined key APA standards of review that have nothing to do with *Chevron*, such as *State Farm*, which described the "hard look" version of arbitrary or capricious review.[292] Moreover, courts have explicitly linked the APA's requirements to provide reasons justifying certain types of decisions to the *Chenery* doctrine, rather than disaggregating them, as Judge Friendly proposed.[293] As a result, the *Chenery* principle is applied in reviewing nearly all types of administrative decisions reviewed under deferential standards, and has not been constrained to situations involving *Chevron* deference or formal delegations of lawmaking authority by Congress.[294]

When the purpose and operation of types of deference other than *Chevron* are examined, the theoretical underpinnings of *Chenery* and its linkage to *Chevron* justify *Chenery*'s application to decisions entitled to statutory deference by analogy. As described above, the theoretical link between the *Chenery* principle and *Chevron* deference is that they act in concert to ensure that agency expertise is actually brought to bear in areas within the agency's congressionally assigned purview.[295] Relatedly, they ensure that the courts are not deferring to (and thus empowering) the wrong set of actors: lawyers representing the agency in litigation.[296]

Those same principles animate other types of deference. While *Chevron* deference arises from Congress's delegation of lawmaking authority to an agency, APA deference standards are themselves also prescribed by Congress.[297] Standards of review have long operated as a way of assigning

---

the agency used, since that would remove the discretionary judgment from the agency to the court").

291. *Burlington Truck Lines*, 371 U.S. at 167.

292. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 49–50 (1983) (refusing to consider post-hoc factual assertions under *Chenery* in reviewing a discretionary decision under APA standards in a case having nothing to do with *Chevron* deference); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971) (same), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

293. *See, e.g.*, *Overton Park*, 401 U.S. at 402, 417, 419–20 (linking *Chenery* to the APA's requirement that the court review the whole record); Gatewood v. Outlaw, 560 F.3d 843, 846–47 (8th Cir. 2009) (linking *Chenery* to deference afforded under the APA).

294. *But see* Stack, *supra* note 175, at 1012 (arguing that *Chenery* should not apply if an agency lacks the authority to issue binding interpretations of law and thus its interpretations of a statute are reviewed using *Skidmore* deference, rather than *Chevron* deference).

295. *See supra* Part III.A.2. Under the nondelegation constitutional account, *Chenery* and *Chevron* deference have common origins: ensuring that the agency is acting within its power as delegated by Congress. Stack, *supra* note 175, at 982.

296. *See supra* Part III.A.2. On the policy-based account, *Chenery* has the effect of empowering agency professionals and experts, and disempowering, relatively speaking, the agency's lawyers. Magill & Vermeule, *supra* note 176, at 1046.

297. *See* 5 U.S.C. § 706 (2012) (statutorily enumerating APA standards of review, including deferential standards such as arbitrary, capricious, or abuse of discretion and substantial evidence).

primary responsibility between reviewing courts and initial decisionmakers.[298] When Congress prescribes a deferential standard of review, the initial decisionmaker is assigned greater responsibility, even if that responsibility is not lawmaking authority delegated from Congress.[299] Moreover, these assignments of responsibility are typically based on a view of the correct decisionmaker in light of relative expertise.[300] In any situation in which the courts owe agencies deference, the *Chenery* principle, in turn, operates to ensure that agency professionals actually exercise the responsibility they are assigned.[301]

The observed deference in FOIA cases, which empirical evidence suggests is even stronger than other types of deference to agencies, justifies the application of *Chenery* for these same reasons. First, while deference under FOIA is a murkier proposition, as Congress formally chose a de novo standard of review, Congress still made a key assignment of responsibility to agencies in the FOIA context in the form of a reasons-giving requirement, suggesting that Congress wanted the agency, not its DOJ lawyers, to provide reasons.[302] Second, in deferring to agencies in FOIA litigation, courts treat agencies as exercising expertise and discretion, and employing *Chenery* to ensure that expertise and discretion are actually exercised is therefore justified by the functional deference given.[303] Thus, like in other contexts in which *Chenery* has extended beyond cases invoking *Chevron* deference, the *Chenery* principle should apply to FOIA review.

1. Congressional Assignment

Courts have often relied on the *Chenery* decision in conjunction with governing statutes to conclude that post-hoc rationalizations will not be considered. For instance, the *Chenery* decision and resulting *Chenery* prin-

298. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47–48 (2000).

299. It is worth at least considering that there is some amount of consensus that Congress's intent to allocate authority to interpret ambiguous statutory provisions is a fiction, whereas the deferential standards in the APA were carefully considered by Congress and positively enacted. *See* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 792 (2002) (noting the fiction of delegation); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996) (detailing the tortured legislative history of the APA, including the standard of review provisions).

300. *See* Magill & Vermeule, *supra* note 176, at 1043–44 (arguing that *Chenery*'s effect is to reallocate power horizontally within agencies).

301. *Id.*

302. *See infra* Part II.B.1.

303. *See infra* Part II.B.2.

ciple predate the enactment of the APA.[304] Nonetheless, courts have at times relied on APA provisions to invoke *Chenery*, or at least to explain *Chenery*'s integral role in administrative law. For example, in extending the *Chenery* principle to informal decisionmaking in *Overton Park*, the Supreme Court relied on *Chenery* and the APA in the same breath.[305] Specifically, the Court referenced the APA's requirement that the court review "the 'whole record'" when an agency action is challenged.[306] In other cases, the Court has relied on other statutory requirements as an alternative rationale for applying *Chenery*.[307] In *State Farm*, the Supreme Court refused to consider post-hoc rationales in reviewing a notice-and-comment rulemaking, citing both *Chenery* and the governing motor vehicle statute.[308] The Court found it relevant that the motor vehicle statute specifically required a record of the rulemaking to be compiled and submitted to the reviewing court and that the reviewing court uphold any outcome supported by substantial evidence in the record as a whole.[309]

An analogous rationale provides strong support for applying the *Chenery* principle in the FOIA context, as the text of FOIA itself suggests *Chenery*'s application. FOIA details the specific procedures agencies must follow in responding to a FOIA request.[310] Agencies are under a strict twenty business day deadline to respond to a request for records made under FOIA, by which the agency must "notify the person making such request of such determination *and the reasons therefor*, and of the right of such person to appeal to the head of the agency any adverse determination."[311]

This requirement that agencies state their reasons for a FOIA denial is even more explicit than the statutory bases relied on by the Supreme Court to extend *Chenery* beyond formal proceedings in *Overton Park* and *State Farm*.[312] In fact, in the FOIA context, there need not be any mystery about where a reasons-giving requirement originates: it is explicitly laid out in the text of the statute itself.[313] The APA has no such explicit reasons-giving

304. The APA was enacted on June 11, 1946, after *Chenery* was decided on February 1, 1943. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946); SEC v. Chenery *(Chenery I)*, 318 U.S. 80 (1943).

305. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 417, 419 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

306. *Id.* at 419; 5 U.S.C. § 706 (2012).

307. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 50 (1983) (using the governing motor vehicle statute as a rationale for applying *Chenery*).

308. *Id.*

309. *Id.* at 43–44.

310. 5 U.S.C. § 552 (2012).

311. *Id.* § 552(a)(6)(A) (emphasis added).

312. *See supra* text accompanying notes 304–310.

313. 5 U.S.C. § 552(a)(6)(A).

requirement as to other informal adjudications.[314] As Stack has compellingly argued in other contexts, a reasons-giving requirement goes hand-in-hand with refusing to consider post-hoc rationalizations proffered by the agency's lawyers in litigation.[315] After all, it is unclear exactly what good the reasons-giving requirement serves if the reasons stated need not be the actual reasons justifying the agency's decision. In fact, the reasons-giving requirement in FOIA indicates that Congress wanted the agency, not the court, to supply the reasons for the decision.[316] Although not a formal delegation of interpretive authority as would invoke *Chevron* deference, this reasons-giving requirement represents Congress's assignment of responsibility in requiring agencies to articulate the basis for their own actions.

Moreover, FOIA administrative processing practices already meet this statutory requirement. Currently, a typical response from an agency in which it denies access to requested records contains a description of the records withheld, including their quantity and length, and the exemption to disclosure that is claimed as to each record or portion thereof.[317] There is also normally a very brief statement explaining why the claimed exemption applies to the materials.[318] Sometimes, response letters are much more detailed, but the typical letter has at least this much information.[319]

Given FOIA's existing procedures, applying *Chenery* would not require any further process or the development of a record at the agency level. Instead, the agency would simply be limited to relying on the rationale that

---

314. *See id.* § 557 (enumerating requirements for decisions pertaining only to formal adjudications and exempting out informal adjudications). Informal rulemakings are subject to an explicit reasons-giving requirement under the APA. *See id.* § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

315. Stack, *supra* note 175, at 1008.

316. *See* 5 U.S.C. § 552(a)(6)(A) (requiring agencies to provide FOIA requesters with reasons for their determinations).

317. *See* Plaintiff's Motion for Summary Judgment at 13–14, Shannahan v. IRS, 680 F. Supp. 2d 1270 (W.D. Wash. 2010) (No. C08-0452JLR) (providing a copy of a request denial that details the volume of withheld records and cites exemptions relied upon); Motion for Summary Judgment, exh. 4, Exxon Mobil Corp. v. U.S. Dep't of Interior, 2010 U.S. Dist. LEXIS 84782 (E.D. La. 2010) (No. 09-6732-AJM-JCW) (providing a copy of a request denial which described a rationale for the application of exemption 4 to certain withheld records); Complaint, exh. 2, Goodrich Corp. v. U.S. EPA, 593 F. Supp. 2d 184 (D.D.C. 2009) (No. 08-1625-JDB) (providing a copy of the request denial, which lists each withheld document and cites exemptions as to each); Plaintiff's Opposition and Cross-Motion for Summary Judgment, exh. H, Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs, 677 F. Supp. 2d 101 (D.D.C. 2009) (No. 09-01054-JDB) (providing a copy of a request denial that detailed the number of pages withheld and the exemptions claimed).

318. *See* GUIDE TO FOIA, *supra* note 68, at 93–94 (discussing the requirements the agency must follow when preparing a FOIA denial letter, including making a reasonable effort to estimate the amount of withheld material and must provide the reasons for the withholding).

319. *Id.*

it articulated in the original denial letter when its decision is challenged in court, and thus *Chenery* might incentivize the agency to respond more thoughtfully at the outset. Although the agency should be limited not only in the specific exemption claimed, but also in its reasoning for applying that exemption, determining whether the agency has strayed too far from its proffered rationale is not unlike the work courts already perform in determining whether an error is preserved for appeal.[320] The task is well suited to the judiciary and does not constitute an overreaching into agency policy matters.

The reasons-giving requirement in FOIA's statutory text provides a strong rationale for courts to adopt the *Chenery* principle as effectuating Congress's allocation of responsibility to the agencies to articulate the reasons for their actions. Without having to acknowledge the problematic deference practices in FOIA litigation, courts might even be able to rely exclusively on this provision to justify the application of *Chenery*.

2. Expertise

Chenery's application to FOIA litigation is also justified by the reality of deference given to agencies' positions in FOIA litigation.[321] Much of the deference courts give in practice to agency positions in FOIA litigation is premised on agencies' officials exercising expertise in administering FOIA.[322] Tellingly, spoken deference arises in areas typically within the executive branch's core—if not exclusive—purview, such as national security and law enforcement.[323] Spoken deference has also begun to appear in areas that concern the agency's own operations, such as the deliberative process privilege.[324] The areas in which courts have expressly deferred to agencies make clear that courts view the agency as exercising expertise that should be respected.[325] Indeed, while agencies may not be viewed as having expertise in FOIA law per se, courts repeatedly treat agencies' representations about the application of FOIA law to the agencies' own records as properly within the agencies' competency.[326]

One case decided by the D.C. Circuit contains a debate between the majority and dissenting opinions that crystallizes the difference between al-

320. *Cf.* Sims v. Apfel, 530 U.S. 103, 115–16 (2000) (comparing *Chenery*'s operation constraining agency arguments in litigation to waiver rules constraining litigants' arguments on appeal).

