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NATIONAL SECURITY INFORMATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT: HISTORICAL PERSPECTIVES AND ANALYSIS

Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives. A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both.

James Madison¹

Democratic self-government requires a free flow of information from the government to the people. The Freedom of Information Act² of 1966 recognized that the necessity for citizen access to information must be balanced against the countervailing danger of breaching secrecy necessary to the national security. The recent Vietnam, Watergate, and post-Watergate revelations, however, have indicated that there are severe defects in this balance.

In October 1974, Congress amended the Freedom of Information Act,³ in part to provide a more enlightened approach to the disclosure of national security information. This article examines the amendments in light of past attempts to penetrate the secrecy surrounding our governmental institutions.

Part I reviews the basis for governmental withholding of national security information prior to the Freedom of Information Act; part II examines the impact of the 1966 Act on the executive's privilege in this area; and part III discusses the 1974 amendments to the Act.

I. GOVERNMENTAL SECRECY PRIOR TO THE FREEDOM OF INFORMATION ACT

Substantial growth in executive power began during the New Deal and has continued through expansion of the federal administrative agencies established at that time. This power is derived

1. Letter from James Madison to W.T. Barry, Aug. 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910), *as quoted in* S. REP. NO. 813, 89th Cong., 1st Sess. 2-3 (1965).

2. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, codified by Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1971)).

3. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *amending* 5 U.S.C. § 552 (1971) (codified at 5 U.S.C. § 552 (Supp. IV, 1975)).

in part from the vast storehouses of information under the agencies' virtually complete control. In general, the agencies have denied public access to information the disclosure of which "in their judgment . . . would, on public considerations, be inexpedient."⁴

Congressional sanction of executive nondisclosure began with the housekeeping statutes. Enacted by the First Congress, these statutes established the first executive departments and gave each department head authority over department records.⁵ In 1873 these laws were consolidated into a single housekeeping statute which provided that "[t]he head of each Department is authorized to prescribe regulations, not inconsistent with law, for the . . . custody, use, and preservation of the records, papers, and property appertaining to it."⁶

The public disclosure section of the Administrative Procedure Act⁷ was a more recent authorization of executive nondisclosure. It limited access "to the extent that there was involved . . . any function of the United States requiring secrecy in the public interest"; information could be withheld "for good cause found," and could only be disclosed if the party seeking it was "properly and directly concerned."⁸

Until enactment of the Freedom of Information Act in 1966, the courts were of negligible assistance to people seeking access to information held by the executive branch. The judicial view was that courts could not require disclosure when in the opinion of the executive it would be contrary to the public interest.⁹ A

4. *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, "Freedom of Information and Secrecy in Government,"* 85th Cong., 2d Sess. 77 (1958). The hearings contain a history of executive refusals to furnish information and papers which are deemed confidential. *Id.* at 63-146. See also 11 OP. ATT'Y GEN. 137, 142-43 (1869) (by Attorney General Speed).

5. *E.g.*, Act of July 27, 1789, ch. 4, § 4, 1 Stat. 29 (Dep't of Foreign Affairs, later called the Dep't of State); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (Dep't of the Treasury). Similar statutes were passed for subsequently created departments. *E.g.*, Act of April 30, 1798, ch. 35, § 2, 1 Stat. 554 (Dep't of the Navy); Act of March 3, 1849, ch. 108, 9 Stat. 395 (Dep't of the Interior).

6. R.S. § 161 (1875), as amended, 5 U.S.C. § 301 (1971) (corresponds to 5 U.S.C. § 22 (1958)). Congress amended the Act in 1958 to limit its usefulness as a justification for nondisclosure: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301 (1971) (corresponds to 5 U.S.C. § 22 (1958)), formerly R.S. § 161 (1875).

7. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946), as amended, 5 U.S.C. § 552 (Supp. IV, 1975).

8. *Id.*

9. See 40 OP. ATT'Y GEN. 45 (1941) (by Attorney General, later Mr. Justice Jackson).

Supreme Court decision in 1900 was an early piece in the pattern of judicial deference. In *Boske v. Comingore*,¹⁰ the Court reversed a state court ruling which held an Internal Revenue collector in contempt for refusing, based upon a departmental regulation, to turn over certain reports in his custody. In the course of its opinion the Court commented upon the public's right of access to information under government control:¹¹

[W]e do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public, despite the wishes of the Department. That cannot be admitted.

In general, secrecy has been premised upon historical practice and constitutional directive, as well as upon congressional mandate.¹²

National Security Information

The executive's control over the flow of national security information was nearly absolute until the amendment of the Freedom of Information Act in 1974. In addition to a common law, state-secrets privilege not to reveal matters concerning strictly military and diplomatic affairs,¹³ the judicial branch recognized an executive privilege of constitutional stature,¹⁴ and therefore refused to review any executive decision not to reveal information claimed to be vital to the national security.¹⁵ Support for this approach lies in the President's power to conduct foreign

10. 177 U.S. 459 (1900).

11. *Id.* at 469; see *In re SEC*, 226 F.2d 501 (6th Cir. 1955) (protecting a claim of privilege pursuant to an agency rule); *Universal Airline v. Eastern Air Lines*, 188 F.2d 993, 999 (D.C. Cir. 1951) ("the right of administrative agencies to make reasonable regulations regarding their records and reports").

12. See Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271, 273-74 (1971). See generally Younger, *Congressional Investigation and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitt. L. Rev. 755 (1959).

13. See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 585 (E.D.N.Y. 1939); *Pollen v. United States*, 85 Ct. Cl. 673, 681 (1937); Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

14. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Totten v. United States*, 92 U.S. 105, 106-07 (1875).

15. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Totten v. United States*, 92 U.S. 105, 106-07 (1875).

affairs and in his duty to provide for the national defense. With the exceptions of the power to declare war¹⁶ and the power to bind the United States in international treaties,¹⁷ the Constitution gives the President almost unbridled discretion in the related areas of international relations and national defense.¹⁸ It is a short step from this basic premise to the conclusion that control of information in these sensitive areas should be, similarly, in the hands of the executive:¹⁹

[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.

. . . If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

The concept that the President is privileged, without congressional authorization, to withhold national security information the revelation of which he believes may be harmful to the national interest is not a recent addition to the law.²⁰ Historically, the privilege has been linked to the need for effective representation of the national interest in foreign affairs.²¹

16. U.S. CONST. art. I, § 8.

17. *Id.* art. II, § 2.

18. *Id.*

19. *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

20. *See, e.g., Totten v. United States*, 92 U.S. 105 (1875). In one of the earliest enunciations of this executive privilege, the Supreme Court affirmed a lower court's refusal to entertain an action against the federal government for compensation for services alleged to have been rendered during the Civil War upon a contract for secret services entered into between President Lincoln and the claimants' intestate. The Court held that confidentiality was implied in all secret employments of the government "in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties . . ." *Id.* at 106.

21. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936):

"The nature of transactions with foreign nations . . . requires caution and unity

The doctrine of separation of powers precludes judicial review of executive action where such review requires the court to perform a nonjudicial function. In defining the parameters of such nonjudicial functions, the Supreme Court has stated:²²

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,²³ the Court extended those principles by nullifying a provision in the Civil Aeronautics Act²⁴ which authorized judicial review of decisions made by the Civil Aeronautics Board. The Court held that, despite the statutory authorization, it could not review an order of the board which by the terms of the statute the President also had discretion to approve or reject:²⁵

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

of design, and their success frequently depends on secrecy and dispatch." U.S. Senate Reports, Committee on Foreign Relations, vol. 8, p. 24.

. . . [The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

22. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *accord*, *Coleman v. Miller*, 307 U.S. 433, 454-55 (1938).

23. 333 U.S. 103 (1948). The Civil Aeronautics Board, with express approval of the President (as provided for by statute, Civil Aeronautics Act, § 801, ch. 601, 52 Stat. 1014 (1938), *as amended*, 49 U.S.C. § 1461 (Supp. IV, 1975)), denied Waterman Steamship a certificate of convenience and necessity for an overseas air route, and granted one to Chicago and Southern Air Lines, a rival applicant. The former sued.

24. Civil Aeronautics Act § 1006, ch. 601, 52 Stat. 1024 (1938), *as amended*, 49 U.S.C. § 1486 (1971).

25. *Chicago Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

Courts have traditionally carved out a small exception to the broad constitutionally based executive privilege to withhold national security information. Where the claim of executive privilege conflicts with the judicial prerogative to control the nature and scope of evidence presented, courts have asserted a degree of authority. The classic statement of the limited review permissible in such instances appears in *United States v. Reynolds*.²⁶ In that case, survivors of civilian observers killed in the crash of a military aircraft testing secret electronic equipment sued the United States for negligence. The plaintiffs moved for production of the Air Force's accident investigation report, including statements made by surviving crew members during the investigation. The Secretary of the Air Force filed a formal claim of privilege on the ground that the aircraft and its personnel were engaged in a highly secret mission and the material therefore could not be furnished without seriously endangering the national security. Noting that the privilege against revealing military secrets is well established in the law of evidence,²⁷ the Court held that the information was privileged. In strongly worded dictum, however, the Court explained that in such cases it is the court itself which must determine whether the circumstances are appropriate for a claim of privilege:²⁸ "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." The Court went on to suggest that in camera review of contested materials to test the severability of innocuous portions from state secrets might sometimes be proper or even necessary.²⁹

The potential of the *Reynolds* dictum for use as a springboard to change the law of privilege was never realized. The heavy presumption against disclosure over claims of executive privilege was the principal obstacle. The Government need only show that there is a danger that disclosure would jeopardize the national security since "[w]hen [a] formal claim of privilege

26. 345 U.S. 1 (1953).

27. *Id.* at 6-7.

28. *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953); *accord*, *Heine v. Raus*, 399 F.2d 785, 788 (4th Cir. 1968). The Court quoted an English decision for support:

"Although an objection . . . on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. . . . It is the judge who is in control of the trial, not the executive."

United States v. Reynolds, *supra* at 8 n.21, *quoting* *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, 642.

29. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

[is] filed . . . under circumstances indicating a reasonable possibility that military secrets [are] involved, there [is] certainly a sufficient showing of privilege to cut off further demands for the documents”³⁰ Thus, it appears that the very limited review of security-related secrets recognized as appropriate by the *Reynolds* Court was an aspect of judicial control of evidence, rather than a product of the clash between executive secrecy and a citizen’s right to know.

This very limited review contrasts with the availability of in camera inspection of documents, claimed to be privileged, but not relating to national security matters. In *United States v. Nixon*,³¹ for example, the Supreme Court has sanctioned such a procedure where material is requested by a government prosecutor in the course of a criminal proceeding:³²

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Classification Under the Executive Orders

A significant manifestation of the executive’s privilege to withhold information was the promulgation of a series of executive orders³³ setting out standards for the classification of information in varying degrees. In what marked the beginning of the “age of passionate classification,”³⁴ President Truman issued

30. *Id.* at 10.

31. 418 U.S. 683 (1974).

32. *Id.* at 706; *accord*, *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960).

33. Exec. Order No. 10,290, 3 C.F.R. (1949-53 Comp.) 789 (1958); Exec. Order No. 10,501, 3 C.F.R. (1949-53 Comp.) 979 (1958); Exec. Order No. 11,652, 3 C.F.R. 375 (1973), *as amended*, Exec. Order No. 11,714, 3A C.F.R. 174 (1974). There is no express statutory authority for these orders. Congress may have tacitly approved them through various acts to protect the national security and through their incorporation in other laws. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(b)(1) (1971); Espionage Laws, 18 U.S.C. §§ 792-99 (1971); National Security Act of 1947, 50 U.S.C. §§ 401, 403(d)(3) (1971). *See generally* Gravel v. United States, 408 U.S. 606, 637 n.3 (1972) (Douglas, J., dissenting). The orders have also been justified on the basis of the President’s powers as Commander-in-Chief. *See* COMMISSION ON GOVERNMENT SECURITY, REPORT, S. Doc. No. 64, 85th Cong., 1st Sess. 158 (1957).