321. Verkuil, *supra* note 12, at 730; Kwoka, *supra* note 21, at 196–200.

322. Kwoka, *supra* note 21, at 201.

323. *See supra* Part II.A. (synthesizing spoken deference doctrines).

324. *See supra* Part II.A. (synthesizing spoken deference doctrines).

325. Kwoka, *supra* note 21, at 211–12.

326. *Id.* at 201.

lowing attorneys in litigation to form the agency's position and respecting the expertise of agency staff. In *Center for National Security Studies v. Department of Justice*,[327] the D.C. Circuit affirmed DOJ's denial of a request for the names of individuals detained on immigration charges and as material witnesses in the course of a post-September 11 investigation.[328] In so doing, the court expressly deferred to the agency's position that revealing the identities of the detainees would interfere with the ongoing law enforcement investigation because the case involved matters of national security.[329] Judge David Tatel, dissenting, took issue not with the majority's decision to defer to the agency's judgments, but with the particular representations to which the court deferred.[330] Specifically, he criticized the majority's acceptance of a representation made in DOJ's brief that, although some identities of detainees had been made known, those disclosures were made strategically so as not to impede the investigation.[331] As Judge Tatel wrote:

> While this may well be so, it is an argument of counsel, and though the court accepts it, FOIA requires that the agency—not counsel—explain such judgments under oath. The reason for this requirement is clear: We owe deference to agency expertise, not to lawyers defending the agency in litigation. If there are legitimate investigative reasons for releasing the names of some detainees, but not others, then [the agency official who did submit a declaration] or others responsible for the terrorism investigation should explain those reasons under oath—in an in camera affidavit, if necessary to protect the information—and that explanation would probably warrant judicial deference.[332]

That is, deference is properly accorded to the reasoning articulated by agencies, not to the positions taken by lawyers representing the agencies in litigation. Although Judge Tatel did not address the additional question of

---

327. 331 F.3d 918 (D.C. Cir. 2003).

328. *Id.* at 937. The court also affirmed the agency's withholding of other information related to the detainees, including circumstances of their arrest, detention, and representation by legal counsel. *Id.*

329. *See id.* at 928, 932 ("[We] join the Third, Fourth, and Seventh Circuits in holding that the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."). This is an example of spoken deference that arose under exemption 7 of FOIA, which covers certain law enforcement records. *Id.*; *see also* 5 U.S.C. § 552(b)(7)(A) (2012).

330. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 944 (Tatel, J., dissenting).

331. *Id.*

332. *Id.* (citations omitted).

timing—that is, contemporaneous reasons versus post-hoc rationalizations—his position clearly demonstrates the danger of deference unconstrained by *Chenery*.[333] In *Center for National Security Studies*, the majority deferred to factual statements that were not even in the form of admissible evidence, much less facts on which the agency relied to come to its position that was under review.[334]

As *Chenery*'s operation in other contexts makes clear, however, agency expertise is only respected if the lawyers must defend the agency's actions based on the rationale provided by the agency at the time the decision was made.[335] Thus, the courts defer not to a post-hoc litigator-crafted position, but to the professional staff of the agency charged with carrying out its substantive work.[336] Setting aside the inappropriateness of any sort of deference in the FOIA context, it is doubly inappropriate to give deference to the lawyers representing the agency in litigation who, after all, lack the subject-matter expertise that sits at the core of deferential standards of review.[337]

Indeed, as FOIA litigation currently stands, agencies are represented not by in-house lawyers, but by lawyers from the DOJ.[338] Without any *Chenery* constraint, lawyers representing the agency in litigation are empowered to rely on any justification they feel may support the agency's underlying decision, regardless of whether it is a justification the agency itself would agree with or would have adopted. Those positions, as the reality of FOIA litigation reveals, will receive both spoken and unspoken deference.[339]

The notion that agency expertise is invoked in FOIA is also consistent with a growing movement toward professionalizing FOIA officers, the agency-level employees responsible for processing FOIA requests and issuing responses. Improving the administration of FOIA at the agency level

333. *Id.* at 951–52.

334. *Id.* at 940.

335. Magill & Vermeule, *supra* note 176, at 1044.

336. *Id.* at 1043–44.

337. *Id.* at 1044.

338. *See* U.S. DEP'T OF JUSTICE, FOIA UPDATE, NO. 3, FOIA LITIGATION REQUIRES COORDINATION (1985), *available at* http://www.justice.gov/oip/foia_updates/Vol_VI_3/page1.htm (stating that the Department of Justice almost always represents the defendant agency on behalf of the government); *see also* Magill & Vermeule, *supra* note 176, at 1060 (noting that most agencies are represented by the Department of Justice in litigation generally).

339. While it is true that an agency must submit affidavits to support its motion for summary judgment or to oppose a requester's motion for summary judgment, FED. R. CIV. P. 56(c)(4), those affidavits are often drafted by the lawyers representing the agency and, in any case, are directed to be created by those lawyers in light of the legal strategy and positions the lawyers have decided are most likely to prevail in court.

was a key concern of FOIA reform legislation enacted in 2007.[340] To that end, one provision of the OPEN Government Act directed the Office of Personnel Management ("OPM") to conduct a study and submit a report to Congress on whether and how to improve personnel policies to encourage all federal employees generally to better comply with FOIA and, more specifically, to "enhance the stature of officials administering [FOIA] within the executive branch."[341] The provision went on to require OPM to consider whether a minimum pay scale for FOIA professionals should be established and whether there should be other changes to ensure a career track with advancement possibilities for those officials.[342]

While OPM's subsequent report fell far short of advocates' hopes, the reaction it provoked demonstrates a concerted movement toward professionalization of personnel dedicated to FOIA administration. OPM reported to the Senate that addressing the stature of access professionals within agencies should be left to the leadership of individual agencies, and not addressed through any executive-wide action.[343] It also recommended against establishing a minimum rate of pay or additional advancement opportunities.[344] The American Society of Access Professionals ("ASAP"), the primary professional organization for FOIA and privacy personnel, immediately responded with a call for OPM to reconsider its position, calling its initial letter a lost opportunity to increase the seriousness with which agency officials treat not only FOIA professionals, but also the overarching goals of transparency those professionals are charged with administering.[345] The requester community, as represented by a group of twenty organizations and advocacy groups as well as prominent named individuals, made a similar plea, noting OPM's process for reaching its conclusions was woefully inadequate.[346]

---

340. *See generally* Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Pub. L. No. 110–175, 121 Stat. 2524 (2007) (codified as amended at 5 U.S.C. § 552) (containing various provisions addressing administrative performance under FOIA).

341. *Id.* § 11(1)(B), 121 Stat. at 2530.

342. *Id.*

343. Letter from Michael W. Hager, Acting Dir., U.S. Office of Pers. Mgmt., to Richard Cheney, President of the Senate 1 (Dec. 16, 2008), *available at* http://www.openthegovernment.org/sites/default/files/otg/DMS%2015028%20Final.pdf.

344. *Id.* at 2–3.

345. Letter from Claire Shanley, Exec. Dir., Am. Soc'y of Access Prof'ls, to John Berry, Dir., U.S. Office of Pers. Mgmt. (Apr. 27, 2009), *available at* http://www.openthegovernment.org/sites/default/files/otg/ASAP%20Response%20to%20OPM-%20Final%2027%20Apr%202009%20doc.pdf.

346. Letter from The Nat'l Sec. Archive, et. al., to John Berry, Dir., U.S. Office of Pers. Mgmt. (June 3, 2009), *available at* http://www.openthegovernment.org/sites/default/files/otg/OPM%20Report%20letter-Final.pdf.

These responses demonstrate an increase in focus on adequately rewarding the work of FOIA personnel and encouraging transparency through greater professionalization.[347] In various contexts, researchers have found that denials of FOIA requests most often stem from a lack of understanding about the legal requirements of disclosure.[348] As one researcher found, "[m]ost of the problems with the way records custodians respond to requests for government information encountered in this study might be alleviated in one way: standardized formal training."[349] ASAP offers a menu of training opportunities, including its main annual training conference, directed at FOIA professionals.[350] These initiatives show, therefore, that there exists an increased focus on fostering and rewarding expertise among the agency-level personnel handling FOIA requests and issuing responses.

In addition to potentially exercising their expertise, agency officials have the option to release records as a matter of discretion in many cases, even if the records fall within an exemption to disclosure.[351] That agencies make discretionary determinations under FOIA invokes another key concern of administrative law: keeping agencies politically accountable.[352] *Chenery* promotes political accountability for decisionmaking by ensuring that "agency policy [has] been embraced by the most politically responsive and public actors within the agency," rather than DOJ lawyers whose responsibility for decisionmaking is both attenuated and not transparent.[353]

Given that courts engage in both spoken and unspoken deference in FOIA cases to the great advantage of agency defendants, at a minimum that deference should be constrained by directing it at the relevant actors and the

---

347. *See* Melissa Davenport & Margaret B. Kwoka, *Good But Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 UDC/DCSL L. REV. 359, 382–83 (2010) (showing significant resistance, including letters from officials at the American Society of Access Professionals, to an OPM report to Congress which stated that no changes to the professionalization of FOIA officers was necessary).

348. *See, e.g.*, Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313, 351 (2003) ("This study showed that records custodians do not completely understand the provisions of public records laws. As a result, records custodians are denying access to information that should be available to the public."); *see also* Davenport & Kwoka, *supra* note 347, at 384 (citing *Freedom of Information Amendment Act of 2000: Hearing on Bill No. 13-829 Before the Comm. on Gov't Operations*, 13th. Per. 1 (D.C. 2000) (statement of Kathy Patterson, Councilmember and Chair, Committee on Gov't Operations, Council of the District of Columbia) ("[T]oo often front line workers simply aren't aware that the public has a clear right to public documents.")).

349. Kimball, *supra* note 348, at 351.

350. *Training and Educational Programs*, AMERICAN SOCIETY OF ACCESS PROFESSIONALS, http://www.accesspro.org/programs/index.cfm (last visited Apr. 6, 2014).

351. *See supra* text accompanying note 170.

352. Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852–53 (2012).

353. Stack, *supra* note 175, at 993.

relevant rationales.[354] *Chenery* is the administrative law doctrine that has the effect of locating power within the agency to the correct decisionmaker and the rationale articulated at the time of the decision, which cabins the effect of deference so that agencies do not enjoy unconstrained deference.[355] Without a shift to reinstate true de novo review in FOIA litigation, the standard of review cannot serve as the justification for letting the government off the *Chenery* hook and allowing agencies to make new claims to justify their withholdings under FOIA once litigation has commenced. The inextricable link between deference to agency positions and requiring agencies to justify their decisions on the grounds contemporaneously articulated calls for the application of *Chenery* to FOIA litigation.

III. IMPROVING GOVERNMENT TRANSPARENCY

Apart from whether *Chenery*'s application to FOIA litigation can be justified, there remains the question of whether applying the *Chenery* principle in this context is desirable. Unquestionably, applying *Chenery* to FOIA would constrain the deference courts give to agency positions and rebalance the litigation dynamic by allowing courts to reverse agency decisions to withhold records when they fail to fully justify their decisions in their initial responses to requesters.[356] Because agencies would not be able to advance new arguments in litigation, rather than being anomalously high, reversal rates in FOIA cases might look like the reversal rates in other litigation reviewing agency decisions, representing more meaningful judicial oversight. The application of *Chenery* would also prevent the sandbagging problem that arises now (whether intentional or unintentional), in which the agency may not advance its strongest arguments at the administrative level, thereby leaving the requester in the dark as to the nature of the claims when evaluating whether to bring a lawsuit, only to find out once in litigation that the agency has an unbeatable argument.[357]

Though these benefits in ensuring a more meaningful check on agency secrecy seem clear cut, extending *Chenery* to FOIA is not without complication. *Chenery* is a controversial administrative law doctrine that has provoked some harsh criticism about its effect on the public's rights, agency administration, and judicial review. Most notably, critics argue that the

354. *See* Magill & Vermeule, *supra* note 176, at 1044 (arguing that *Chenery* represents a commitment to technical, nonlegal expertise within agencies).

355. *See* Stack, *supra* note 175, at 1008–10 (explaining *Chenery* as a constraint on deference).

356. *See infra* Part III.B. (explaining and citing support for the proposition that applying *Chenery* to FOIA processes will appropriately constrain agency decisionmaking).