34. O’Neill, *The Accessibility of Sources for the History of the Second World War: The Archivist’s Viewpoint*, 1972 JOURNAL OF NATIONAL ARCHIVES 25 (prologue). O’Neill notes that as of 1972, over 200 million classified documents relating exclusively to World

Executive Order No. 10,290³⁵ in 1951. The Order was flawed by imprecision in its definition of categories, unrestricted delegation of authority to classify, and the absence of procedures for the eventual declassification of material. The result was that mountains of classified material were created and declassification rarely, if ever, occurred.³⁶

In 1953, President Eisenhower issued Executive Order No. 10,501³⁷ which initiated the current system of classification. It established three degrees of classification and provided graphic examples of the type of information which would fall into each category.³⁸ The Order thus lessened the classifying officers' discretion. Authority to classify was extended to any agency or department having either primary or partial responsibility for the national defense.³⁹ The Order contained a general admonition against "[u]nnecessary classification and over-classification,"⁴⁰ and directed department heads to initiate a prompt review of requests for disclosure "in order to preserve the effectiveness and integrity of the classification system and to eliminate accumulation of classified material which no longer requires protection in the defense interests."⁴¹ As part of the general review procedure, the Order directed a presidential staff member to hear and take

War II were in the National Archives and that 50 million more such documents were in the possession of various departments and agencies. *Id.* at 21.

35. 3 C.F.R. (1949-53 Comp.) 789 (1958).

36. See Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11,652*, 59 IOWA L. REV. 110, 114-16 (1973).

37. 3 C.F.R. (1949-53 Comp.) 979 (1958). President Kennedy's promulgation of Executive Order No. 10,964, 3 C.F.R. (1959-63 Comp.) 486 (1964), amended the original Eisenhower order by providing a schedule for automatic downgrading and declassification. The Order was eventually revoked and superseded by Executive Order No. 11,652, 3 C.F.R. 375 (1973), as amended, Exec. Order No. 11,714, 3A C.F.R. 174 (1974). See notes 159-77 *infra* and accompanying text. The mechanics of Executive Order 10,501 retain their importance, however, as the judicial review authorized by the Freedom of Information Act, 5 U.S.C. § 552 (1971), as amended, (Supp. IV, 1975), requires determination of whether information has been properly classified under the executive order in effect at the time of classification. Information classified before 1972 would fall under the procedures and prescriptions of Executive Order No. 10,501.

38. The "top secret" designation was reserved for information requiring the "highest degree of protection" in that disclosure "could result in *exceptionally grave damage* to the nation." The "secret" designation was reserved for information which, if disclosed, could "result in *serious damage* to the nation." The "confidential" designation was reserved for information which "could be *prejudicial* to the defense interests of the nation." Exec. Order No. 10,501, § 1, 3 C.F.R. (1949-53 Comp.) 979-80 (1958) (emphasis added).

39. Exec. Order No. 10,501, § 2, 3 C.F.R. (1949-53 Comp.) 979-80 (1958).

40. *Id.* § 3, 3 C.F.R. at 980.

41. *Id.* § 4, 3 C.F.R. at 980-81.

action upon complaints from citizens,⁴² subject to review by the National Security Council.⁴³ As a general statement of policy, the Order directed that “no information [be] withheld hereunder which the people of the United States have a right to know”⁴⁴

While Executive Order No. 10,501 was a vast improvement over its predecessor, it had many objectionable features. Seeking primarily to avoid underclassification, it contained “blanket classification” provisions under which an entire document, file, or group of physically connected documents was to be given the classification of its highest classified component, notwithstanding that paragraphs, sections, or pages therein would not otherwise carry the classification.⁴⁵ The mechanics of declassification were left unclear, amounting in large part to reliance upon benevolent agency action.⁴⁶ In sharp contrast to the existence of penalties for the improper release of sensitive information,⁴⁷ the Order provided no meaningful sanction for overclassification.

Judicial review of classification pursuant to the orders was consistent with the prevailing attitude on executive privilege. In *Scarbeck v. United States*,⁴⁸ for example, a foreign service employee was found to have violated a federal espionage law by communicating classified information to foreign representatives. The Court of Appeals for the District of Columbia did not require the Government to show that the information had been properly classified. The court reasoned that it is not its province to determine whether a classifying officer has arrived at a proper conclusion. If it did so,⁴⁹

[t]he Government might well be compelled . . . to reveal policies and information going far beyond the scope of the classified documents transferred by the employee. The embarrassments and hazards of such a proceeding could soon render [the espionage law involved] an entirely useless statute.

In sum, until the amendment of the Freedom of Information

42. *Id.* § 16, 3 C.F.R. at 985.

43. *Id.* § 17.

44. *Id.* § 18, 3 C.F.R. at 986.

45. *Id.* §§ 3(B)-(C), 3 C.F.R. at 980.

46. *See id.* § 4, 3 C.F.R. at 980-81.

47. *See id.* § 5(I), 3 C.F.R. at 982.

48. 317 F.2d 546 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 856 (1963).

49. *Id.* at 560.

Act in 1974, the public could not force review of security classification determinations. The only way in which it might be informed of controversial government policies in the national security area was through a "system of off the record press briefings and selective leaking of information."⁵⁰

II. THE FREEDOM OF INFORMATION ACT: NATIONAL SECURITY INFORMATION, 1966-1974

During the mid-1950's, Congress began to investigate the possibility of enacting some type of public disclosure statute. In 1955, the House created the Special Subcommittee on Government Information.⁵¹ Its purpose was to "ascertain the trend in the availability of Government information," to "scrutinize the information practices of executive agencies and officials," and to "seek practicable solutions for [the] shortcomings" it found.⁵² The first result of extensive investigative hearings by the Subcommittee and its successor standing subcommittees⁵³ was a 1958 amendment to the Housekeeping Statute⁵⁴ which prohibited department heads from using the statute as a basis for withholding information from the public. Then, in 1962, President Kennedy informed the Congress that he had advised the federal bureaucracy that the power to assert a claim of executive privilege to withhold sensitive national security information would henceforth be limited to the President himself and would not be avail-

50. Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93, 106 (1973).

51. See *Hearings Before the Special Subcomm. on Government Information of the House Comm. on Government Operations, Availability of Information from Federal Departments and Agencies*, 84th Cong., 1st Sess. (1955).

52. H.R. REP. NO. 876, 93d Cong., 2d Sess. 3 (1974) [accompanying H.R. 12471, amendment to the Freedom of Information Act], U.S. CODE CONG. & AD. NEWS 6268-69 (1974).

53. See *id.* at 4, U.S. CODE CONG. & AD. NEWS at 6269. The Senate was also studying the problem of government secrecy with the aim of enacting remedial legislation. See *Hearings on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Freedom of Information and Secrecy in Government*, 85th Cong., 2d Sess. (1958); *Hearings on S. 1666 & S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Freedom of Information*, 88th Cong., 1st Sess. (1963); *Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); *Hearings on S. 1160, S. 1336, S. 1758 & S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong. 1st Sess. (1965) [hereinafter cited as *Hearings on S. 1160*].

54. Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547, amending R.S. § 161 (1875) (codified at 5 U.S.C. § 301 (1971) corresponds to 5 U.S.C. § 22 (1958)); see note 6 *supra*.

able to delegates of executive power.⁵⁵

By the mid-1960's, however, it was apparent that further congressional action would be required to open government to the people.⁵⁶ National security information classified pursuant to executive order⁵⁷ was of course not affected by the presidential pronouncement limiting the use of executive privilege. In general, the prevailing judicial interpretation of the "public information" section of the Administrative Procedure Act⁵⁸ remained "the major statutory excuse for withholding Government records from public view."⁵⁹ A Government Operations Committee report concluded that⁶⁰

[i]n the time it takes for one generation to grow up and prepare to join the councils of Government . . . the law which was designed to provide public information about Government activities [had] become the Government's major shield of secrecy.

The Freedom of Information Act, a product of more than

55. See H.R. REP. NO. 1497, 89th Cong., 2d Sess. 3 (1966) [accompanying S. 1160, the Freedom of Information Act], U.S. CODE CONG. & AD. NEWS 2419-20 (1966) [hereinafter referred to as 1966 H.R. REP.]. President Johnson affirmed this position in a letter to Congressman Moss, dated April 2, 1965. *Id.* at 3, U.S. CODE CONG. & AD. NEWS at 2420.

56. The Government seems to withhold information impulsively. For an excellent examination of government secrecy see Henkin, *supra* note 12, at 275-76:

Government frequently withholds more and for longer than it has to. Officials, of course, tend to resolve doubts in favor of non-disclosure. Some concealment is improperly motivated—to cover up mistakes, to promote private or partisan interests, even to deceive another branch or department of government, or the electorate.

57. See notes 33-47 *supra* and accompanying text.

58. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946); see notes 7-8 *supra* and accompanying text.

59. 1966 H.R. REP., *supra* note 55, at 3, U.S. CODE CONG. & AD. NEWS at 2420.

60. *Id.* at 12, U.S. CODE CONG. & AD. NEWS at 2429. The Committee's report outlined some of the statute's more egregious faults:

In a sense, "public information" is a misnomer for 5 U.S.C. 1002, since the section permits withholding of Federal agency records if secrecy is required "in the public interest" or if the records relate "solely to the internal management of an agency." Government information also may be held confidential "for good cause found." Even if no good cause can be found for secrecy, the records will be made available only to "persons properly and directly concerned." Neither in the Administrative Procedure Act nor its legislative history are these broad phrases defined, nor is there a recognition of the basic right of any person—not just those special classes "properly and directly concerned"—to gain access to the records of official Government actions. Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records.

Id. at 5, U.S. CODE CONG. & AD. NEWS at 2422.

eight years of congressional investigation and study, was signed into law by President Johnson on July 4, 1966.⁶¹ The House and Senate Committee Reports and the floor debate in the House of Representatives plainly reveal that Congress' overriding concern was to establish a general policy of full agency disclosure.⁶² Recognition that "the intelligence of the electorate varies as the quantity and quality of its information varies"⁶³ led the lawmakers to pass a statute which would ensure an increased flow of information to the public.

The Act establishes a new concept of public records law by making records available to any person requesting them.⁶⁴ A party seeking information is no longer required to provide proof of some special interest in it; the only requirement is a reasonable description of the materials sought.⁶⁵ The United States district courts are given jurisdiction to order disclosure of any agency records improperly withheld.⁶⁶ The courts are empowered to inquire into the propriety of any agency withholding in a *de novo* proceeding.⁶⁷ Thus, judicial review of administrative decisions to withhold requested information is extended beyond its traditional scope. The burden of proof is placed on the agency⁶⁸ because an agency refusing to disclose information will usually be the only party with sufficient knowledge to effectively argue its case.

The Act specifies nine distinct types of information which are

61. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, codified by Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1971)). For a comprehensive study of the Act's legislative history see Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

62. See 1966 H.R. REP., *supra* note 55, at 2-4, U.S. Code Cong. & Ad. News at 2418-23, 2429; S. REP. NO. 813, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, 89th Cong., 1st Sess. 3 (1965) [hereinafter referred to as 1965 S. REP.]; 112 CONG. REC. 13640-61 (1966) (especially remarks of Rep. Moss, *id.* at 13641).