357. *See supra* Part II.A.2. Even critics of *Chenery* admit that it is relatively effective in preventing sandbagging. *See, e.g.*, Murphy, *supra* note 222, at 848 (noting that *Chenery* promotes procedural fairness and protects against agency sandbagging).

Chenery principle leads to inefficient proceedings and formalistic agency responses to judicial reversals.[358] As explained in detail below, these criticisms, as a practical matter, simply do not have as much force with respect to FOIA litigation as they do in other contexts.[359] Moreover, because of the way FOIA litigation proceeds, *Chenery* may offer some unique benefits.[360]

A. Remands

One of the most pervasive critiques of *Chenery* concerns the operation of *Chenery* remands. A court applying *Chenery* in refusing to consider a new justification and reversing an agency's action as insufficiently justified will typically remand the matter to the agency for it to reconsider the matter afresh.[361] As *Chenery* itself illustrates, *Chenery* remands may result in the agency taking exactly the same position but advancing different reasons.[362] Thus, the plaintiff may have won the lawsuit, but may not receive any tangible relief at the end of the day.[363] Moreover, litigation may again ensue over the agency's newly offered rationale resulting in a back-and-forth litigation dynamic that has been compared to a game of Ping-Pong between the agency and the courts.[364]

By contrast, FOIA litigation as it currently stands avoids this inefficiency. In cases where the requester prevails and the agency's justification for withholding fails, courts order the release of the records to the requester under FOIA.[365] The judicial decision thus ends the matter and does not remand the case to the agency to reconsider the question in light of the court's decision or invite the agency to come up with a new way of achieving the

358. *See infra* Part III.A (highlighting criticism of the *Chenery* principle based on its allowing agencies to continue to promulgate the same policies, even after those policies have been rebuffed by courts during judicial review); *see also* Amy R. Motomura, *Rethinking Administrative Law's* Chenery *Doctrine: Lessons from Patent Appeals at the Federal Circuit*, 53 SANTA CLARA L. REV. 817, 861 (2013) (citing the significant inefficiencies inherent in the *Chenery* principle that, as some scholars hypothesize, have led to ossification of the administrative state).

359. *See infra* Parts III.A–B (addressing the concerns about the *Chenery* principle and arguing that they do not apply as strongly in the FOIA context).

360. *See infra* Parts III.A–B.

361. *See* Friendly, *supra* note 284, at 205–06 (discussing the characterization of the *Chenery* principle "as upholding 'the proposition that when an agency gives the wrong reasons for a decision . . . the reviewing court will send the case back for a new determination, even though the court *might have upheld* the order if no reasons had been assigned'").

362. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 209 (1947) (upholding, after the initial reversal and remand, the SEC's identical decision not to approve the public holding utility's reorganization plan because the SEC had provided a sustainable rationale).

363. *Id.* at 206–07.

364. Murphy, *supra* note 222, at 820.

365. 5 U.S.C. § 552(a)(3)(A) (2012).

same outcome.[366] A win for a FOIA requester is a full win under the current litigation regime. Because of this distinction, some hesitation is warranted before concluding that adopting *Chenery* in FOIA decisions would help requesters regain some of the footing they have lost in the FOIA litigation dynamic.

Despite some drawbacks associated with *Chenery* remands, the potential gains for both FOIA litigants and overall government transparency outweigh the downsides of applying *Chenery* to FOIA. First, FOIA requesters winning their cases outright under the current litigation regime are rare: only ten percent of requesters achieve this holy grail of litigation victory.[367] Indeed, FOIA decisions are affirmed far more than other administrative decisions.[368] The spoken and unspoken deference doctrines that have developed uniquely in FOIA jurisprudence, combined with the lack of a *Chenery* constraint on agencies' arguments, go a long way to explaining the government's remarkably high success rate in FOIA litigation. [369] Thus, the current regime results in very few requester wins.[370]

As numerous commentators have observed, judges often find themselves in seemingly difficult positions when adjudicating FOIA cases.[371] For instance, they must assess the government's claims about national security interests and the potential dangers that might arise from releasing records.[372] If courts err in their assessment, judges fear that improperly released records might have devastating consequences.[373] The consequences of erroneous release may not be as vividly illustrated in those cases not involving national security claims, but they are nonetheless considerable. Wrongly released records could, for instance, compromise individuals' per-

366. *Id.*; *see also* Green v. Dep't of Commerce, 618 F.2d 836, 841 (D.C. Cir. 1980) (stating that in a FOIA case a final decision "is an order by the District Court requiring release of documents by the Government to the plaintiff, or an order denying the plaintiff's right to such release").

367. Verkuil, *supra* note 12, at 734.

368. Zaring, *supra* note 22, at 169.

369. *See supra* Part II.A.

370. Verkuil, *supra* note 12, at 734.

371. *See, e.g.*, Fensterwald v. CIA, 443 F. Supp. 667, 668 (D.D.C. 1977) (noting that the court is in a difficult position in FOIA cases due to problems of proof and procedure, and because FOIA litigation turns on "narrowly drawn factual determinations that are *not* the product of adversarial give and take"); 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, 89–90 (1992) (discussing problems facing courts reviewing FOIA cases concerning national security, including the weight to give evidence and the procedures to be used to model the adversarial setting).

372. Fuchs, *supra* note 67, at 163.

373. *See, e.g.*, Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (finding that disclosure of CIA research efforts "may compromise the Agency's ability to gather intelligence as much as disclosure of intelligence sources").

sonal privacy rights or companies' trade secrets.[374] Moreover, because the full adversarial process is not brought to bear in FOIA cases (albeit largely as a result of unspoken deference doctrines created by the courts themselves), courts may feel ill equipped to judge many of the governments' claims.[375] It is understandable that courts may err on the side of caution when faced with a difficult decision. This is especially true when courts perceive an error in favor of disclosure as risking a very tangible harm, but see an error in favor of secrecy producing only a more ephemeral informational harm to a requester, which can in any case be reviewed by a higher court.

The dilemma courts face, however, may partly be brought about by FOIA's strong medicine. The statute gives the district court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[376] As FOIA litigation currently stands without the application of *Chenery*, all arguments are considered and ruled upon with nothing left for the agency to do after a judgment. Thus, the only two options are to uphold the agency's decision withholding the records from the requester or to order immediate release of the records into the public domain under this statutory provision.

Were *Chenery* to apply, it would provide a third option: a "reversal-lite" approach. Because courts would only consider those justifications offered at the administrative level, it would have the option to reverse on those justifications but remand to the agency for reconsideration. According to Judge Patricia Wald, a *Chenery* reversal "says 'No' to the agency, yet gives it a second chance with the court's guidance to reach the result it thinks proper."[377] If *Chenery* were applied and a reverse-and-remand for reconsideration option were available, courts might be less reluctant to reverse agency decisions that are poorly supported. For this same reason, even the same courts that have created the very deference that troubles FOIA litigation may be attracted to a solution that increases their menu of remedial options. Instead of ordering the release of contested records, the court could remand to the agency with instructions to redo its own analysis. This point is worth emphasizing: requesters would likely achieve more success and reversal rates might increase in FOIA cases if courts had more

374. *See* 5 U.S.C. § 552(b)(4), (6) (2012).

375. *See, e.g.*, *Fensterwald*, 443 F. Supp. at 669 (explaining the difficulty of ruling on FOIA claims, even when the court conducts in camera review of withheld records).

376. *See* 5 U.S.C. § 552(a)(4)(B).

377. Patricia M. Wald, Keynote Address at the Section of Administrative Law Fall Meeting (Oct. 1987), *The Contribution of the D.C. Circuit to Administrative Law*, *in* 40 ADMIN. L. REV. 507, 529 (1988).

available remedial options, such as the reverse and remand that *Chenery* provides.[378]

Of course, a reverse and remand order does little good if the agency arrives at the same conclusion, but history demonstrates that remanding to the agency is not necessarily an exercise in futility. As Judge Friendly described in a seminal article on the *Chenery* doctrine, *Chenery* usefully "serves the 'think-it-over' function."[379] Judge Friendly points to an example in which seven of the eight supplied reasons for a decision made by the ICC about railroads were found by a court to be invalid and the decision was reversed and remanded under *Chenery*.[380] The ICC then revisited the decision and concluded its initial position was in error, and it reversed its own initial action.[381] Emily Hammond has recently demonstrated in the regulatory context that even when remands lead to serial litigation, benefits accrue: "Courts and agencies engage in fruitful discussions that lead to better understanding of the issues and, ultimately, their resolution."[382] Although empirical evidence is mixed, some studies strongly suggest remands often produce a change in agency position. For instance, two separate studies found that certain agencies made at least some policy changes in about three-quarters of remanded cases.[383] One study demonstrated major changes about forty percent of the time.[384]

Without doubt, agencies often take a different approach. As in *Chenery*, agencies may adopt the same position on remand as they did initially, and empirical evidence suggests agencies are apt to do so when regulatory schemes are at issue.[385] There is good reason to believe, however,

---

378. This conclusion is supported by empirical data. In other administrative review contexts, *Chenery* is "one of the most common grounds for judicial reversal and remand." Stack, *supra* note 175, at 957 (citing Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 tbl. 6); Wald, *supra* note 377, at 528.

379. Friendly, *supra* note 284, at 209.

380. *Id.* at 214; N.Y., N.H. & H.R. Bondholders Comm. v. United States, 289 F. Supp. 418, 446 (S.D.N.Y. 1968).

381. Friendly, *supra* note 284, at 214.

382. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1725 (2011). Emily Hammond Meazell now goes by Emily Hammond. *See Faculty Profiles – Emily Hammond*, WAKE FOREST UNIV. SCH. OF LAW, http://law.wfu.edu/faculty/profile/meazeleh/bio/ (last visited Apr. 18, 2014).

383. ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 91 (2009).

384. *See* Schuck & Elliott, *supra* note 378, at 1047 (describing the major changes finding with regard to the post-remand process).

385. *See* William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 445 (2000) (concluding that agencies are still able to implement their overall regulatory program even after a remand).

that agencies are more apt to reach the same conclusion on remand in regulatory processes rather than adjudicatory processes such as FOIA. Rulemakings tend to embody agency policy goals set by high-ranking officials, and after an investment of time and research considering the various options.[386] As reflections of the agency's policy judgment, regulatory decisions tend to be more considered and planned than adjudications, which tend to be more hurried, based on less extensive records, and made by low-level staff.[387] This distinction is especially true of informal adjudications like decisions to withhold or disclose documents pursuant to FOIA because they need not be decided through the formalized processes enumerated in the APA. Consequently, agencies are likely not as wedded to these adjudicated positions as they are to the regulations that they have determined best promote their policy objectives.[388] In fact, as Judge Friendly noted, these attributes of adjudicatory administrative proceedings may suggest a greater need for "judicial enforcement of the requirement of reasoned decision" through the *Chenery* principle.[389]

In FOIA litigation, there is an additional reason agencies may choose to change their position on remand: at the point of reconsidering the matter, the only cost to the agency of avoiding another round of litigation is releasing the records.[390] In *Chenery II*, the court noted that after *Chenery I*, the agency was "bound to deal with the problem afresh."[391] There, however, the result was that the agency had to go through another formalized process, including a hearing, taking evidence, and drafting a new decisional document.[392] Agencies faced with *Chenery* remands in FOIA cases, by contrast, may have more incentive to reevaluate their positions and to release records because doing so is relatively costless and reaching the same conclusion risks another round of litigation.

In fact, the Ping-Pong analogy, which is used to critique *Chenery* on the grounds that it produces delay and ossification of agency process, is also

386. *See* Friendly, *supra* note 284, at 216 (discussing this phenomenon in the context of administrative law in the 1970s specifically).

387. *See id.* (noting that the application of *Chenery* to such cases could "be a blessing or a curse").

388. *See* Jordan, *supra* note 385, at 440 (giving an empirical account of agencies persevering in attaining their policy objectives in the face of judicial reversals and remands).