63. 1966 H.R. REP., *supra* note 55, at 12, U.S. Code Cong. & Ad. News at 2429.

64. "[E]ach agency . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3) (1966), *as amended*, (Supp. IV, 1975).

65. See 5 U.S.C. § 552(a)(3) (1971), *as amended*, (Supp. IV, 1975).

66. On complaint, the district court . . . [either in the district where the complainant resides or has his principal place of business, or in the district where the agency records are located] . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(3) (1966), *as amended*, (Supp. IV, 1975).

67. "In such a case the court shall determine the matter *de novo*" *Id.*

68. "[T]he burden is on the agency to sustain its action." *Id.*

exempt from its disclosure requirements.⁶⁹ Disclosure is mandated "except as specifically stated."⁷⁰ Therefore, the exemptions are to be construed narrowly,⁷¹ and disclosure is the rule rather

69. 5 U.S.C. § 552(b) (1971), *as amended*, 5 U.S.C. § 552(b) (Supp. IV, (1975)):

- (b) This section does not apply to matters that are—
 - (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
 - (2) related solely to the internal personnel rules and practices of an agency;
 - (3) specifically exempted from disclosure by statute;
 - (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
 - (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
 - (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
 - (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
 - (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
 - (9) geological and geophysical information and data, including maps, concerning wells.

The preceding exemptions were amended as follows:

- (b) This section does not apply to matters that are—
 - (1)(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;
 -
 - (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel

70. 5 U.S.C. § 552(c) (1966), *as amended*, (Supp. IV, 1975). For a criticism of the "specifically stated" provision of the Act for the reason that it disallows judicial discretion in interpreting the vague language of some of the exemptions see Davis, *supra* note 61, at 783-84.

71. This conclusion flows not only from the language of the statute itself, but also from the legislative history. See 1965 S. REP., *supra* note 62, at 3, 10; 1966 H.R. REP., *supra* note 55, at 12, U.S. Code Cong. & Ad. News at 2429. But see Davis, *supra* note 61, at 762-63. Professor Davis notes that while a review of the House floor debate and the Senate

than the exception.⁷²

Executive Privilege

While the Freedom of Information Act succeeded in closing some of the loopholes in its predecessor statute (section 3 of the Administrative Procedure Act),⁷³ on its face the new Act failed to resolve the role of executive privilege within the statutory scheme for disclosure of national security information. As one commentator has noted:⁷⁴

Legislative history of the [Act] reveals scant consideration by Congress of the status of executive privilege under the new law. . . . The only attention paid the privilege was the fear occasionally raised in the hearings that the broad sweep of the Act might unconstitutionally infringe upon the President's powers. Those fears were either allayed or ignored as Congress pushed the Act to overwhelming passage.

Resolution of the role of executive privilege is vital to the institution of any statutory scheme under which the courts are empowered to order disclosure of information which the executive seeks to withhold. Although the Act does not specifically mention the

Committee Report supports a narrow reading of the exemptions, there is language in the House Report which indicates a contrary intent. The Report states that "[t]he Court will have authority *whenever it considers such action equitable and appropriate* to enjoin the agency from withholding its records and to order production of agency records improperly withheld." 1966 H.R. REP., *supra* note 55, at 9, U.S. Code Cong. & Ad. News at 2426 (emphasis added). This language might enable a court to read the exemptions expansively. The courts, however, have viewed the Senate Report as a more accurate reflection of the legislative intent. *See, e.g.,* Department of the Air Force v. Rose, 44 U.S.L.W. 4503 (U.S. Apr. 21, 1976); Hawkes v. IRS, 467 F.2d 787, 792 n.6, 797 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670, 678-79 & n.32 (D.C. Cir. 1971). Thus, the Act's exemptions have been construed narrowly. *See, e.g.,* Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

72. *Nixon v. Sampson*, 389 F. Supp. 107, 122 (D.D.C.), *stayed on other grounds*, *Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975) (dictum).

73. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946), *as amended*, 5 U.S.C. § 552 (Supp. IV, 1975); *see* notes 7-8 *supra* and accompanying text.

74. 49 TEXAS L. REV. 780, 785-86 (1971); *see, e.g.,* *Hearings on S. 1160, S. 1336, S. 1758 & S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 205 (1965) (statement of Norbert Schlei, A.A.G., Dep't of Justice) ("[T]he Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for executive records to the courts.") The Department of Justice ultimately took the position that the Act, as worded, was not violative of the Executive's constitutional prerogatives. *See* statement of Wozencraft, A.A.G., Dep't of Justice, in *Panel on the Public Information Act and Interpretative & Advisory Rulings*, *as reprinted in* 20 AD. L. REV. 1, 45-46 (1967).

privilege, it incorporates the executive order authorizing national security classification into the first exemption: "This section does not apply to matters that are: (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"⁷⁵ Thus, by exempting classified national security information, Congress accounted in part for the executive's privilege.

The immediate problem of statutory interpretation, however, was to determine to what extent the doctrine of executive privilege operates over and above its inclusion through the executive order. Conceptually, the privilege might impose a separate and distinct limitation upon the Act's disclosure requirements. Arguably, the codification of some of the components of executive privilege⁷⁶ "is augmented by a rule of executive privilege attaining constitutional dimensions"⁷⁷ arising out of the separation of powers concept.⁷⁸ It would follow that "[t]his uncertain constitutional doctrine operates as an invisible, albeit inevitable, restraint upon the scope of the FOIA."⁷⁹ President Johnson assumed that the Act left the executive's privileges intact, stating when he signed the bill into law: "[It] in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires."⁸⁰ On the other hand, the proposition that the Act was intended as a complete codification of the executive's privileges has had its adherents as well. They contend that in establishing nine exemptions, "[t]he draftsmen were trying to make specific in statutory terms the many strands of executive privilege which had been viewed in the past as bases for presidential control over information coming

75. 5 U.S.C. § 552(b)(1) (1966), *as amended*, (Supp. IV, 1975). It has been argued that the "specifically required" language of the first exemption means that for classified information to qualify for exempt status under the Act, it must be either personally classified by the President, or supported by a separate executive order. *See EPA v. Mink*, 410 U.S. 73, 83 (1973). This argument was rejected by the Supreme Court when it held that since Congress was familiar with the order and the character of the classification procedures thereunder, it must have intended that the delegation of authority to classify should fall within the parameters of the national security exemption. *Id.* at 82-84.

76. *See generally* Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

77. Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 930 (1974).

78. *See Soucie v. David*, 448 F.2d 1067, 1080-83 (D.C. Cir. 1971) (Wilkey, J., concurring); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957). *See also* notes 13-25 *supra* and accompanying text.

79. Note, 74 COLUM. L. REV., *supra* note 77, at 930.

80. 41 C.F.R. §§ 105-60.603 (1969) (statement of President Johnson, July 4, 1966).

from the executive department.”⁸¹

Professor Kenneth Culp Davis stated at the hearings before the Senate subcommittee considering the proposed enactment:⁸²

We do not have a body of judge-made law on this subject. The only interpretations that we have in the Federal system are interpretations by the executive branch itself.

One of the things that would happen under section 3(c) is that some of these questions for the first time would come to court. Presumably the courts would gradually mark some lines as to what are the limits of the doctrine of executive privilege.

Thus, the courts might ultimately adopt the position, suggested by the Supreme Court in *United States v. Reynolds*,⁸³ that the courts themselves must determine under what circumstances a claim of privilege is appropriate.

Judicial Interpretation

Of the cases decided under the national security exemption of the 1966 Act, only one presented the executive privilege issue. In *Soucie v. David*,⁸⁴ the appellants brought suit under the Freedom of Information Act to compel the Director of the Office of Science and Technology to release the Garwin Report, an evaluation of the federal program for development of the supersonic transport. Chief Judge Bazelon distinguished between the right of the government to withhold information under the doctrine of executive privilege, which “to some degree [is] inherent in the constitutional requirement of separation of powers,”⁸⁵ and the executive’s right to withhold information under the statutory exemptions provided by the Freedom of Information Act. Deciding the case on other grounds,⁸⁶ the court left unresolved the “[s]erious constitutional questions . . . presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act,”⁸⁷ for example, “whether the disclosure provi-

81. Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 745 (1975); see 1966 H.R. REP., *supra* note 55, at 2423.

82. *Hearings on S. 1160*, *supra* note 53, at 146.

83. 345 U.S. 1, 8 (1973); see notes 26-30 *supra* and accompanying text.

84. 448 F.2d 1067 (D.C. Cir. 1971).

85. *Id.* at 1071 n.9.

86. *Id.* at 1073. The district court had dismissed on the ground that the Office of Science and Technology was not an “agency” within the meaning of the Freedom of Information Act, and therefore was not subject to the Act’s requirements. *Id.*

87. *Id.* at 1071.

sions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.”⁸⁸

Litigation centered on the role of the courts in applying the exemption to requests for disclosure. The “imprecise language of the exemption” required that the courts refer to the legislative history.⁸⁹ One interpretation would have permitted judicial determination of whether the classified information had been properly classified according to the standards of the appropriate executive order.⁹⁰ The other view, adopted by the Department of Justice in a memorandum issued to all executive agencies,⁹¹ was that so long as a document had been classified pursuant to executive order, disclosure under the Act was impermissible.⁹² The court would thus be limited to a determination of whether a particular document had in fact been classified.

The courts ultimately adopted the latter interpretation. In *Epstein v. Resor*,⁹³ one of the first cases to consider the permissible scope of judicial review and a decision consistent with earlier decisions under the executive privilege doctrine,⁹⁴ the Ninth Circuit held that national security classification is an executive function beyond the scope of judicial review. The court limited judicial inquiry to whether, on the basis of affidavits submitted by the Government, the classification appeared “arbitrary

88. *Id.* at 1072.

89. Note, 74 COLUM. L. REV., *supra* note 77, at 930; *see, e.g.*, *EPA v. Mink*, 410 U.S. 73 (1973).

90. *See, e.g.*, Note, *Access to Government Information and the Classification Process—Is there a Right to Know?*, 17 N.Y.L.F. 814, 821-23, 839-40 (1971).

91. *Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act*, as revised effective July 4, 1967, United States Dep’t of Justice, Ramsey Clark, Attorney General, as reprinted in 20 AD. L. REV. 263 (1967) (containing an interpretation of the exemptions in which all doubts were resolved in favor of restricting access to information, *id.* at 297-308).

92. *Id.* at 298.

93. 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970), *aff’g* 296 F. Supp. 214 (N.D. Cal. 1969). Suit was brought by an historian who sought access to an Army file designated “Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul.” The file was compiled during World War II and had retained its top secret classification since 1948. The Government had argued that the Act’s provision for de novo review did not apply to any of the nine listed exemptions since the statute precluded application of “this section” to them. 5 U.S.C. § 552(b) (1971). The Court rejected this argument and, while noting that the Act was awkwardly drawn, stated that:

[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose an (a)(3) judicial review of the circumstances of exemption.

Epstein v. Resor, *supra* at 932-33.

94. *See* notes 13-25 *supra* and accompanying text.

or capricious.”⁹⁵ Noting that the national security exemption was “couched in terms significantly different from the other exemptions,”⁹⁶ the court reasoned that “what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with.”⁹⁷ Thus, despite the provision for de novo review of questions arising under the Act, the court would not allow itself to review the propriety of particular national security classifications.

The level of review permitted in *Epstein v. Resor* was derived from the Supreme Court’s decision in *United States v. Reynolds*.⁹⁸ The Ninth Circuit affirmed the district court which, quoting Professor Davis’ analysis of the Act, had concluded that the Act’s provision for de novo review could be reconciled with the very limited review authorized by *Reynolds*.⁹⁹

“‘Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts.’ That position seems to me extreme, just as is the opposite position that the courts may take the whole power away from the executive would be extreme; the long-term constitutional solution is likely to follow the middle position of the *Reynolds* case that the executive determines the scope of the privilege, subject to a judicial check whenever a court has jurisdiction.”

Thus, the de novo review provision in the Freedom of Information Act is a grant of jurisdiction,¹⁰⁰ but the judicial check on the

95. *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970) (the court found that the withholding at issue was not “arbitrary and capricious”).

96. *Id.* at 933. The provision exempts information which is “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.” 5 U.S.C. § 552(b)(1) (1966), *as amended*, (Supp. IV, 1975) (emphasis added).

97. *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970). The court reached this conclusion although an affidavit submitted to the trial court by Congressman Moss, a co-author of the Act, explained that the statute intended to give “broadest latitude to review all agency acts in this regard . . . and that the powers granted to the Court and the burdens placed upon the Government . . . were meant to include rather than exclude the [national security] exemption.” *Epstein v. Resor*, 296 F. Supp. 214, 216 (N.D. Cal. 1969).

98. 345 U.S. 1 (1953); see notes 26-30 *supra* and accompanying text.

99. *Epstein v. Resor*, 296 F. Supp. 214, 218 (N.D. Cal. 1969), *aff’d*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970), quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 764-65 (1967), quoting *Hearings on S. 1160*, *supra* note 53, at 192, 205 (statement of Norbert Schlei, A.A.G.).

100. Jurisdiction might also be predicated on the Administrative Procedure Act’s codification of the court’s traditional obligation to prevent arbitrary administrative action. See 5 U.S.C. § 706 (1971).

executive's privilege was merely review to prevent its "arbitrary and capricious" exercise.

It was not clear from *Epstein v. Resor* how the standard suggested in that case might be applied in other cases. It has been advanced by one commentator that the "arbitrary and capricious" standard does not leave the courts with much to review at all.¹⁰¹ In *United States v. Bianchi & Co.*,¹⁰² the Supreme Court noted that the standard has "frequently been used by Congress and [has] consistently been associated with a review limited to the administrative record."¹⁰³ The inquiry is one into the reasonableness of the agency action based on the evidence which was before it. In the context of national security classification there is no administrative record to review. Thus, a finding of "arbitrary" or "capricious" conduct could only mean that the information is not actually contained in a classified document.¹⁰⁴ The court in *Epstein v. Resor* reasoned that "the origin of the file's contents itself [was] sufficient to dispel any suggestion that the original classification was arbitrary or capricious."¹⁰⁵ Thus, despite the policies behind the enactment, the Ninth Circuit left the decision of what the public should know about national security matters where it was before the Act, exclusively in the hands of the administrative agencies.

The interpretation by the Ninth Circuit in *Epstein v. Resor* was a guidepost for other circuits struggling with the same question. In *Soucie v. David*,¹⁰⁶ the Court of Appeals for the District of Columbia ruled that review of a national security classification is limited to a determination of whether it was arbitrarily and capriciously made. In *United States v. Marchetti*,¹⁰⁷ the Court of Appeals for the Fourth Circuit adopted a similar interpretation

101. See Note, 74 COLUM. L. REV., *supra* note 77, at 935 n.215.

102. 373 U.S. 709 (1963).

103. *Id.* at 715. See also Administrative Procedure Act § 10, 5 U.S.C. § 1009 (1964).

104. Arguably, the imposition of such a standard could take the form of a heavy burden on the Government to prove that documents had been duly classified. See, e.g., *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (holding that such a burden is inappropriate).

105. 421 F.2d 930, 933 (9th Cir. 1970).

106. 448 F.2d 1067 (D.C. Cir. 1971). On the basis of *Epstein* and *Soucie* lower courts held that when the classifying agency makes a reasonable showing that disclosure would be harmful to the national defense or foreign policy, it need not submit the requested material to the court for in camera review. See, e.g., *Moss v. Laird*, C.A. 1254-71 (D.D.C. Dec. 7, 1971) (unreported opinion) (a suit brought by Representative Moss and others to gain access to classified portions of the Pentagon Papers).

107. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

in a case with an unusual fact pattern. The court affirmed an injunction to enforce a secrecy agreement between the CIA and one of its employees.¹⁰⁸ The agreement, of a type routinely required of CIA personnel, provided that the employee submit for approval, before its release or publication, anything concerning the agency or its intelligence methods and procedures obtained by virtue of employment with the agency and not otherwise obtainable. The court held that the agreement was enforceable through an injunctive proceeding, but only insofar as it related to classified information. Nonclassified information could not be suppressed. Marchetti was entitled to judicial review of any action by the CIA disapproving publication, but such review would be limited to the issue of "whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain."¹⁰⁹ The court would not examine the merits of the classification itself. The principles underlying this restrictive ruling were virtually the same as had been found controlling in *Epstein v. Resor* and the earlier cases on executive privilege: the process of classification, as part of the executive function in the conduct of foreign affairs and national defense, is beyond the scope of judicial review.¹¹⁰ Moreover, practical consid-

108. For the text of the agreement see *id.* at 1312. Marchetti challenged the constitutionality of the agreement on first amendment grounds, arguing that because the Government had failed to meet the very heavy burden against any prior restraint on expression, an injunction enforcing the agreement was barred by the Supreme Court's decision in the *Pentagon Papers* case. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). The court held that the agreement concerned classified information "touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to [secrecy]." *Marchetti v. United States*, 466 F.2d 1309, 1313 (4th Cir. 1972). Therefore, no first amendment interests were violated. *Id.* at 1317. The court reasoned that the first amendment was not intended to protect every utterance, that the government has a constitutional privilege to maintain a level of secrecy consistent with the nation's security needs, and that secrecy agreements with employees provide a reasonable means by which to protect the internal secrets of government agencies. Such agreements, however, would only be enforceable to the extent that they prevented the disclosure of classified information. *Id.* at 1318. For a valuable analysis of the first amendment issues raised see 51 N.C.L. Rev. 865 (1973).

109. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). While the case did not involve construction of the national security exemption under the Act, it has since been held in *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), that the scope of review permissible when a citizen already in possession of classified information seeks to release it is virtually the same as that in cases where access itself is sought under the Act. In both instances the issue is the extent to which the courts can review an administrative decision to classify information. The *Marchetti*-type case requires resolution of the additional question of whether a prior restraint on publication of such information is permissible under the first amendment.

110. *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972).

erations militate against judicial involvement in classification disputes:¹¹¹

What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

While the *Marchetti* decision did not mention the “arbitrary and capricious” standard established in *Epstein v. Resor*, Judge Craven’s concurring opinion suggested another approach to classification issues. Although agreeing with the majority that what may be done by the President under his power over the conduct of foreign relations is not subject to judicial inquiry, he stated that an adjudication of the reasonableness of a secrecy classification may be warranted by the growing recognition of a “right to know.”¹¹² Judge Craven would, therefore, have held that:¹¹³

[T]he classification of documents and information by the executive [is] subject to judicial review. Because the national security may be involved and because of the expertise of the executive, I would resolve any doubt about the reasonableness of a classification in favor of the government. If the burden were put upon one who assails the classification, and surely it ought to be, much of the difficulty envisioned in the court’s opinion would presumably disappear.

Judge Craven’s suggested presumption of reasonableness might work well in a *Marchetti*-type situation, where the litigant already possesses the information and the litigated issue is whether he can release it to the public. A petitioner seeking to compel disclosure under the Freedom of Information Act, on the other hand, is not in a position to argue the unreasonableness of a particular classification since the very purpose of his lawsuit is to gain access to information he does not have.¹¹⁴ The best he could

111. *Id.* at 1318.

112. *Id.* at 1318-19 (Craven, J., concurring):

“The right to know” is in a period of gestation. I think that the people will increasingly insist upon knowing what their government is doing and that, because this knowledge is vital to government by the people, the “right to know” will grow.

113. *Id.* at 1318.

114. It is for this very reason that Congress placed the burden on the administrative

hope for is in camera inspection of the material sought to be withheld in order to obtain an independent determination of the reasonableness of the classification. It was this procedure, however, which the Supreme Court disallowed in *EPA v. Mink*.¹¹⁵

Mink was the Supreme Court's initial attempt to delimit the boundaries of the national security exemption under the Freedom of Information Act. Thirty-three members of Congress sued to enjoin the withholding of nine documents which were classified secret and top secret by the EPA pursuant to Executive Order No. 10,501. The documents were relevant to an ongoing debate on a planned underground nuclear test on Amchitka Island, Alaska. The affidavit of John N. Irwin II, then Under Secretary of State, was submitted to the district court. It attested to the fact that the documents involved highly sensitive matters vital to the national defense and foreign policy, and had been classified secret and top secret pursuant to executive order. On the strength of this affidavit alone, the district court granted summary judgment in favor of the Agency.¹¹⁶ The Court of Appeals for the District of Columbia reversed and concluded that the national security exemption permits withholding of only the secret portions of those documents bearing a separate classification under the executive order and requires disclosure of the nonsecret components if separable.¹¹⁷ The case was remanded with instructions to examine the classified documents in camera, "looking toward their possible separation for purposes of disclosure or nondisclosure"¹¹⁸ The Supreme Court reversed, holding that the national security exemption: (1) bars disclosure of any classified document and (2) bars in camera inspection to sift out nonsecret components.¹¹⁹ The Agency had therefore met

agencies to sustain their determinations in suits brought pursuant to the Freedom of Information Act. See notes 67-68 *supra* and accompanying text.

115. 410 U.S. 73 (1973).

116. See *Mink v. EPA*, 464 F.2d 742, 744 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973). The district court also upheld the Government's claim that the information fell within the Act's fifth exemption, 5 U.S.C. § 552(b)(5) (1971), covering interagency memoranda.

117. *Mink v. EPA*, 464 F.2d 742, 745-46 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973).

118. *Id.* at 746.

119. *EPA v. Mink*, 410 U.S. 73, 84 (1973), *rev'g* 464 F.2d 742 (D.C. Cir. 1971). The dissenters argued forcefully, with reference to legislative history for support, that the *de novo* review provision of the Act applied with equal force to all of the exemptions. *EPA v. Mink*, *supra* at 96 (Brennan, J., dissenting); *id.* at 106-07 (Douglas, J., dissenting). The Act's supporters had indicated in floor debate that they envisioned in camera review of contested national security information. See, e.g., 112 CONG. REC. 13659 (1966) (remarks of Rep. Gallagher):

its burden of demonstrating that the documents were entitled to protection under the exemption.¹²⁰

The decision in *Mink* was based on a reading of the congressional intent, rather than a reading of executive privilege into the Act's proscriptions.¹²¹ Finding that Congress intended the Act to "in no way [affect] categories of information which the President . . . has determined must be classified to protect the national defense or to advance foreign policy,"¹²² the Court concluded that: "Congress chose to follow the Executive's determination in these matters and that choice must be honored."¹²³ Thus, since Executive Order No. 10,501 permitted classification of all documents according to their highest classifiable component, the Court had no choice but to uphold the procedure.¹²⁴

The Court's opinion was implicitly an approval of the prior case law on the scope of judicial review under the Act. Its reliance, however, was on statutory intent rather than executive privilege. As Justice Stewart stated in his concurring opinion:¹²⁵

[T]he language of the exemption, confirmed by its legislative history, plainly withholds from disclosure matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

. . . .
 . . . [Congress] has built into the Freedom of Information

It can be anticipated that the judicial review provision, if nothing else, will have a major salutary effect, in that Government employees, down the line, are going to be very cautious about placing a secrecy stamp on a document that a district court later might order to be produced.