389. Friendly, *supra* note 284, at 216.

390. In fact, it would be even more costless for the agency to change its position on releasing records under FOIA when it does so on a *Chenery* remand than when it does so in litigation, because changing its position in litigation can result in an award of attorneys' fees to the plaintiff. *See* 5 U.S.C. § 552(a)(4)(E)(ii)(II) (2012) (allowing an award of attorneys' fees when a plaintiff has substantially prevailed, and defining "substantially prevailed" to include "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial").

391. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 201 (1947).

392. *See id.* at 198–99 (describing the agency's process after remand).

less apt in the FOIA adjudication context.[393] Litigants challenging regulations, which tend to burden them with extra requirements, may benefit from delay itself and thus use *Chenery* to effectuate a substantive outcome for a period of time.[394] FOIA litigants, however, do not benefit from delay, and thus have no incentive to use *Chenery* as a litigation weapon against the agency. If anything, since *Chenery* is unidirectional, aggrieved individuals under FOIA may be able to take advantage of it to enforce reasoned decisionmaking, but cannot use it to promote a litigation strategy alone.[395] Accordingly, *Chenery* remands, while seemingly a weak remedy (and without a doubt a weaker remedy than the remedy of immediate release provided under the statutory text of FOIA), nonetheless hold great promise for FOIA requesters.

Another key benefit to requesters comes from *Chenery* remands, regardless of the agency's subsequent actions: the judicial precedent rejecting the agency's claims of exemption. Because *Chenery* would empower courts to reverse weak agency claims of withholding more often, courts would be able to create strong precedent policing the boundaries of the exemptions, rather than watering them down so as to avoid what courts might see as a risky result. The precedent would then bind not only future cases, but also administrative processing of FOIA requests.[396]

Finally, not all FOIA withholdings that are reversed by courts would be remanded under *Chenery*. Courts would still be empowered under FOIA to order the release of records, and the *Chenery* doctrine, over time, has admitted to some flexibility[397] that could dictate when and how courts should simply order release of records versus reverse and remand for fur-

393. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion) (addressing a critique of *Chenery* remands as creating a Ping-Pong game between the courts and the agency).

394. *See* Pieter M. Schenkkan, *When and How Should Texas Courts Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1135 (1995) (observing that "many see judicial activism as a threat that gives regulated industries, with their superior litigation resources, an additional means to delay or defeat progressive regulation").

395. *See* Friendly, *supra* note 284, at 216–17 (noting that "the prolonged process of reversal and remand for failure to state reasons adequately and correctly would be peculiarly painful to individuals needing quick relief and lacking the funds for protracted proceedings," but that a "partial answer" can be found in that *Chenery* "will be invoked only when the agency has denied relief to an individual or has proceeded against him for a wrong reason, not when it may have erred in doing what he wanted").

396. For instance, DOJ issues guidance to agencies to be used in processing FOIA requests based on judicial interpretations of FOIA. *See, e.g.*, *DOJ Guide to the Freedom of Information Act: Table of Contents*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/foia_guide09.htm (last visited Apr. 6, 2014).

397. Even the Supreme Court has at times strained the *Chenery* principle to accommodate competing concerns and uphold the agency's action. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (upholding an agency action on grounds other than those articulated contemporaneously).

ther consideration.[398] For instance, *Chenery* remands are inappropriate when there is but one permissible outcome; as Judge Friendly explained, it is a "scarcely questionable principle that when agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality."[399] This precedent, which establishes a sort of "futility exception," would justify a court in deciding that release of records is mandated and order the agency to do so as FOIA contemplates, and as courts are currently authorized to do.[400] *Chenery* would simply present another option. In fact, one recent call for reform in *Chenery*'s application would allow exactly this type of flexibility in courts' application of the *Chenery* doctrine.[401] Indeed, requesters may well continue to win outright the ten percent of FOIA cases they currently win, given how strong those cases have to be for the courts to overturn the agencies under the current regime.

B. Administrative Decisionmaking

Chenery's reason-giving requirement has been lauded as a method through which to improve the administrative process itself, irrespective of judicial review.[402] Requiring and holding the agency to a contemporaneous justification motivates an agency to give the matter serious consideration at the outset, documents agency rationales that may guide its actions in the future, and contributes to agency accountability.[403] Perhaps even more than in other contexts, *Chenery* has great promise to improve the administrative processing of FOIA requests and responses to the benefit of all requesters, not just those requesters who later become litigants.

---

398. There may also be instances where courts should consider post-hoc rationales in FOIA cases despite *Chenery*, such as when the application of an exemption could not have been asserted at the time of the initial decision, but is available at the time of litigation. *See, e.g.*, Frito-Lay v. U.S. Equal Opportunity Emp't Comm'n, 964 F. Supp. 236, 239 (W.D. Ky. 1997). In *Frito-Lay*, the court noted that the agency invoked exemption 7(A), which covers certain law enforcement records relating to a pending investigation, in responding to plaintiff's request. *Id*. By the time litigation commenced, the investigation was over, thereby eliminating that claim; however, another exemption, which would not have been available to plaintiff during the investigation, was now appropriately invoked. *Id.*

399. Friendly, *supra* note 284, at 210. Friendly also argues that *Chenery* should not require remand where it is clear that the agency would come to the same conclusion. *Id.* Other commentators have called this the "harmless error rule" in the *Chenery* context. *See, e.g.*, Murphy, *supra* note 222, at 864–68.

400. *Cf.* Levin, *supra* note 237, at 298–99 (explaining that key administrative law remedies have admitted to flexibility when courts feel the practical consequences of strict enforcement would be unduly disruptive).

401. *See* Murphy, *supra* note 222, at 876–77.

402. Stack, *supra* note 175, at 992–96.

403. Murphy, *supra* note 222, at 849–50.

Stack's linkage of *Chenery* to constitutional nondelegation norms also illuminates the link between *Chenery* and better administrative decisionmaking generally. He contends that *Chenery* promotes rule-of-law values because the reasons given for decisions made "have greater generality than the outcomes they support, [and therefore] giving a reason typically implies a commitment to outcomes falling within the reason's scope."[404] In turn, a collection of decisions over time with articulated rationales, as Stack describes, "makes each agency action . . . a source of constraint for future actions."[405] In this way, *Chenery* promotes nonarbitrariness in agency decisionmaking by spurring the agency to create a sort of common law for itself. Judge Friendly notes that *Chenery*, apart from its outcome in particular cases, "should improve the administrative process" in this regard.[406]

As it currently stands, administrative processing of FOIA requests is notoriously poor, making this processing perhaps the single biggest concern regarding FOIA among advocates, Congress, and FOIA users.[407] Numerous reports show that delay,[408] over-withholding,[409] and nonresponsiveness[410] are rampant across agencies and FOIA offices. Congress has made

404. Stack, *supra* note 175, at 997.

405. *Id.* at 998.

406. Friendly, *supra* note 284, at 210.

407. *See* WENDY GINSBERG, CONG. RESEARCH SERV., THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND AND POLICY OPTIONS FOR THE 113TH CONGRESS 13–14, 16 (2013) (noting that use of some exemptions by agencies is growing and observing that "every Congress since the 109th" has introduced "a bill entitled the Faster FOIA Act"); *Administration of the Freedom of Information Act: Current Trends: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H.R. Comm. on Oversight and Government Reform*, 111th Cong. 41–50 (2010) (statement of Larry F. Gottesman, Nat'l FOIA Officer, EPA) (testifying that the EPA took aggressive steps to decrease the backlog of FOIA requests, including revising procedures and processes, and deploying updated information technology tools).

408. *See* Nate Jones, *The Rubber Hasn't Met the Road. Response to the Department of Transportation's Letter to the Washington Post*, NSA ARCHIVE (Mar. 23, 2011), http://nsarchive.wordpress.com/2011/03/23/the-rubber-hasnt-met-the-road-response-to-the-department-of-transportations-letter-to-the-washington-post/ (noting that the average response time for a simple FOIA request to the Department of Transportation is 141 days); *see also* NAT'L SEC. ARCHIVE, JUSTICE DELAYED IS JUSTICE DENIED 1 (2003), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/tenoldest.pdf (finding that as of 2003, the oldest FOIA requests dated back to the 1980s); Press Release, Public Citizen, Despite Progress in Transparency, Obama Administration Still Slow to Act on Freedom of Information Requests (Mar. 18, 2010), http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3084 (finding that, while the Obama Administration has increased its efforts toward greater government transparency, FOIA delays and backlogs still persist); *FOIA's 40th Anniversary – Bigger Backlogs and Poor Planning*, CTR. FOR EFFECTIVE GOV'T (July 11, 2006), http://www.foreffectivegov.org/node/2988 (finding that FOIA's backlogs have been increasing).

409. Sam Kim, *FOIA Performance Goes from Bad to Worst*, CTR. FOR EFFECTIVE GOV'T (Aug. 21, 2007), http://www.foreffectivegov.org/node/3411 (noting a rise in denials of information).

410. Lauren Harper, *Why Agencies Should Not be Allowed to Lie About FOIA Requests*, NSA ARCHIVE (Oct. 25, 2011), http://nsarchive.wordpress.com/2011/10/25/foia-what-is-it-good-

various legislative efforts to reform administrative processing in response to these problems. For instance, in the 2007 OPEN Government Act, Congress established the position of "FOIA Liaison" in each agency, a position dedicated to serving the public by answering concerns about their FOIA requests and assisting in the resolution of disputes about request processing.[411] Congress also mandated individualized tracking numbers for requests[412] and created penalties for agency delays.[413]

Moreover, all but a tiny fraction of FOIA denials are ever challenged in court, making the administrative process the final word on almost every FOIA request.[414] Improving the administrative processing of FOIA requests is, therefore, crucial to improving FOIA as a tool for government transparency. *Chenery*'s effect of incentivizing more resources to be spent at the agency level in this context would be a net benefit to all FOIA requesters, and therefore serve to increase government transparency.[415] Promoting reasoned decisionmaking at the front-end is far more effective in the FOIA context than back-end corrections by the courts. Moreover, *Chenery*'s promise in the FOIA context may be even greater than in other contexts in which agencies have more built-in incentives to invest in the administrative process.

IV. CONCLUSION

FOIA litigation has proven to be a far more feeble bulwark against governmental attempts to conduct its affairs in secret than Congress envisioned. As deference has crept into FOIA jurisprudence and agencies have been subjected to less and less judicial oversight, affirmance rates in FOIA cases are among the highest of any type of administrative action reviewed in federal court. Compounding the problem, the deference that courts give

---

for%E2%80%A6if-the-justice-department-has-its-way/ (reporting on a problem of agencies falsely responding that records responsive to a FOIA request do not exist).

411. Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Pub. L. 110–175, 121 Stat. 2524 (2007) (codified as amended at 5 U.S.C. § 552).

412. *Id.* § 7.

413. *See id.* § 6(b) (instituting a penalty in the form of barring the agency from collecting certain fees from requesters).

414. In fiscal year 2011, 644,165 FOIA requests were made, resulting in 438,638 final agency decisions, 202,164 of which denied access either to all of the requested records or at least some portion of them at the administrative level. *What Is FOIA?: FOIA Data at a Glance—FY 2008 through FY 2012*, U.S. DEP'T OF JUSTICE, http://www.foia.gov (last visited Apr. 23, 2013). Over the last thirty years, however, only about three hundred to five hundred lawsuits challenging agency denials are decided by the courts each year. *See Federal Court Cases: Integrated Database*, FED. JUDICIAL CTR., http://www.icpsr.umich.edu/icpsrweb/landing.jsp (select "Find & Analyze Data," then search for "federal judicial center integrated database") (last visited Apr. 6, 2014).

415. *See* Stack, *supra* note 175, at 971. Stack notes that *Chenery* "increases the resources that agencies must devote to explaining the decisions they make." *Id.*

to agencies in FOIA litigation is not constrained by *Chenery*'s requirement that the agency justify its action on the rationale offered at the time the decision was made rather than post hoc. So long as courts continue to defer to agency decisions to withhold government documents rather than apply the true de novo review standard explicitly required by the statute, *Chenery*'s application to FOIA litigation promises to even the playing field between agencies and requesters. Moreover, applying *Chenery* may push reversal rates in FOIA litigation closer to the norm across administrative law, restore litigation as a means to check agency secrecy, and improve administrative processing of FOIA requests even for those requesters who will never litigate a denial of information access.