120. *EPA v. Mink*, 410 U.S. 73, 84 (1973).

121. As Justice Stewart indicated in his concurring opinion:

This case presents no constitutional claims, and no issues regarding the nature or scope of "Executive privilege" The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U.S.C. § 552.

Id. at 94 (Stewart, J., concurring).

122. *Id.* at 83 (1973), quoting 112 CONG. REC. 13659 (1966) (remarks of Representative Gallagher).

123. *Id.* at 81.

124. *Contra, id.* at 102 (Brennan, J., concurring in part and dissenting in part) ("it would seem odd, to say the least, to attribute to Congress an intent to incorporate 'without reference' Executive Order 10,501 into Exemption 1"). Justice Brennan would read the Act as incorporating the Order's standards for classification, rather than each and every procedure specified.

125. *Id.* at 94-95 (Stewart, J., concurring).

Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The majority in *Mink* deferred to the congressional judgment. Acknowledging that Congress has the power to legislate standards and procedures by which the courts are to determine what information the executive can withhold, the Court took no position concerning to what degree, if any, the doctrine of executive privilege acts as a limitation upon this congressional power:¹²⁶

Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—*subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.*

Thus, the task of providing on adequate review mechanism for national security classification was left to the legislators.

The decision also expressed no view on whether the limited judicial scrutiny of agency classifications authorized in *Epstein v. Resor* comported with the doctrine of executive privilege. The Court never reached this issue since neither the fact of classification nor the classification's reasonableness was before it. The sole issue on appeal of the b(1) question was whether in camera inspection in order to excise nonclassified information is permissible.¹²⁷ The appropriateness of an "arbitrary and capricious" review standard would be questionable, however, in light of the general tenor of the *Mink* decision.

The net result was that in the years since the Supreme Court's decision in *Reynolds* there was no definitive ruling clarifying or resolving the issues which arise when the time-honored doctrine of executive privilege clashes with the recently recognized right of the public to know. When considered in conjunction with *Mink*'s very restrictive interpretation of the judicial role under the national security exemption to the Freedom of Information Act, this fact lent support to Justice Douglas' view

126. *Id.* at 83 (emphasis added), citing *United States v. Reynolds*, 345 U.S. 1 (1953). With the passage of the 1974 amendments to the Freedom of Information Act, Congress has enacted just such legislation. Section 552(b) provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (Supp. IV, 1975).

127. *EPA v. Mink*, 410 U.S. 73, 84 (1973).

that despite the broad policies of open government and liberal disclosure adopted by Congress, "[t]he Executive Branch now ha[d] *carte blanche* to insulate information from public scrutiny whether or not that information [bore] any discernible relation to the interests sought to be protected by subsection b(1) of the Act."¹²⁸

Lower court decisions subsequent to *Mink* followed the decision faithfully. Most notable among these was the decision in *Wolfe v. Froehlke*,¹²⁹ in which the release of the "Operation Keelhaul" file litigated in *Epstein v. Resor* was once again the subject of a lawsuit under the Freedom of Information Act.¹³⁰ There was no mention of the "arbitrary and capricious" standard which the same court had approved only four years earlier in *Epstein v. Resor*. Citing *Mink* as "the definitive case to date on the first exemption to the . . . Act,"¹³¹ the district court denied the request, stating that "absent allegations of fraud or subterfuge the Court is not to look beyond the fact of procedurally proper classification of documents pursuant to Executive Order."¹³²

III. THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

Executive Privilege versus The Right to Know

After the decision in *EPA v. Mink*,¹³³ it was clear that concealment of foreign affairs and defense-related information would remain largely unaffected by the Freedom of Information Act. The extent of judicial review of any matter classified in the interest of national security was the same as that under the earlier

128. *Id.* at 110 (Douglas, J., dissenting).

129. 358 F. Supp. 1318 (D.D.C. 1973), *aff'd mem.*, 510 F.2d 654 (D.C. Cir. 1974); *accord*, *Shaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974) (an action under the Freedom of Information Act to order the Secretary of State to disclose reports concerning conditions in prisoner-of-war camps in South Vietnam).

130. See notes 93-105 *supra* and accompanying text. Since the *Epstein* decision, the government had determined that it no longer objected to declassification of the file in issue. Since the British government maintained its objection, however, the information was kept classified on the theory that its release would be detrimental to United States' foreign relations. It was this basis for the withholding which the plaintiffs unsuccessfully challenged.

131. *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), *aff'd mem.*, 510 F.2d 654 (D.C. Cir. 1974).

132. *Id.* The court of appeals refused the appellant's request to defer decision until the expected passage of the proposed amendment to the Freedom of Information Act. The amendment provides for judicial determination of the propriety of executive classification. See notes 192-94 *infra* and accompanying text.

133. 410 U.S. 73 (1973).

“executive privilege” analysis.¹³⁴ Criticism of the *Mink* decision was widespread.¹³⁵ The entire line of cases interpreting the Act’s national security exemption ran directly counter to the policy of review which was explicitly recognized by Congress when it created a judicial remedy for any unauthorized withholding.¹³⁶

The very restrictive application given to the Act’s de novo review provision in national security cases seemed to contradict not only the Act’s basic policy objectives, but its express language as well. The cases held in essence that “the only ‘matter’ to be determined de novo under section 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret.”¹³⁷ Traditional formulations of de novo review would indicate that Congress intended something more.¹³⁸ The construction limiting review under the exemption to a narrow, nonsubstantive, factual determination under which a “bare claim of confidentiality” would “immunize agency files from scrutiny,”¹³⁹ was an unlikely one since the drafters envisioned it to be a judicial, not an agency function to determine the validity of claims to exemption.¹⁴⁰ Congress, in fact, explicitly stated that the courts were to review the “propriety” of agency withholding.¹⁴¹ One commentator observed: “the Court’s suggested alternatives to in camera review . . . will be ineffective . . . as they invest in the agencies a faculty for circumventing the FOIA.”¹⁴²

134. See notes 13-25 *supra* and accompanying text.

135. See, e.g., Warren, *Governmental Secrecy: Corruption’s Alley*, 60 A.B.A.J. 550, 551-52 (1974); Comment, 35 U. PITT. L. REV., *supra* note 50, at 108-13; 42 U. CIN. L. REV. 529 (1973).

136. See notes 66-68 *supra* and accompanying text.

137. *EPA v. Mink*, 410 U.S. 73, 95 (1973) (Brennan, J., dissenting).

138. See, e.g., 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.07, at 152 (1958): [T]he court often reviews de novo both in the sense that it takes its own evidence and in the sense that it uses its own independent judgment on law, facts, policy, and discretion.

139. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

140. *Id.*

141. S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965). The Act was explained as follows: That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency’s action is made by the court [thus] prevent[ing] it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it.
Id.

142. Note, 74 COLUM. L. REV., *supra* note 77, at 911.

Some of the principal pragmatic arguments made to support the very restrictive application of the *de novo* review provision were that courts cannot be trusted with extremely sensitive material and that judges are not qualified to make what are essentially determinations of an executive character.¹⁴³ There is little basis for the argument that courts are less trustworthy in their handling of national security material than the executive departments whose employees have daily access to it, or the legislative committees which occasionally examine such material in closed session. Wigmore once queried whether "it [is] to be said that even this much of disclosure [in camera] cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?"¹⁴⁴

That the judicial branch is not qualified to pass judgment upon agency classifications because it lacks the expertise peculiar to the executive branch in national security matters is a more formidable objection.¹⁴⁵ Courts, however, are constantly requested to make judgments in areas in which they have no substantive expertise. It is the function of the adversary system to educate the court in such cases. This occurs in review under all but one of the other eight exemptions in the Freedom of Information Act¹⁴⁶ and in many other cases in which courts are asked to review actions of an administrative agency, for example, in review of the adequacy of the impact statements required under the National Environmental Policy Act.¹⁴⁷ Review of classifications under the standards of the executive orders requires no greater

143. See *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368-69 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); *United States v. Marchetti*, 466 F.2d 1309, 1317-18 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

144. 8 J. WIGMORE, *EVIDENCE* § 2379 (3d ed. 1940); see *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc, plurality opinion). The *Zweibon* court held that a warrant must be obtained before a wiretap may be installed on a domestic organization even though a presidential directive authorized such wiretaps in the interest of national security. Addressing the issue of the security risks posed by in camera inspection, the court stated that "given the number of individuals already involved [in the decisionmaking process] [citation omitted], the additional oversight of a single federal judge poses a miniscule marginal risk of a security breach." *Id.* at 647 n.157.

145. See, e.g., text accompanying note 111 *supra*. *Contra*, *Zweibon v. Mitchell*, 516 F.2d 594, 643 (D.C. Cir. 1975) ("judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation").

146. The third exemption which excepts material "specifically exempted from disclosure by statute" will not usually call for an independent judgment by the court. 5 U.S.C. § 552(b)(3) (1971), *as amended*, (Supp. IV, 1975).

147. 42 U.S.C. § 4332(2)(c) (1971).

expertise than does review of environmental impact statements.

While it has been held that the judiciary is constitutionally barred from conducting *any* substantive review of agency classification,¹⁴⁸ there is constitutional support for the contrary view. In juxtaposition to the separation of powers principle supporting the executive's national security privilege,¹⁴⁹ the system of checks and balances permits each branch of government to operate as a restraint upon the others. The role of constitutional arbiter has devolved upon the courts, the Supreme Court becoming "the entity possessing sole and final authority to determine the limits of executive privilege"¹⁵⁰

It is well established that executive power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹⁵¹ It is the judicial branch of government which is able to insure that actions taken under cover of executive privilege are in conformity with constitutional prescriptions.¹⁵² In the area of information, the alternative of no judicial review, according to Wigmore,¹⁵³

148. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). See notes 107-11 *supra* and accompanying text.

149. See notes 22-25 *supra* and accompanying text.

150. Strong, *President, Congress, Judiciary: One is More Equal than the Others*, 60 A.B.A.J. 1050 (1974) (demonstrating that a doctrine of "constitutional review" permits a judicial check on the legitimate exercise of the executive's privilege). See also R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974).

151. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *accord*, *Kent v. Dulles*, 357 U.S. 116 (1958); *Zweibon v. Mitchell*, 516 F.2d 594, 604-05, 619-27 (D.C. Cir. 1975) (en banc, plurality opinion). In *Zweibon* the court noted that although the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals [footnote omitted], the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds.

Id. at 604-05. The court labeled it a "misconception" that "Executive power in the domain of foreign relations . . . [is] exempt from judicial review or immune to constitutional limitations." *Id.* at 626.

152. One such prescription may be the public's right to know which is implicit in the first amendment. A proponent of such a right is Thomas Emerson who concludes that freedom of expression "includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3 (Random House ed. 1970). Advocates of the public's "right to know" acknowledge that the right is not specifically stated in the Constitution, but indicate that it may be inferred from it. See Note, 17 N.Y.L.F., *supra* note 90. "Recognition of the right to know would . . . broaden the scope of judicial review where executive privilege is invoked by government officials to justify non-disclosure." *Id.* at 836. Such judicial review might include the determination of whether, in the exercise of administrative discretion, the classifying officer had effected an impermissible restraint on first amendment rights.

153. J. WIGMORE, *supra* note 144, § 2379, at 810. Such was the case during the

furnish[es] to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing

It follows that any meaningful check upon the power of administrative agencies to classify information must reside outside the executive branch itself.¹⁵⁴

With the exception of Judge Craven's concurring opinion in *United States v. Marchetti*,¹⁵⁵ and Justice Douglas' expository analyses in *Gravel v. United States*¹⁵⁶ and *New York Times Co. v. United States*,¹⁵⁷ there have been no judicial expressions of a constitutional basis for substantive review of agency classifica-

Vietnam War when even the Senate Foreign Relations Committee was so unsuccessful in obtaining accurate information from the executive branch that it was forced to hire its own investigators and send them to Southeast Asia. *Executive Privilege: The Withholding of Information by the Executive, Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 206 (1971). There have been numerous instances of classification abuse. See *Gravel v. United States*, 408 U.S. 606, 642 n.9 (1972) (Douglas, J., dissenting); *TIME*, July 5, 1971, at 14. Justice Douglas noted in his dissent in *Gravel*:

We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both Communist and United States forces. . . . [O]rdinary newspaper clippings of criticism aimed at the military have been routinely marked secret Former Justice and former Ambassador to the United Nations, Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time."

Gravel v. United States, *supra*.

154. There is ample precedent for the type of judicial review envisioned here. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court reviewed an action by the Secretary of State taken pursuant to a direct order from the President. Despite the Government's claim that the seizure of steel mills was necessitated by national security and defense considerations, the Court barred it as violative of the Constitution. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court sanctioned judicial review of legislative apportionment, an area which is at least as much a function of the legislative branch of government as the protection of information vital to the national security is a function of the Executive. Thus, the fact that a particular function is traditionally left to one branch of government, and that the separation of powers doctrine indicates that it should remain with that branch, need not preclude judicial review to see that the action was carried out within the limits prescribed by the Constitution.

155. 466 F.2d 1309, 1318 (4th Cir. 1972) (Craven, J., concurring).

156. 408 U.S. 606, 633 (1972) (Douglas, J., dissenting) (Justice Douglas argued that the first amendment should be preferred over all competing claims of executive privilege).

157. 403 U.S. 713, 723 (1971) (Douglas, J., concurring).

tion determinations. As a result of *Mink*'s intepretation of the 1966 Act judicial debate on this issue was foreclosed. A call was then sounded for amendment of the Act whose purpose had been to open government to the people.¹⁵⁸

Executive Order No. 11,652

The executive branch had itself taken steps to modify the elements of Executive Order No. 10,501 at issue in *Mink* in favor of increased disclosure. In January 1971, in an attempt to forestall any major revision of the Freedom of Information Act which would threaten executive control over the flow of national security information, President Nixon established an interagency group to review Executive Order No. 10,501.¹⁵⁹ Its work product was Executive Order No. 11,652,¹⁶⁰ signed by President Nixon on March 8, 1972, overriding and superseding Executive Order No. 10,501. The new order reduced the number of agencies, departments, and agency personnel given general classification authority.¹⁶¹ While retaining the same classification categories, the Order narrowed the scope of the material encompassed by each.¹⁶² A complex system of review, downgrading, and automatic declassification was established.¹⁶³ These procedures, however, were to have only prospective effect.

With respect to classification procedure, the "blanket classification" technique challenged in *Mink* was eliminated. Each page of a file is to be separately classified, and single documents are "to the extent practicable, [to] be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."¹⁶⁴ Under the new executive order, each classified document must be identified by its office of origin, date of classification,

158. See, e.g., C. BARKER & M. FOX, CLASSIFIED FILES: THE YELLOWING PAGES (1972); Henkin, *supra* note 12.

159. See 7 WEEKLY COMP. PRES. DOCS. 1019 (1971); Comment, *Declassification of Sensitive Information: A Comment on Executive Order 11652*, 41 GEO. WASH. L. REV. 1052, 1060 n.63 (1973). The group was initially headed by Assistant Attorney General, later Mr. Justice William Rehnquist, and subsequently by David Young, then a National Security Council staff member.

160. 3 C.F.R. 375 (1973), as amended, Exec. Order No. 11,714, 3A C.F.R. 174 (1974).

161. *Id.* § 2, 3 C.F.R. at 376-78.

162. See *id.* §§ 1 (A)-(C), 3 C.F.R. at 376.

163. *Id.* § 5, 3 C.F.R. at 380-81.

164. *Id.* § 4(A), 3 C.F.R. at 379. The 1974 amendments to the Freedom of Information Act similarly provided that "any reasonably segregable portion of a record" must be released. 5 U.S.C. § 552(b) (Supp. IV, 1975).

and the name of the highest authority approving the classification.¹⁶⁵

The Order specifically prohibits the use of the classification stamp to conceal inefficiency or error, or to prevent personal or departmental embarrassment, and provides that “[r]epeated abuse of the classification process shall be grounds for an administrative reprimand.”¹⁶⁶ The Order, however, does not provide a satisfactory method by which abuse might be exposed. The Supreme Court’s decision in *Mink* further diminished the impact of the provision.

A partial answer to the problem of checking the substantive accuracy of a classification is suggested by the Order’s provision for an Interagency Classification Review Committee (ICRC)¹⁶⁷ to hear citizen complaints about agency classification determinations. The ICRC, which is composed of representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the CIA, and the National Security Council Staff, and whose chairperson is appointed by the President, has the power to order the production of documents from the classifying agencies pursuant to its role in monitoring the implementation of the executive order.¹⁶⁸

Theoretically, creation of the ICRC should have facilitated the discovery of classification abuses and thereby made the sanction of “administrative reprimand” meaningful. In practice, the Order gave ultimate responsibility for monitoring and implementation to the National Security Council¹⁶⁹ and the ICRC adopted

165. Exec. Order No. 11,652, *supra* note 160, at § 4.

166. *Id.* § 13, 3 C.F.R. at 386. The 1974 amendments to the Freedom of Information Act have since provided even stronger sanctions for classifications abuse. Section 552(a)(4)(F) directs that where a court finds that

the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted

5 U.S.C. § 552(a)(4)(F) (Supp. IV, 1975). For a comprehensive discussion of this provision see Vaughn, *The Sanctions Provision of the Freedom of Information Act*, 25 AM. U.L. REV. 7 (1975).

167. Exec. Order No. 11,652, *supra* note 160, at § 7(A), 3 C.F.R. at 383-84.

168. Section 7(A) gives the ICRC power to “oversee Department actions to ensure compliance” *Id.* at 383-84. Section 7(B) requires ICRC approval of departmental regulations adopted pursuant to the Order. *Id.* at 384. Section 13 provides that where the ICRC has discovered unnecessary classification or overclassification, “it shall make a report to the head of the Department concerned in order that corrective steps may be taken.” *Id.* at 386.

169. *Id.* § 7(A), 3 C.F.R. at 383-84.

an advisory posture.¹⁷⁰ The more fundamental problem, however, is that the review procedure established by the executive order allows representatives of the agencies which classified the material in the first instance to sit in judgment over the accuracy and propriety of the determinations. The reviewers are likely to have the same biases as the original classifier and to be susceptible to similar pressures. Without at least the possibility of later judicial review, competing considerations are unlikely to be given their due weight, and only the most egregious cases of administrative abuse are apt to come to light and be effectively remedied.

While Executive Order No. 11,652 contained serious defects in its procedures for control of classification abuse, it was a step toward that end and a vast improvement over Executive Order No. 10,501. The new order was ostensibly "based upon . . . a reexamination of the rationale underlying the Freedom of Information Act,"¹⁷¹ and purported to establish a "new, more progressive system for classification and declassification of Government documents relating to national security."¹⁷² President Nixon acknowledged that "controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations."¹⁷³ The Order itself provided:¹⁷⁴

Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations.

A National Security Council directive further underscored this policy by providing that "any substantial doubt" should be resolved in favor of "the less restrictive treatment."¹⁷⁵

The Order was nevertheless open to substantial criticisms.

170. See Comment, 41 GEO. WASH. L. REV., *supra* note 159, at 1068. The Order itself was vague as to the relative roles of the ICRC and NSC. When it considered declassification appropriate, the ICRC would forward its recommendations to Presidential Advisor Henry Kissinger, who would make a final decision after consultation with the National Security Council.

171. 8 Presidential Documents 542, 543 (March 13, 1972).

172. *Id.* at 542.

173. *Id.* at 543.

174. § 4, 3 C.F.R. 375, 379 (1973).

175. NSC Directive, May 19, 1972, 37 FED. REG. 10053-54 (1972).

These were, in brief: (1) lack of an adequate mechanism for the control of classification abuse,¹⁷⁶ (2) retention of presidential discretion to authorize classification by additional officials, departments, or agencies, (3) failure to require agencies and departments to routinely review classified material to determine whether downgrading or declassification is warranted, (4) creation of unreasonably long automatic declassification periods, and (5) exclusion of information classified prior to the effective date of the new executive order from its automatic declassification provisions. By far the most serious limitation on the prevention of classification abuse, however, was the unavailability of meaningful judicial review, precluded by the Court's decision in *Mink*. The decision was mystifying in light of the position taken by the executive branch itself. Consider, for example, the statement of David Young, former Executive Director of the ICRC:¹⁷⁷

There is a two-tier mechanism. The [classifying] department will establish a Review Committee, and then you will move up to the Inter-Agency Committee, and then if you are unhappy, you can go to court. That is where the Freedom of Information Act comes in. What we have done is give the court a means for interpreting [the national security] exemption of the Freedom of Information Act.

The judiciary had lagged behind both the executive and legislative branches and allowed unchecked assertions of national security interests to override constitutional protections and the legislative will.

The 1974 Amendments

After the decision in *New York Times Co. v. United States*,¹⁷⁸ Congress began a series of hearings on the problem of government secrecy. The House Subcommittee on Foreign Operations and Government Information conducted a comprehensive study of agency action under the Freedom of Information Act, and followed this study with investigatory hearings.¹⁷⁹ The tone of the

176. See notes 166-70 *supra* and accompanying text.

177. White House Press Release of John D. Ehrlichman and David Young, March 8, 1972, at 9, reprinted in Note, 59 Iowa L. Rev., *supra* note 36, at 126 n.166.

178. 403 U.S. 713 (1971).

179. *Hearings on U.S. Government Information Policies and Practices — Administration and Operation of the Freedom of Information Act Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pts. 4, 5, & 6 (1972). See also *id.* pt. 7 (*Security Classification*

hearings generally was represented in Chairman Moorhead's statement opening hearings on the b(1) exemption:¹⁸⁰

The Congress passed a law in 1966 designed to limit Government secrecy. We listed nine categories of public records which Government agencies might withhold. . . . It might require further legislation to convince the secrecy-minded bureaucrats that Congress meant what it said 5 years ago when it passed the first Freedom of Information Act.

It will require legislation, I believe, to straighten out the secrecy mess which has been created in the name of national defense.

The thrust of the movement for reform was in the House; hearings on H. R. 5425 and H. R. 4960 were opened by Chairman Moorhead on May 2, 1973.¹⁸¹ Testimony before the House Subcommittee criticized the executive departments and agencies for failing to cooperate in implementation of the Act.¹⁸² The basic complaint was that top administrators had "failed to push full implementation of the Act, while middle-level officials had no incentive to abandon past habits of caution. The safe course continued to be 'when in doubt, deny.'"¹⁸³ The prevailing judicial interpretation of the national security exemption had rendered the Act practically useless as a means of access to improperly classified information and to information for which classification was no longer justified. The decision in *Mink* was seen by many as one of the major obstacles to full implementation of the congressional intent.¹⁸⁴

Those opposing amendment, in the main representatives of

Problems Involving Subsection (b)(1) of the Freedom of Information Act). The subcommittee issued a unanimous report recommending measures to strengthen the Freedom of Information Act. H.R. REP. NO. 92-1419, *Administration of the Freedom of Information Act*, 92d Cong., 2d Sess. (1972). See also *Hearings on S. 1125*, *supra* note 153.

180. *Hearings on U.S. Government Information Policies and Practices*, *supra* note 179, pt. 7, at 2284-85.

181. *Hearings on H.R. 5425 & H.R. 4960 Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. (1973).

182. *Id.* at 93, 344-47. See also Engel, *Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U.L. REV. 14 (1973); Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971); Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1970).

183. Clark, *supra* note 81, at 763.

184. For example, Senator Edmund Muskie, who sponsored the amendment in the Senate, observed that the change was required because of the Supreme Court's decision in *Mink*. See 42 U. CIN. L. REV. 529, 538-39 n.55 (1973).

administrative agencies and executive departments, argued that the *Mink* decision was constitutionally warranted, and that the Act was the maximum permissible intrusion upon the executive's privilege to withhold information. The Justice Department quoted with approval the Court's statement in *Mink* that judicial review may not extend to "[e]xecutive security classifications . . . at the insistence of anyone who might seek to question them."¹⁸⁵ The Department argued that "the courts, as they themselves have recognized, are not equipped [for such review],"¹⁸⁶ and that the new executive order provided adequate sanction for abuse.¹⁸⁷ The Department of Defense suggested an alternative approach. Fearing that new amendments would be "interpreted as an encouragement to the courts to second-guess security classification decisions made pursuant to an Executive Order,"¹⁸⁸ it urged Congress to¹⁸⁹

simply permit the court, where it has some reason to doubt the validity of an affidavit supporting a security classification, to examine the classified record solely for the purpose of determining that the authorized official of the Executive Branch has exercised his classification authority in good faith and in basic conformity with the criteria of the Executive Order.

This would have placed the burden of proof on the plaintiff seeking disclosure.

H. R. 12,471, amending the Freedom of Information Act,¹⁹⁰ was ultimately passed over the objections of the Departments of Justice and State, and over President Ford's veto.¹⁹¹ The amendments effected two major changes in this area. The first, removing the bar imposed by *Mink*, provided that a court reviewing a claim of exemption "may examine the contents of . . . agency

185. Letter from the Department of Justice to Representative Chet Holifield, Chairman of the House Committee on Government Operations, Feb. 20, 1974, U.S. Code Cong. & Ad. News 6279 (1974), *quoting* *EPA v. Mink*, 410 U.S. 73, 82 (1973).

186. Letter from the Department of Justice, *supra* note 185, U.S. Code Cong. & Ad. News at 6279.

187. *Id.* at 6281.

188. Letter from L. Niederlehner, Acting General Counsel of the Department of Defense to Representative Chet Holifield, Chairman of the House Committee on Government Operations, Feb. 20, 1974, U.S. Code Cong. & Ad. News 6285 (1974).

189. *Id.*

190. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *amending* 5 U.S.C. § 552 (1971) (codified at 5 U.S.C. § 552 (Supp. IV, 1975)).

191. *Veto of Freedom of Information Act Amendments*, Oct. 17, 1974, 10 WEEKLY COMP. PRES. DOCS. 1318 (1974). *See generally* N.Y. Times, Nov. 22, 1974, at 21, col. 3.

records *in camera*”¹⁹² The second was a restatement of the national security exemption. It now exempts from the Act’s disclosure requirements any matters which are:¹⁹³

(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

The House Report which accompanied the bill specifies the legislative intent:¹⁹⁴

The first of these amendments would insert an additional clause in section 552(a)(3) to make it clear that court review *may* include examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in section 552(b). This language authorizes the court to go behind the official notice of classification and examine the contents of the records themselves.

. . . .

The second amendment aimed at court review is a rewording of section 552(b)(1) The change from the language pertaining to information “required” to be classified by Executive order to information which is “authorized” to be classified under the “criteria” of an Executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.

Thus, the amendments were a major change in the law. There was no reference in the House Report, however, to a possible conflict between the scope of judicial review authorized and executive privilege. The Report simply noted that the witnesses who testified as representatives of the executive branch had opposed the original Act and were similarly opposed to the new amendments.¹⁹⁵

The Senate debates were an interesting piece of the legisla-

192. 5 U.S.C. § 552(a)(4)(B) (Supp. IV, 1975).

193. 5 U.S.C. § 552(b)(1) (Supp. IV, 1975).

194. H.R. REP. NO. 876, *supra* note 52, at 7, U.S. CODE CONG. & AD. NEWS 6273 (1974) (emphasis in original).

195. *Id.* at 10, U.S. CODE CONG. & AD. NEWS at 6275.

tive history. The Senate's version of the amendments had provided that upon submission of an agency head's affidavit¹⁹⁶

certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld . . . the court shall sustain such withholding unless, following its *in camera* examination, it finds the withholding is without a reasonable basis

Such a provision, similar to that suggested by the Defense Department, would have shifted the burden from the agency to the petitioner who requests security-related information.¹⁹⁷ The proposal was never adopted by the full Senate.

The only indication of congressional intent to limit the power of the courts to conduct full-scale review of agency classification appeared in the Conference Report which accompanied the final version of the bill.¹⁹⁸ The Report reiterated that the amendment set aside the holding in *Mink* and allowed *in camera* review of classified documents to determine whether they were " 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in [the] Executive order."¹⁹⁹ The Report cautioned, however, that because of the extreme sensitivity of the material involved, deference should be given to executive determinations in this area.²⁰⁰

Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure.

The conferees also noted that:²⁰¹

196. S. 2543, 93d Cong., 2d Sess. (1974), 120 CONG. REC. 9311 (daily ed. May 30, 1974).

197. It has been suggested that the reason behind this proposed change was that Senator Kennedy, who authored the draft and who was steering it through the Senate, went along with this language to keep peace within a coalition which included a number of conservatives whose support was necessary to avoid a showdown over the [proposed] provisions which imposed sanctions against officials who unreasonably withheld information.

Clark, *supra* note 81, at 757.

198. H. REP. NO. 93-1380 (Conference Report No. 1200), 93d Cong., 2d Sess. (1974), U.S. CODE CONG. & AD. NEWS 6285 (1974) [hereinafter cited as Conference Report], accompanying ultimate passage of H.R. 12471.

199. *Id.* at 12, U.S. CODE CONG. & AD. NEWS at 6290.

200. *Id.* at 9, U.S. CODE CONG. & AD. NEWS at 6288.

201. *Id.* at 12, U.S. CODE CONG. & AD. NEWS at 6290.

[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

The full meaning of this caveat is not readily apparent. How is the "substantial weight" accorded to an agency affidavit to be reconciled with the fact that the Act places on the agency the burden of proving that information has been "'properly classified' pursuant to both procedural *and substantive* criteria contained in [the] Executive order"?²⁰² The Conference Report did affirm that "[t]he burden remains on the Government under this law."²⁰³ It is likely that the conferees merely intended to emphasize that in camera review of the substantive accuracy of a classification is merely an option at the court's disposal, and may not be necessary where the Government can show that documents are "*clearly* exempt from disclosure."²⁰⁴ Such an interpretation is consistent with the purposes of the amendments and of the original Act.

Preclusion of in camera inspection might occur when the material requested is so critically sensitive, either to military preparedness or a delicate facet of our foreign relations, that disclosure to the court and a full-scale hearing would subject the material to an unwarranted and unnecessary risk. An example would be a request for State or Defense Department codes. In such a case, however, the executive would doubtless challenge in camera review on constitutional grounds—as violative of the separation of powers doctrine which gives the executive authority over foreign and military affairs.²⁰⁵ It is thus possible that the quoted passage in the Conference Report is an oblique recognition of the limitations which the doctrine of executive privilege places upon the congressional scheme. It is unfortunate that courts may arguably be able to choose between the version of the legislative history suggested here and a version which considers the Confer-

202. *Id.* (emphasis added).

203. *Id.* at 9, U.S. Code Cong. & Ad. News at 6287.

204. *Id.*, U.S. Code Cong. & Ad. News at 6288 (emphasis added).

205. See Clark, *supra* note 81, at 755.

ence Report as intending the courts to sustain withholding whenever there is a reasonable basis shown.

President Ford, in vetoing the amendments,²⁰⁶ emphasized that the judicial review provisions could conceivably violate the executive's privilege, and as such were unconstitutional. In doing so, he argued that:²⁰⁷

As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable.

This, he contended, "would violate constitutional principles."²⁰⁸ As previously noted,²⁰⁹ however, a judicial check upon the propriety of actions taken by the executive is not unconstitutional, and may in some cases be constitutionally required. All the Act's new language does is to "require the executive department to comply with its own rules as set out by executive order and . . . give the court the authority to decide whether there has been such compliance"²¹⁰

The President and the Congress have constitutional authority to establish standards for, and regulate the disclosure of, national security-related information;²¹¹ Congress has chosen at this time, however, to leave the determination of the standards to the executive. By permitting the courts to review classification determinations pursuant to the executive's standards, Congress has not invested the judiciary with a power which usurps an executive function. Congress has simply subjected the executive branch to the accountability contemplated by the constitutional system of government. The result should be the prevention of a runaway system of classification. As administrative officials must now be prepared to defend their actions in court, a giant step has been taken toward compelling the bureaucracy to honor the public's statutory right to know, and insuring more responsible determinations of what the public does not have a right to know.

206. *Veto of Freedom of Information Act Amendments, Oct. 17, 1974*, 10 WEEKLY COMP. PRES. DOCS. 1318 (1974).

207. *Id.*

208. *Id.*

209. See notes 149-54 *supra* and accompanying text.

210. Clark, *supra* note 81, at 754.

211. *EPA v. Mink*, 410 U.S. 73, 83 (1973); see Henkin, *supra* note 12, at 280 n.29.

Implementation of the judicial review mandated by the amendment, however, raises significant practical difficulties. Congress in effect incorporated the executive orders into the 1974 Act and a court must determine whether a challenged classification meets the standards of the appropriate order. The orders are generalized prescriptions stated in terms of vague concepts which present problems to a court charged with giving them practical effect.²¹² The difficulties are compounded because neither the statutory language, nor the legislative history, are clear on what standard of proof is to be imposed. The language of the Conference Report itself injects a degree of uncertainty on this issue.²¹³ As courts have done in other areas where they are authorized to review the legal basis for administrative action, they should, however, be able to develop a feel for the sensitive balancing which agency personnel must make in determining whether to classify. While in many cases the agency's judgment will prevail, the submission of administrative determinations to judicial scrutiny should in itself have a moderating influence.

Judicial review may not actually be the ultimate answer to the problem of reducing the great backlog of erroneously classified information. It has been argued that this burden should ultimately rest with Congress.²¹⁴ At present, however, it is the duty of the courts to prevent administrative abuse of the classification

212. In *Gorin v. United States*, 312 U.S. 19, 28 (1941), the Supreme Court defined "national defense" as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Gorin* has been severely criticized in that "[t]here are innumerable documents referring to the military or naval establishments, or related activities of national preparedness, which threaten no conceivable security or other governmental interest" Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 326 (1974). In recent years economic and environmental information have become increasingly important to the national security and welfare, even displacing the traditional military conception of what is vital to the national defense. Is such information circumscribed by the "national security" concept? One suggestion is that the standard for disclosure should be that upon release of the information in question, serious injury to the state is both likely and imminent. See *id.* at 332. See also Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177 (1973).

213. See notes 198-205 *supra* and accompanying text.

214. Henkin, *supra* note 12, at 279-80; see S. 3393, 93d Cong., 2d Sess. (1974). The bill would have established a Joint Committee in Congress in order to "supervise . . . the protection and disclosure of information relating to [national defense and foreign] policies [of the United States]" *Id.* § 4(b)(2). The Joint Committee would have been empowered to "direct the public disclosure" of such information. *Id.*

system to the extent possible within the limits imposed by the adversary system of justice.

The Judicial Response

Although, the amendments seem to have had some salutary effect upon the practices of the administrative agencies,²¹⁵ the only decisions dealing with the revised national security exemption to date have interpreted it in a manner not fully consistent with the policies behind the amendments. In *Alfred A. Knopf, Inc. v. Colby*,²¹⁶ the Fourth Circuit decided a sequel to the case of *United States v. Marchetti*, in which the court had issued an injunction prohibiting Marchetti's public disclosure of classified information acquired by him during his employment with the Central Intelligence Agency, thereby enforcing his contract of secrecy with the agency.²¹⁷ In the earlier decision, Marchetti had been ordered to submit any material intended for publication for review by the agency. After submission of his manuscript, the CIA specified 168 unpublishable items said to contain classified information. An action was filed by Alfred A. Knopf, Inc., the intended publisher, Marchetti, and John Marks, a former employee of the State Department who was also bound by the agency's decision, seeking an order which would permit the publication of these deleted items.²¹⁸

215. "[P]rodded by suits under the Act," the agencies made "three highly publicized disclosures" revealing material "viewed as both sensitive and embarrassing." Clark, *supra* note 81, at 750. The Atomic Energy Commission released documents that "it had suppressed over a ten-year period, setting out opinions of staff scientists that a major reactor accident might kill up to 45,000 people and create a disaster area the size of Pennsylvania." *Id.* at 750-51. The Department of the Army agreed to release the Peers Report, which described "the details of the My Lai massacre and . . . the failure of high ranking officers to face up to their responsibilities." *Id.* at 751. "[T]he Internal Revenue Service surrendered to the Tax Reform Research Group memoranda, letters and other documents describing the activities of an investigative group of the IRS which had since 1969 been keeping 'leftist organizations' under surveillance." *Id.* More recently, the FBI, under pressure from a lawsuit brought on behalf of the Socialist Workers Party, released documents which revealed that the party had been the subject of intensive investigation by the bureau for the past 20 years. *Washington Post*, July 17, 1975, at 1, col. 1. Similarly, the Justice Department has released 20,000 pages of documents concerning the investigation of Ethel and Julius Rosenberg. The couple's sons, Robert and Michael Meeropol, had filed suit under the Freedom of Information Act to obtain all the Government's files on their parents' case. *N.Y. Times*, Nov. 23, 1975, at 61, col. 1.

216. 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

217. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); *see* note 108 *supra* and accompanying text.

218. While the action was not brought under the Freedom of Information Act, its disclosure requirements were relevant in view of the court's holding that "[t]hese plain-

The district court limited its decision, reached prior to the amendment of the Freedom of Information Act, to the issue of whether the agency had satisfactorily demonstrated that the items sought to be withheld had been classified pursuant to executive order. A strict standard of proof was applied, however, the Court holding that information²¹⁹

is not classified until a classifying officer makes a conscious determination that the governmental interest in secrecy outweighs a general policy of disclosure and applies a label of 'Top Secret' or 'Secret' or 'Confidential' to the information in question.

On appeal, Chief Judge Haynsworth took cognizance of the new amendments, and stated that "the Freedom of Information Act as now amended clearly provides for judicial review of questions of classifiability," and that "any citizen now can compel the production of information actually classified if its classification was not authorized by the Executive Order."²²⁰ The court remanded the case for an appropriate determination of this issue. It then reviewed the lower court's determination on the issue of whether the material had in fact been classified, and concluded that "the burden of proof imposed upon the defendants to establish classification was far too stringent"²²¹ The court ordered new findings of fact, substituting for the lower court's standard of proof, a "presumption of regularity"²²² under which there is "no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the 'Top Secret' legend on the document."²²³

In applying a presumption of regularity to classification issues, the Fourth Circuit acted in disregard of the stated premises

tiffs should not be denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

219. *Id.* at 1366 (court of appeals characterizing the district court holding).

220. *Id.* at 1367.

221. *Id.* at 1370.

222. *Id.* at 1368.

223. *Id.* The court also relied on the presumption of regularity in deciding that vague testimony by deputy directors of the CIA on the probable time of classification was sufficient to prove that classification occurred before Marchetti's employment had terminated. The presumption dispelled the need for any testimony by the classifying officer on this issue. *Id.* at 1369.

of the Freedom of Information Act. While it is generally recognized that a "presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties,"²²⁴ the Freedom of Information Act abrogated the presumption in the area of government-held information. The legislative reports accompanying the bill specifically state, with regard to information withheld pursuant to executive classification, that it is the intention of the Act to place the burden of proof squarely on the Government.²²⁵ The presumption is now one of irregularity with respect to agency determinations to withhold information from the public.

The other decision to date dealing with the disclosure of national security information under the amended Act is that of a district court in *Therault v. United States*.²²⁶ The survivors of a United States Air Force civilian employee killed in the crash of an Air Force EC-135 brought suit under the Freedom of Information Act for a complete copy of the Air Force accident report for use in a pending wrongful death action. The court relied on executive privilege to preclude disclosure.²²⁷ Finding that the report did not fall under the national security exemption since it had never been classified pursuant to the procedures outlined in Executive Order 11,652, the court held that "[t]he filing of a claim of

224. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *accord*, *FCC v. Schreiber*, 381 U.S. 279 (1965); *Keene v. United States*, 266 F.2d 378 (10th Cir. 1959) where the court stated:

[W]e will indulge in the regularity of the [selective service] board proceedings, i.e., 'that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown' [citations omitted].

Id. at 380.

225. *See, e.g.*, Conference Report, *supra* note 198, at 9, U.S. Code Cong. & Ad. News at 6287-88.

226. 395 F. Supp. 637 (C.D. Cal. 1975).

227. An alternate basis for the decision was reliance on equity principles. The district court adhered to an earlier decision of the Ninth Circuit in the same case. *Therault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974) ("[w]e realize that a given agency might fail to show a specific exemption protecting a given record and yet in good faith claim that dire adverse potentialities will occur and result from a disclosure of a given record"). Courts are sharply divided on whether equitable jurisdiction is available to deny disclosure of materials on grounds other than those specified by the Act. *Compare* *Rose v. Department of Air Force*, 495 F.2d 261, 269-70 (2d Cir. 1974), *aff'd on other grounds*, 44 U.S.L.W. 4503 (U.S. Apr. 21, 1976), *with* *Soucie v. David*, 448 F.2d 1067, 1077 (D.D.C. 1971). *But see* 5 U.S.C. § 552(c) (Supp. IV, 1975) (limiting withholding to the exemptions "specifically stated" in the Act).

Executive Privilege . . . invokes the Court's equitable powers and requires the Court to balance the needs of the parties in addition to considering whether the documents in question are specifically exempted from disclosure under the Freedom of Information Act. [Citations omitted.]”²²⁸ The court found that “[t]he disclosure of the withheld portions of the aircraft accident report would adversely affect the Air Force’s Aviation Safety Program, which has a direct bearing on the national security of this country.”²²⁹ Disclosure of the report was therefore denied.

The question which *Theriault* raises is whether the doctrine of executive privilege is a substitute for the national security exemption of the Act and is to be used whenever an agency desires to prevent disclosure but fails to meet the requirements which the Act imposes. To answer affirmatively would be to eliminate any need for the statutory exemption and to vitiate the Act. *Theriault*, in “balancing the competing interests,” and noting that “the documents in question would clearly fall within the spirit if not the letter of the exemption,”²³⁰ adopts this untenable position, and should be reversed.²³¹

228. *Theriault v. United States*, 395 F. Supp. 637, 641 (C.D. Cal. 1975). The opinion states that had the report been classified pursuant to Executive Order 11,652, the Air Force would have “thereby precluded any further proceedings by this Court” *Id.* at 641, citing *EPA v. Mink*, 410 U.S. 73, 84 (1973). Judge Hauk was apparently unaware that the decision in *Mink* was specifically overruled by the amendments to the Freedom of Information Act.

229. *Theriault v. United States*, 395 F. Supp. 637, 642 (C.D. Cal. 1975). The court reached this conclusion by noting that

[i]n order to insure that all possible causes of an accident are identified and considered and all corrective actions are weighed, investigators operate [and witnesses testify] with the understanding that their deliberations and their reports [and their testimony] will not be released outside of the Air Force or used for any purpose other than aviation safety.

Id. at 640. The court reasoned that the “keystone” of the Air Force Aviation Safety Program is the “ability of the Air Force to obtain all available information pertaining to an accident,” and as the program is vital to the national security, release of the report would be detrimental to national security interests. *Id.* at 641.

230. *Id.* at 642.

231. A very similar fact pattern was presented to another court in *Rabbitt v. Department of Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1975). The court held that transcripts of witnesses’ statements before the Air Force Investigation Board were protected from disclosure by a qualified claim of executive privilege extending to “documents which are integral to an appropriate exercise of the executive’s decisional and policy-making functions” and “intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated [citations omitted].” *Id.* at 1208-09. See also *Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975). It thus seems that, at least insofar as air crash

Theriault raises an issue discussed by Professor Davis in his analysis of the 1966 Act: can it be said that²³²

the statute defines the national interest or the public interest under the doctrine of executive privilege, and that the constitutional law and the common law of executive privilege are embodied in the statutory law, which then would become the foundation for all law of disclosure?

He concluded that the Act permitted no such conclusion and predicted that "[i]nstead of building on the statute, the courts will build on three foundations—the statute, the public interest according to the doctrine of Executive privilege, and equity traditions."²³³ Professor Davis' prediction may have come to fruition notwithstanding the amendment of the Act in 1974.

IV. CONCLUSION

Despite their disappointing interpretations of the new amendments, it is to be hoped that courts will ultimately adopt a more liberal attitude toward requests for information of a national security character—one which is more consistent with democratic theory, first amendment rights, and the Freedom of Information Act. Thomas Jefferson once asked "whether peace is best preserved by giving energy to the government, or information to the people" ²³⁴ He answered that the latter "is the most certain, and the most legitimate engine of government."²³⁵

The Supreme Court denied certiorari in *Alfred A. Knopf v. Colby*.²³⁶ By so doing, it let stand a lower court decision which placed a greater premium on the executive's right to secrecy than on the public's right to know. The judicial branch should be aware that under the statutory scheme it is the courts' power of review which stands as the sole limitation upon an executive branch infused with the notion that it is privileged to withhold almost any information it pleases.²³⁷ Vietnam and Watergate

accident reports are concerned, courts have managed to bypass the Freedom of Information Act and deny disclosure.

232. Davis, *supra* note 61, at 803.

233. *Id.* at 803-04.

234. 6 WRITINGS OF THOMAS JEFFERSON 392 (Memorial ed. 1903), as quoted in *Gravel v. United States*, 408 U.S. 606, 641 (1972) (Douglas, J., dissenting).

235. *Id.*

236. 421 U.S. 992 (1975).

237. The danger of abuse of the system of classification was underscored by Justice Douglas in his dissenting opinion in *Gravel v. United States*, 408 U.S. 606, 641-42 (1972):

teach that it is impossible for citizens to ascertain whether those who have been charged with the protection of the national interest have acted responsibly unless there is access to such information as will facilitate public scrutiny of official action. Justice Stewart made this point in his concurring opinion in the *Pentagon Papers* case.²³⁸

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the area of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. . . .

. . . I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure recognizing that secrecy can best be preserved only when credibility is truly maintained.

Mark S. Adler

[A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin “incident,” and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials’ tool of suppression and it has been used to withhold information which in “99 1/2%” of the cases would present no danger to national security.

238. *New York Times Co. v. United States*, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring).