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THE FREEDOM OF INFORMATION ACT,
A CHALLENGE TO THE
EXECUTIVE AND THE JUDICIARY

AN HISTORICAL PERSPECTIVE ON LEGISLATION
RELATED TO THE CONTROL OF GOVERNMENT INFORMATION

Any analysis of the amended section 3 of the Administrative Procedure Act (APA)\(^1\) would be incomplete without a brief perspective of prior legislation involving the control and dissemination of government information. The federal government's first attempt at authorizing the control of information was the "Housekeeping" provision of 1789, permitting heads of agencies to prescribe regulations for the custody, use, and preservation of its records, papers, and property.\(^2\) Since its enactment, the provision has continually been used by the Government as a means of withholding information.\(^3\) While there is no conclusive evidence that this section was intended to be a public disclosure law, an objective examination of the statute indicates that it was not necessarily intended to operate as a barrier to those individuals legitimately seeking information.

In recognition of numerous Government abuses under the statute, and in order to resolve any doubt as to whether the section could be invoked to withhold government information from the public, Congress passed the Moss-Hennings Amendment. In *Cooney v. Sun Shipbuilding & Drydock Co.*,\(^4\) the district court commented on section 22 and the Moss-Hennings Amendment as follows:

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1. The original section 3 of the Administrative Procedure Act was amended by Pub. L. 89-487 and codified as 5 U.S.C. § 552 (1967). Because this analysis relies primarily upon the legislative history of both houses and upon the ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), [hereinafter cited as ATT'y GEN. MEMO.] which were all written with reference to the uncodified version, such version will be used here. As noted in the *U.S. Code Cong. & Adm. News*, 90th Cong., 1st Sess., S. REP. No. 248 p. 1196 (1967), changes between the uncodified and codified versions were not intended to alter in any way the substance of the section as originally enacted. (See Appendix A for the uncodified version of the amended section 3 of the APA and Appendix B for the original section 3).

2. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. (R.S. § 161.)

3. See, e.g., United States *ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); Boske *v. Comingore*, 177 U.S. 459 (1900); Appeal of the United States Securities & Exchange Comm'n, 226 F.2d 501 (6th Cir. 1955); *Ex parte Sackett*, 74 F.2d 922 (9th Cir. 1935).

Of itself the statute [5 U.S.C. 22] does not authorize the withholding of departmental files. But for many years, government agencies, with the acquiescence of the courts, consistently cited the statute as the basis for regulations prohibiting subordinate officials from making records available to members of the public or for use in litigation except upon permission of the secretary or agency head. However, any former presumptions as to the authority of that statute to justify the withholding of records was [sic] effectively laid to rest by the 1958 amendment to that statute [Moss-Hennings], which provided:

'This section does not authorize withholding information from the public or limiting the availability of records to the public.'

Section 3 of the Administrative Procedure Act

In its first true attempt to create a public disclosure law, Congress enacted section 3 of the APA in 1946. The congressional intent in enacting the original section 3 was reviewed in the House committee hearing on the Freedom of Information Act. In commenting upon section 3 of the APA, it was stated that the public information provisions

are in many ways among the most important, far-reaching, and useful provisions ***. The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance.

The weaknesses of the original section 3 were readily apparent to Congress and the citizens who sought information. Although there were many loopholes through which the Government could arbitrarily refuse to release information, dissatisfaction with the section focused on four principal areas.

1. There is excepted from the operation of the whole section 'any function of the United States requiring secrecy in the public interest ***'. There is no attempt in the bill or its legislative history to delimit 'in the public interest,' and there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to withhold information.

2. Although subsection (b) requires the agency to make available to public inspection 'all final opinions or orders in the adjudication of cases,' it vitiates this command by adding the following limitations: *** except those required for good cause to be held confidential ***.'

3. As to public records generally, subsection (c) requires their availability 'to persons properly and directly concerned except information held confidential for good cause found.' This is a double-barreled loophole because not only is there the vague phrase 'for good cause found,' there is also a further excuse for with-
holding if persons are not 'properly and directly concerned.'

(4) There is no remedy in case of wrongful withholding of in-
formation from citizens by Government officials.8

Government withholding in these four areas as well as
others ranged from reasonable to absurd.9 In 1962, the National
Science Foundation believed that it was not "in the public in-
terest" to disclose cost estimates submitted by unsuccessful
contractors on a multi-million dollar deep sea study. It appeared
that the firm which was awarded the contract had not submitted
the lowest offer.10 In 1961, the Secretary of the Navy withheld
the Navy's telephone directories, relying upon section 3 as it
pertains to matters relating solely to the internal management.11

While the public information section, because of its many
loopholes, clearly could not and did not operate as a disclosure
law, few perceived that it would have the reverse effect of au-
thorizing the withholding of government information. In sum-
marizing its analysis of the original section 3, the Senate made
two major observations: (1) the section was inadequate to
serve the purpose for which it was designed, and (2) many in-
justices were perpetrated under the "Public Information" sec-
tion.12

The Freedom of Information Act

The Freedom of Information Act of 1966 (FOIA) was in-
tended to assure maximum disclosure of government information
to all citizens and to rectify the numerous inadequacies of the
original section 3 of the APA.13 More specifically, it was in-

1497, at 2422 succinctly states:
Improper denials occur again and again. For more than 10 years,
through the administration of both political parties, case after case of
improper withholding based upon 5 U.S.C. § 1002 has been documented.
10 Id. at 2422.
11 Id.
12 See S. Rep. No. 813, 89th Cong., 1st Sess. at 5, wherein it is stated:
It is the conclusion of the committee that the present section 3 of the
Administrative Procedure Act is of little or no value to the public in
gaining access to records of the Federal Government. Indeed, it has
had precisely the opposite effect: it is cited as statutory authority for
the withholding of virtually any piece of information that an official
or an agency does not wish to disclose.
Under the present section 3, any Government official can under
color of law withhold almost anything from any citizen under the vague
standards — or, more precisely, lack of standards — in section 3. It
would require almost no effort for any official to think up a reason why a
piece of information should be withheld (1) because it was in the
'public interest,' or (2) 'for good cause found,' or (3) that the person
making the request was not 'properly and directly concerned.' And,
even if his reason had not a scintilla of validity, there is absolutely
nothing that a citizen seeking information can do because there is no
remedy available.
13 The amended section 3 of the Administrative Procedure Act, 60 Stat.
238, 5 U.S.C. § 552 was signed into law by President Lyndon Johnson on
July 4, 1966, and became effective on July 4, 1967. It is popularly referred
to as the Freedom of Information Act.
tended that the Government should no longer be able to practice indiscriminate withholding of information by the use of the original section 3 loopholes. In commenting upon the purpose of the bill, the Senate report states:

It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies.

Cognizant that the government's arbitrary withholding of information had occurred too often under the original section 3, the Attorney General stated that the revised section 3 was enacted with the following key concerns:

- that disclosure be the general rule, not the exception;
- that all individuals have equal rights of access;
- that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
- that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
- that there be a change in Government policy and attitude.

It was not the purpose of the Act to require absolute disclosure in all situations. Both Congress and the Attorney General recognized instances when disclosure could infringe upon an individual's right of privacy or when disclosure could jeopardize the national security and should therefore not be allowed. Thus, the Act was designed to operate as a fulcrum for the balancing of interests: a citizen's right to know for the balancing of opposing interests, but it is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and provides.

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14 See text accompanying note 8 supra for the principal areas of dissatisfaction under the original section 3 of the Administrative Procedure Act.
15 Supra note 8, at 3.
16 ATT'Y GEN. MEMO., Foreword at III-IV.
17 Subsection (e) declares that none of the provisions of section 3 shall be applicable to nine listed exemptions. The exemptions apply across the entire law and govern all of the disclosure subsections — (a), (b), (c), and (d). (See Appendix A).
18 The principle of the “people's right to know” of their government's activities may have its base in the United States Constitution. Although not explicitly stated therein, some authorities find an implied right derived from the first and ninth amendments.
The Freedom of Information Act

tects all interests, yet places emphasis on the fullest possible disclosure.\textsuperscript{19}

\textbf{An Analysis of the Freedom of Information Act}

While the legislative history of the FOIA in each house of Congress clearly indicates a broad philosophy of disclosure, difficulties in interpretation and application have occurred. A brief analysis\textsuperscript{20} of each section will serve to illuminate significant changes from the original section 3, as well as to indicate the more important and troublesome areas for the practicing attorney.

Based upon the first two words of the introductory clause of the Act, "Every agency", the requirements apply to every "department, board, commission, division, or other organizational unit in the executive branch."\textsuperscript{21} The introductory clause of the original section 3 established two general exceptions prohibiting disclosure.\textsuperscript{22} In contrast, the revised section 3 begins with an affirmative direction that all agencies make government information available to the public, thus establishing at the outset that the Act is a "disclosure law," rather than a "withholding statute".

\textbf{Publication in the Federal Register}

Subsection (a) deals exclusively with materials which must be published in the Federal Register, enabling the public to find information concerning administrative operations. The Senate report notes that "[t]his subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material."\textsuperscript{23}

In order to avoid unnecessary duplication, the subsection does not require an agency to publish materials that are reasonably available and that can be incorporated by reference in the Federal Register. Such incorporation by reference is only permitted with approval of the Director of the Federal Register, and not merely by an agency head.

Another provision in subsection (a) serves as an added incentive for agencies to publish necessary information in the Federal Register. It provides that "Except to the extent that a

\begin{footnotes}
\item[19] \textit{Supra} note 8, at 3.
\item[20] For further analysis see K. C. Davis, \textit{Administrative Law Treatise}, ch. 3A, \textit{The Freedom of Information Act} (Supp. 1970); S. Rep. No. 813 and H.R. Rep. No. 1497 to which Professor Davis states at 116: "[p]robably more than ninety-five per cent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report." Also refer to the \textit{Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act}.
\item[21] \textit{Supra} note 15, at 4.
\item[22] \textit{Supra} note 16, at 4.
\item[23] \textit{Supra} note 8, at 6.
\end{footnotes}
person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published." Such a provision represents a more stringent clarification of a similar provision in the original sections, that "No person shall in any manner be required to resort to organization or procedure not so published."

_Agency Opinions and Orders_

Subsection (b) of both the past and present section 3 concerns the availability of agency opinions, orders, and rules. The original subsection (b) required publication of "... all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential ...)." Subsection (b) of the amended section 3 broadens disclosure by including "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and ... administrative staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale." It should be noted that while the revised subsection (b) similarly requires the availability of "final opinions or orders" in the adjudication of cases, it extends this disclosure obligation to include both "concurring and dissenting opinions."

The reasons necessitating the expansion of subsection (b) were explained in the House report as follows:

As the Federal Government has extended its activities to solve the Nation's expanding problems — and particularly in the 20 years since the Administrative Procedure Act was established — the bureaucracy has developed its own form of caselaw. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160.

In recognition of the diverse interests to be protected by the Act, subsection (b) includes a provision for the deletion of details to prevent a "clearly unwarranted invasion of personal privacy." In each case, the justification for deletion must be fully explained in writing. The Senate report explained that this authority to delete identifying details is "necessary in order to be able to balance the public's right to know with the private
citizen's right to be secure in his personal affairs which have no bearing or effect on the general public."\textsuperscript{29}

The subsection also requires agencies to maintain and make available for public inspection and copying\textsuperscript{30} a current index of any material which is issued, adopted, or promulgated after July 4, 1967, and which is required by the subsection to be made available or published. This clause sought to preclude the possibility that a citizen would lose a controversy with an agency because of an obscure order or opinion known only to the agency. Subsection (b) further provides its own sanction for agency non-compliance. Any "final order, opinion, statement of policy, interpretation, or staff manual, or instruction" not properly indexed and made available to the public (unless the party seeking information has actual and timely notice of its terms) may not be relied upon, used or cited as precedent by an agency against any private party.

\section*{Agency Records\textsuperscript{31}}

Subsection (c) contains some of the most unique and controversial provisions of the FOIA. The subsection deals with "agency records" that have not been made available to the general public by subsections (a) and (b). In noting the distinction between these subsections, the \textit{Attorney General's Memorandum} stated:

Whereas subsections (a) and (b) require the publication or general availability of the materials described in those subsections, the only

\textsuperscript{29} Supra note 8, at 7.

\textsuperscript{30} The phrase "and copying" was added because it is frequently of little use to be able to inspect orders or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful. 

\textsuperscript{31} The term "records" is not defined in the Act. However, in connection with the treatment of official records by the National Archives, Congress defines the term in the act of July 7, 1943, § 1, 57 Stat. 380, 44 U.S.C. § 366 (1964 ed.).

Section 366. Definition of records.

When used in sections 366-376 and 378-380 of this title, the word 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of the word 'records' as used in sections 366-376 and 378-380 of this title. (July 7, 1943, ch. 192, § 1, 57 Stat. 380.)
records which must be made available under subsection (c) are those for which a request has been made.\textsuperscript{32}

Since "any person" may request information, it is possible for an attorney to request it on behalf of a client without revealing the identity of the person actually desiring the material.\textsuperscript{33} The records requested must be identified\textsuperscript{34} by the person requesting them; however, the requirement of identification is not to be used by the Government as a means of withholding information.\textsuperscript{35} Also, agencies may establish fees for copying the requested material.

Subsection (c) provides a unique remedy for improper withholding of government information by giving United States district courts jurisdiction to compel production of such records. Additionally, it is expressly required that the burden of proof to justify withholding is placed upon the agency. Proper procedure dictates that a party exhaust all administrative remedies,\textsuperscript{36} including a review by the head of the agency denying information, before resorting to a judicial proceeding. In commenting upon the district court action the House report stated:

The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.\textsuperscript{37}

The complaint, naming the agency as defendant, must be filed in the district in which the applicant resides, or has his place of business, or in which the agency records are situated.

The Act thus rejects the usual principle of deference to administrative determinations — first, by requiring a trial de novo, and second, by shifting the burden of proof to the agency defendant. The procedure of de novo judicial review applies as well to any agency claim that documents sought to be discovered come within one or more of the nine statutory exemptions to disclosure. Here too, the agency has the burden of proof "as to

\textsuperscript{32} Supra note 16, at 23.
\textsuperscript{33} General Services Administration v. Benson, 289 F. Supp. 590, 593 (1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969).
\textsuperscript{34} "Identifiable" is defined as "a reasonable description enabling the Government employee to locate the requested records." Supra note 8, at 8.
\textsuperscript{36} Sterling Drug Inc. v. FTC, 450 F.2d 698, 710 (D.C. Cir. 1971).
\textsuperscript{37} Supra note 7, at 2426.
whether the conditions of exemption in truth exist." In order to expedite the proceedings and prevent an overly crowded court docket from delaying disclosure, the subsection provides authorization for FOIA cases to take precedence on the docket over all other causes. Subsection (c) further includes its own sanction against officials who fail to comply with a court order, authorizing the district court to punish responsible officers for contempt of court.

**Agency Proceedings**

Subsection (d) provides that any agency having more than one member shall keep a record of the final votes of each member in all agency proceedings. Such record shall be made available for public inspection.

**Exemptions**

In explicit recognition that the "right of the public to know" shall not be absolute, the legislature enacted subsection (e) of the FOIA. The subsection declares that none of the above mentioned subsections of the Act shall be applicable to nine listed exemptions. However, in the interest of assuring the fullest possible disclosure under the Act, it has been judicially determined that the exemptions shall be narrowly construed, and the disclosure subsections broadly construed. The exemptions cross the entire Act, and govern all matters in subsections (a), (b), (c), and (d). Therefore, matters exempted under (e) need not be published in the Federal Register nor made available upon request.

It should be noted that the Government is never expressly forbidden from disclosing information, even when material does fall within one of the nine exemptions. Despite the power to release exempted information, past experience under both the original and the amended section 3 make this possibility remote.

Before entering into an analysis of the individual exemptions, the question of whether the nine expressed exemptions provide the only justification for withholding information must be considered. It has been argued by at least one district court that explicit exemptions are not the only grounds upon which a

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40 Section 3 of the Administrative Procedure Act, subsections (a), (e). (See Appendix A).
41 Section 3 of the Administrative Procedure Act, subsection (e). (See Appendix A).
42 La Morte v. Mansfield, 438 F.2d 448, 451 (2d Cir. 1971).
court may refuse to compel disclosure. The court held that jurisdiction to enjoin improper withholding of records invokes equitable principles which also allow the court to deny relief at its discretion, even when no exemption is applicable. The trial court stated:

Even though the records sought are not exempt, the court is not bound under the Act to automatically order their disclosure. In exercising the equity jurisdiction conferred by the Act, it must, according to traditional equity principles, weigh the effects of disclosure and non-disclosure and determine the best course to follow at the present time. While the logic supporting the invocation of equitable principles may be sound, such a construction clearly goes against the express language of subsection (f).

The Senate report explained:

The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e).

There also has been considerable judicial disagreement with the position of the court in the Consumers Union case. In Getman v. National Labor Relations Board, the court discussed the apparent conflict and concluded "that a District Court has no equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions." The latter decision appears to be the wiser. If, beyond the nine specified exemptions, a court begins to invoke equitable principles to preclude disclosure, the broad purpose of the Act could be seriously impaired.

1. National Defense and Foreign Policy

Exemption (1) concerns matters which are "specifically required by Executive order to be kept secret in the interest of...

44 Id.
45 Id.
46 Section 3 of the Administrative Procedure Act, subsection (f) states: "Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, . . . " (See Appendix A).
47 Supra note 8, at 10.
48 450 F.2d 670 (D.C. Cir. 1971).
49 Id. at 678. See also Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971) where the court stated:

It has been argued that courts may recognize other grounds for non-disclosure, apart from the statutory exemptions. At least one court has held that the Act's grant of 'jurisdiction to enjoin' improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable. But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.
the national defense or foreign policy.”

The Senate report noted the problems and arbitrary withholdings resulting from the phrase “in the public interest” in the original section 3, and purposely omitted such a standard from this exemption. The report, in commenting upon the necessity of removing the phrase, stated:

The change of standard from ‘in the public interest’ is made both to delimit more narrowly the exception and to give it a more precise definition. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with Federal agencies.

2. Internal Procedures

Exemption (2) prevents disclosure of matters “related solely to the internal personnel rules and practices of any agency.”

The House report, in stating possible examples of matters coming within the exemption, indicated that this will also be a narrower exemption than under the original section 3. The report stated:

Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all ‘matters of internal management’ such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

3. Statutory Exemption

The previous subsections of the Act are not applicable to matters which are “specifically exempted from disclosure by statute.” The House report indicated that there are nearly one hundred statutes or sections of statutes which restrict public access to certain government records. Such restrictive provi-
sions are not affected by the public disclosure sections of this Act.

4. Information Given in Confidence

The disclosure provisions of section 3 are not applicable to matters that are "trade secrets and commercial or financial information obtained from any person and privileged or confidential." The wording of this exemption makes it particularly difficult to interpret and apply. The Attorney General's Memorandum explains that not only are the terms "general" and "undefined", but the sentence structure makes the exemption susceptible to different readings. The Memorandum explained:

The exemption can be read, for example, as covering three kinds of matter: i.e., 'matters that are * * * (a) trade secrets and (b) commercial or financial information obtained from any person and (c) privileged or confidential.' [bracketed initials added]. Alternatively, clause (c) can be read as modifying clause (b). Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Both committee reports of the House and Senate explained the necessity for exemption (4) in similar fashion. The more inclusive House report stated:

[T]his exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure.

57 For cases discussing exemption (4) see Sterling Drug Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1967). (See Appendix A).

58 Supra note 16, at 32.

59 H. R. REP. No. 1497 at 2427 includes in addition to those mentioned in S. REP. No. 813 at 9, "scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations."

60 Supra note 7, at 2427 (footnotes omitted).
5. Internal Communications

The disclosure subsections of section 3 are not applicable to matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." The committee reports stated that the purpose of the exemption is to allow complete and open discussion within agencies without fear that every memorandum or letter would later be made available to the public. The House report explained:

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S.1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

A difficult problem in the application of this exemption arises from the fact that it applies only to memoranda or letters "which would not be available by law to a private party in litigation with the agency." Professor Davis, commenting upon the limitation, stated:

The words 'a private party' seem to assume that every memorandum or letter would either be available or unavailable to 'a private party' under discovery and related law, but that assumption is erroneous. All government records fall into three categories — those which are (1) always, (2) never, and (3) sometimes subject to discovery. The large category is probably the third, for the need of the party seeking the information is usually a factor. The fifth exemption is workable for the first and second categories. But when a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, should the agency disclose it, refuse disclosure,

61 For cases discussing exemption (5) see Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); American Mail Line, Ltd. v. Guleck, 411 F.2d 696 (D.C. Cir. 1969). (See Appendix A).

The codified version, 5 U.S.C. § 552(b) (5), omits "private party" and substitutes the phrase "party other than an agency." However, as noted in the U.S. Code Cong. & Adm. News, 90th Cong., 1st Sess., S. Rep. No. 248, 1196 (1967), changes between the uncodified versions and codified versions were not intended to alter in any way the substance of the section as originally enacted.

62 Supra note 7, at 2427-28.
or apply discovery law to the facts about the particular applicant? The last course seems desirable, but the Act seems to forbid that course, for it requires disclosure to 'any person' and it replaces the former statutory words 'persons properly and directly concerned.' The applicant's need cannot be the test. The agency cannot say that one person is 'any person' but that another is not.3

Some assistance in analyzing this exemption may be afforded by the statement in the House report that "... any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."4 Thus, the standard for withholding information appears to be an objective one. The right to obtain information becomes the right of any party among the general public and not the right or necessity of a particular applicant. The interpretation and application of this exemption should prove to be a continuing source of litigation.

6. Protection of Privacy

Pertinent subsections of section 3 involving disclosures and the availability of information are not applicable to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."5 It is apparent that this exemption attempts to prevent disclosure of matters which are personal to an individual and are not of proper concern to the general public. The explicit phrase "personnel and medical files" was clearly not intended to be all inclusive. Obviously, it would have been impractical for the drafters to list all types of records, and therefore, they included the phrase "and similar records." The committee reports are essentially the same, with the House report explaining the exemptions as follows:

Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of 'a clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government rec-

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4 Supra note 7, at 2428.
5 For a discussion of exemption (6) see Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971). (See Appendix A).
The Freedom of Information Act ords on an individual which can be identified as applying to that individual. . . .

The terminology used in the exemption should cause minimal difficulty. "Personnel and medical files," "similar files," and a "clearly unwarranted invasion of personal privacy" are all reasonably clear standards which will become even more definitive when supplemented by case law.

The exemption is applicable where disclosure would cause an invasion of "personal privacy." Therefore, the question of whose personal privacy is to be protected must be given consideration. The Attorney General's Memorandum provides some assistance in answering this question. In examining the problem, the Memorandum refers to the definition of "person" in section 2(b) of the APA, which includes corporations, organizations and others, and then concludes that the exemption would normally involve the privacy of individuals rather than of business organizations.

Another problem may develop, not from the language of the statute, but from the Attorney General's interpretation of it. While the statute exempts "files," certain authorities believe that:

[Common sense seems to ... call for disclosing some information within files and withholding other information, and the question whether the statute permits this is not easy. The natural assumption is that all three types of files — 'personnel,' 'medical,' and 'similar' must be treated alike in this respect.]

The Attorney General's Memorandum seems to come to a contradictory conclusion when it states that "[t]he exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person ... ." The Attorney General seems to exclude completely from disclosure personnel and medical files, while permitting a separation of material in "similar files." It is difficult to reconcile the statutory language with the Attorney General's comment, or to understand his reasoning.

7. Investigations

Section 3 disclosure provisions are not applicable to matters that are "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."

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66 Supra note 7, at 2428 (footnotes omitted).
67 Section 2 (b) of the Administrative Procedure Act fully defines "person" to include individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.
68 Supra note 63, at 162.
69 Supra note 16, at 36.
70 For cases discussing exemption (7) see Frankel v. S.E.C. 460 F.2d
The Senate report states that the exemption concerns "files prepared by Government agencies to prosecute law violators." The House report seems to take a broader view of this exemption by stating that "[t]his exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws."

A distinction should also be noted between the language "except to the extent available by law to a private party," as used in this exemption, and the phrase "which would not be available by law to a private party in litigation with the agency," used in exemption (5). In commenting upon the difference, the Attorney General's Memorandum stated:

[T]he effect of exemption (5) is to make available to the general public those internal documents from agency files which are routinely available to litigants, unless some other exemption bars disclosure. The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants.

8. Information Concerning Financial Institutions

The disclosure provisions of section 3 are not applicable to matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions." The House report states as follows:

This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm.

9. Information Concerning Wells

Provisions of section 3 on disclosure are not applicable to matters that are "geological and geophysical information and data (including maps) concerning wells."

While the Senate committee failed to comment on this exemption, the House report stated:

This category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure 'would be prejudicial to the interests of the Government' (43 CFR, pt. 2). Witnesses con-
tended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration.  

Limitation of Exemptions

The House report explaining this subsection states:

[T]he purpose of this subsection is to make clear beyond doubt that all the materials of Government are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information. Members of the Congress have all of the rights of access guaranteed to 'any person' by S.1160 . . . .

THE FOIA IN PERSPECTIVE

The FOIA cannot be viewed as the panacea which will terminate all agency abuse in the withholding of government information from the public. It represents no more than a significant improvement over the initial public disclosure section of the APA. To proclaim that there will be maximum disclosure under the amended section 3 would be overly optimistic; to refuse to recognize the improvement effected by this statute and its potential as a tool for access to information would be unduly cynical. The elimination of broad loopholes in previous statutes prohibiting dissemination is a substantial improvement, but the mechanics of gaining access, including request procedures, fees, administrative and judicial appeals and exemptions, continue, to some extent, to be obstacles to private litigants seeking government documents.

The disparity of positions in which the parties appear before the court in an FOIA suit was recently recognized in Vaughan v. Rosen.  

The Vaughan court commented:

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.  

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . . The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

This analysis indicates that no statute is flawless irrespective of the specific word choice or the legislative intent behind it.

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15 Supra note 7, at 2428-29.
16 Supra note 7, at 2429.
17 484 F.2d 820 (D.C. Cir. 1973).
18 Id. at 823-24.
Discretion will always exist in both the Executive and Judiciary to decide whether to disclose or withhold information from a deserving private litigant. Conceivably, it will be the use or abuse of this discretion that will ultimately determine the success or failure of the FOIA. In any event, the concept of executive privilege as codified in exemption 1 of the FOIA is likely to raise exceedingly controversial and exceptionally complex questions in need of resolution.

**ISSUES RAISED BY THE INVOCATION OF EXEMPTION (1)**

A problem that has occurred both before and after the enactment of the FOIA concerns the responsibilities of both the Judiciary and the agency, including the executive branch, once the latter has asserted a privilege to withhold information. Two essential and interrelated questions must be resolved. First, whether the information the government seeks to withhold is in fact privileged; and second, whether the agency's claim of privilege prevents any judicial inquiry into the validity of that assertion.

While the executive branch's claim of a privilege relating to any subject matter is important, the scope of this section is devoted to resolving the above two questions as they relate to exemption (1) of the Freedom of Information Act, i.e., "matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."79

There is no doubt that instances arise where the executive branch must legitimately assert executive privilege on the basis of national security, in order to deny access to information. The Government must be allowed to keep sensitive military and diplomatic information secret in order to protect national defense, to conduct foreign policy, and to maintain the trust of countries with whom the United States deals. But it can hardly be doubted that the executive branch is using the phrase "national security" for purposes other than those mentioned above, and has often used it as a means of suppressing information that could be disseminated to the public,80 to Congress,81 or to private liti-

79 Section 3 of the Administrative Procedure Act, subsection (e) (1). (See Appendix A).
80 A witness before the Subcommittee on Foreign Operations and Government Information, a recently retired Air Force civilian security classification official, testified that he believed 99 ½ percent of the 20 million documents could now be made public without compromising national defense. Horton, The Public's Right To Know, Jan.-Feb. 1972 Case & Com. 5.
81 It is not the formal invocation of executive privilege alone that causes difficulty in gaining access to information, it is the multitude of specious reasons given by department and agency heads and other officers and employees of the Executive branch for their refusals to provide the information sought by Congress. Ervin, Executive Privilege: The Need For Congressional Action, ILL. B.J. 66, 67 (Oct., 1973).
gants,\textsuperscript{82} without endangering the country's security. It shall be
the premise of this section that fundamental fairness to the par-
ties in an adjudicative proceeding, as well as the necessity of
balancing the interests of the Government and the public, dictate
that the Judiciary make the ultimate decision as to the validity
of the Government's claim of privilege. It shall also be argued
that such judicial determination can be made safely, without
threatening national security, through the implementation of
\textit{in camera} inspection.\textsuperscript{83}

\textbf{What Is "National Security"?}

"National security" is a term which cannot be precisely
declared.\textsuperscript{84} While the concept certainly includes the government's
ability to protect its citizens from internal and external aggres-
sion, in a broader sense it also encompasses the government's
ability to serve citizens' interests both at home and abroad in
whatever areas it deems necessary. In recent administrations,
the executive branch has taken an ever-broadening approach as
to what constitutes national security. Recent examples of gov-
ernmental actions taken in the name of "national security" in-
clude the unauthorized secret bombing of a southeastern Asian
nation,\textsuperscript{85} as well as the breaking and entering of the office of a
defendant's psychiatrist prior to criminal prosecution of this
same defendant.\textsuperscript{86}

The widening definitions of national security promulgated
by the executive branch have resulted in a lack of government
information being disseminated to the public. Coexisting with
this development is a dwindling of public confidence in the Ex-
ecutive's ability to govern.

While the legal community generally perceives the problem
as being one between a private litigant and the Government, in
truth it is far more pervasive. The basis and strength of the

\textsuperscript{82} In evaluating claims based on national security needs . . . there
are lessons to be learned by examining past areas of conflict. Chief
among these lessons is the need for a skeptical approach to national
security claims. All branches of government, but particularly the
political branches, characteristically have overestimated threats to the
national security — to the detriment of civil liberties.

\textit{Developments in the Law — The National Security Interest and Civil Lib-

\textsuperscript{83} The purpose of \textit{in camera} inspection by the District Court is to
permit the District Judge to examine the documents and determine which
documents, or which portions of documents, may be properly disclosed to
the other party, and which should continue to be held in a confidential
status.

\textit{Committee For Nuclear Responsibility, Inc. v. Seaborg}, 463 F.2d 788, 792
(D.C. Cir. 1971).

\textsuperscript{84} "National security" has often been used as a catchall including such
terms as national defense, state secrets, military secrets, domestic security
and other terms.


\textsuperscript{86} \textit{Commonweal}, Nov. 9, 1973, at 132.
democratic form of government is an informed electorate, participating in the formulation of public policy and reviewing governmental actions. In enacting the FOIA, the legislature expected that the press as well as individuals would receive the requisite information necessary for a more informed judgment.

**POSITIONS OF THE EXECUTIVE AND JUDICIAL BRANCHES WITH RESPECT TO THE NATIONAL SECURITY PRIVILEGE**

The executive branch has operated on the premise that it alone possesses uncontrolled discretion to withhold from the courts anything whose disclosure would be against the public interest, and that such decisions are non-reviewable by the courts. In essence, the Government has argued that the executive privilege to withhold documents in the public interest is absolute. This position is strikingly similar to that taken by the English courts. Strong documentation of the executive branch's position is found in opinions of the attorneys general. Attorney General Speed announced the following view in 1865:

Upon principles of public policy there are some kind of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as 'privileged communications.' The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosures would, on

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87 The Government contends . . . that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it. Reynolds v. United States, 192 F.2d 987, 996-97 (3d Cir. 1951).

See also In re Grand Jury Subpoena Duces Tecum Issued To Richard Nixon, Memorandum in Support at 19 (Sept. 14, 1973): "[c]ounsel for respondent [President] claim an absolute Presidential prerogative to withhold material evidence . . . merely upon the assertion that production is against the public interest."


88 See Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 943 (Ct. Cl. 1958) where the court, upon the Government's refusal to turn over documents, stated:

The Government took the position "that this court should not review the claim of privilege asserted by a witness or an agency head by requiring the witness to testify or the agency to produce documents, so that the court may itself reach a conclusion as to whether or not such information could be disclosed without risk to the public interest."

89 See, e.g., The Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Reynolds v. United States, 192 F.2d 987, 992 (3d Cir. 1951).

public considerations, be inexpedient. As an indication that the attitude of the executive branch has remained constant and unwavering, then Assistant Attorney General Rehnquist stated before the Senate in 1971 that:

The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest.

A recent court decision further substantiates the executive branch's position of executive absolutism. In Committee for Nuclear Responsibility, Inc. v. Seaborg, conservation groups sought to halt an underground nuclear test by seeking government documents which they claimed were required to prove that the Atomic Energy Commission's impact statement did not satisfy the requirements of the National Environmental Policy Act. The Government asserted executive privilege and refused to turn over any documents. In commenting upon the privilege, the appellate court stated:

The claim of privilege consists of the filing of affidavits from the five officials heading the agencies where the documents are located. Each of those officials avers that he has determined that the documents in his official custody may not be produced for the personal in camera inspection of the judge, on the ground that such disclosure even to the judge would be contrary to the public interest. The government's position . . . is that this determination by the executive official is conclusive upon the court, and the court has no judicial authority to require the production of the documents in the possession of an executive department, once the head of that department has filed this formal claim of privilege. Government counsel further asserts that this executive determination is conclusive even where the document only relates to certain factual material that is essential for disposition of the lawsuit, and even where the document is such that the court may readily separate factual material to be disclosed to the other party from the kind of recommendations and discussion that would be an integral part of the decision-making process.

Thus, historically and throughout present-day litigation, the executive branch continues to maintain a rigid posture on the question of the determination of executive privilege. The Government insists that the privilege to withhold information con-

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11 Op. Att'y Gen. 137, 142-43 (1865) (emphasis added). See also Attorney General Olney's opinion that it is for the President or head of the department having the legal custody of a paper, and "not for the judge presiding at the trial," to determine whether "such general public interest forbids the production of an official record or paper in the courts. . . ."


93 463 F.2d 788 (D.C. Cir. 1971).

94 Id. at 792.
cerning state or military secrets is immune from challenge. Considering this stance, the Judiciary's role becomes an extremely limited one.

THE JUDICIAL BRANCH'S POSITION WITH RESPECT TO THE NATIONAL SECURITY PRIVILEGE

As ardently and vociferously as the executive branch has argued an absolute right to withhold information pursuant to an assertion of privilege, the judicial branch has staunchly maintained that the propriety of the assertion is a judicial matter. In essence, the Judiciary has held that the privilege to withhold is no more than a qualified right, subject to some degree of judicial scrutiny.95

Certainly the most influential decision concerning the Judiciary's role in cases involving alleged national security information is United States v. Reynolds.96 While testing secret equipment, an Air Force bomber crashed, killing three civilian observers. Their widows filed suit under the Federal Torts Claim Act and sought to discover an Air Force flight accident report under Rule 34 of the Federal Rules of Civil Procedure. The Government resisted discovery on the ground that the report contained secret information and thus was privileged. The district court granted the plaintiffs' discovery motion over the Government's claim of privilege, holding that good cause for production of the documents had been shown. The judge ordered production of the documents so that the court could determine the question of privilege. The Government declined to produce the documents and the district court entered an order, under Rule 37(b)(2)(i) of the Federal Rules of Civil Procedure, to the effect that the facts be taken as established in favor of the plaintiffs on the issue of negligence. On appeal from final judgment, the Court of Appeals for the Third Circuit affirmed, stating:

[A] claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination in camera.97

Upon granting certiorari, the Supreme Court recognized the necessity of judicial control over executive action in the assertion

96 345 U.S. 1 (1953).
97 Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951) (footnotes omitted).
of a state secrets privilege. While sustaining the Government’s claim of privilege, thus reversing the two lower court holdings, the Court nevertheless held that the Judiciary must be the branch to control the evidence admissible in any litigation, and must also determine whether or not the privilege is applicable.98

Although the decision appears to be equivocating, confusing, and nearly defying reasoned judicial application, it has nevertheless been cited by substantially all courts in which there is litigation involving state secrets or military information.

Proponents of judicial determination as to the existence and propriety of the invocation of a state secrets privilege often quote such positive expressions from Reynolds as “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,”99 or “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”100

Yet the absolute power of judicial review implied by these statements was apparently qualified by a later expression that in camera inspection would not be necessary if the Government can “satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged.”101 The Court held that where a claim of privilege is supported by a “reasonable possibility” that military secrets are involved, the party seeking the information must show “necessity” for compelling disclosure. In contriving a “necessity formula”, the Court stated:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.102

The Supreme Court’s opinion left numerous unanswered questions, and created substantial difficulties for an already overmatched private litigant. The “necessity formula” became the heart of the problem for both the court and the citizen litigant. It defies reason to require that the party without the information establish a “necessity” for the documents, when, in fact, it is only the Government that knows the contents of the

98 United States v. Reynolds, 345 U.S. 1, 8-11 (1953).
99 Id. at 9-10.
100 Id. at 8 (footnotes omitted).
101 Id. at 10.
102 Id. at 11 (footnotes omitted).
documents. The formula becomes even more illogical when considered within the framework of the general principle that all material evidence is subject to production. Furthermore, to believe that a trial court judge could accurately or fairly rule on a private litigant's showing of "necessity," without being sufficiently familiar with the contents of the documents, is similarly unreasonable. It is doubtful whether government affidavits which describe the contents of the documents can adequately supply the judge with the information necessary to determine plaintiff's "necessity." At a minimum, permitting a judge to rule on the basis of what he may infer from government affidavits makes in depth scrutiny of the government's claim unlikely.  

The *Reynolds* Court left unanswered the implicit question of what standard a judge should apply to government affidavits when deciding whether there is a "reasonable possibility" that military secrets are involved. Also, to ask a judge to determine whether national security might be endangered by disclosure of agency documents, when the court has little idea of their contents, is a questionable judicial policy.

Much of the confusion surrounding the *Reynolds* decision may be attributed to a true lack of understanding of this complex decision. The case does not stand for the proposition that there shall never be in camera inspection after a formal assertion of executive privilege for military secrets. Neither does it "automatically require complete disclosure to the judge before the claim of privilege will be accepted in any case." 104 Rather, the decision stated that it may be possible to satisfy the court from all the circumstances of the case that compulsion of the evidence would expose matters endangering national security. 105 The Court went on to say that "When this is the case, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 106

The difficulties confronting a court in determining the propriety of an asserted privilege and those facing a private litigant in seeking information withheld under an assertion of the national security privilege, were further compounded by decisions following *Reynolds*. Nearly all courts accepted the view of *Reynolds* that where agency affidavits indicated a "reasonable possibility" that military secrets were involved, the court's role was restricted to actions other than in camera in-
spection. But the Judiciary's purview, as well as a citizen's legitimate right to government information, was further confined by Epstein v. Resor in 1969.

In Epstein, the plaintiff, an historian, filed an action under the FOIA, seeking disclosure of a twenty year old file on allied involvement in the forced reparation of anti-communist Soviet citizens to the Soviet Union following World War II. The file had been classified Top Secret pursuant to Executive Order 10501. The district court refused in camera inspection and granted summary judgment in favor of the defendant, the Army. The court of appeals affirmed. However, while the court expressly stated that it was applying the pre-FOIA rule stated in Reynolds, it in fact created an even narrower rule by limiting the court's jurisdiction to a determination of whether the classification decision was arbitrary or capricious. Clearly the Epstein rule limits the role of the Judiciary more than the already confusing Reynolds decision and approaches a grant of blanket immunity whenever the government asserts executive privilege to withhold classified documents.

DETERMINATION OF THE PRIVILEGE

The Reynolds and Epstein decisions make it uncertain how and when a district court judge should order in camera inspection of allegedly classified information. Nevertheless, these and other recent decisions, as well as legal commentators, remain unequivocal in the proposition that it is the Judiciary and not the Executive that shall make the ultimate determination as to the propriety of the executive claim of privilege. In Committee for Nuclear Responsibility, Inc. v. Seaborg, the Government claimed that the executive branch's "inherent constitutional

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108 421 F.2d 930 (9th Cir. 1970).
109 "There is no reason for denying application of the principles announced in Reynolds to this case." 296 F. Supp. 214, 218 (N.D. Cal. 1969).
112 The governing principle is aptly summarized by Wigmore: A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish 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 under the privilege. Both principle and policy demand that the determination of the privilege shall be - for the court.
Wigmore, Evidence, (McNaughton rev. ed. 1961) § 2379 at 809-10. Also see McCormick, Evidence, Privileges for Governmental Secrets, ch. 12, § 110 at 235.
113 463 F.2d 788 (D.C. Cir. 1971).
powers" included the right to conclusively determine what documents in the possession of the executive branch were subject to executive privilege. In Seaborg, the constitutional dimension of executive privilege was premised on the contention that the separation of powers doctrine prevented the courts from ordering the production of such documents. The court of appeals, however, rejected the claim of executive absolutism by stating:

In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.

An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.\textsuperscript{114}

The recent case of In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,\textsuperscript{115} in which tapes and documents for use in a grand jury proceeding were sought, provides further substantiation of the court's total rejection of any absolute immunity. While Judge Sirica admitted that there can be executive privilege which will bar the production of evidence and which the court would clearly recognize, he rejected the Executive's contention of an absolute privilege:

The Court, however, cannot agree with Respondent that it is the Executive that finally determines whether its privilege is properly invoked. The availability of evidence including the validity and scope of privileges, is a judicial decision.\textsuperscript{116}

As previously mentioned, the executive branch has principally founded its right to withhold information by the exercise of executive privilege on the separation of powers doctrine. The Executive has placed emphasis on the words "separation" and "power" but has failed to interpret them collectively. Instead, the argument has heavily relied on an interpretation which suggests that the "separation" required under the constitutional doctrine implicitly means an absolute division without interaction. However, interaction among the three branches is an essential element of the American form of constitutional government, and one branch frequently requires action by another in the process of exercising its constitutional powers. This argument has been rejected by both the Congress and the courts. As Mr. Justice Jackson stated in Youngstown Sheet & Tube Co. v. Sawyer:\textsuperscript{117}

\textsuperscript{114} Id. at 792-93.
\textsuperscript{116} Id. at 5 (emphasis added).
\textsuperscript{117} 343 U.S. 579 (1952).
The actual art of governing under our Constitution does not
and cannot conform to judicial definitions of the power of any of its
branches based on isolated clauses or even single Articles torn from
context. While the Constitution diffuses power the better to secure
liberty, it also contemplates that practice will integrate the dis-
perssed powers into a workable government. It enjoins upon its
branches separateness but interdependence, autonomy but reci-
procity.\footnote{Id. at 635.}

More recently, Judge Sirica again recognized the implicit
interaction required under the separation of powers doctrine by
stating:

A “watertight” division of different functions was never their
[Framers of the Constitution] design. The legislative branch may
organize the judiciary and dictate the procedures by which it trans-
acts business. The judiciary may pass upon the constitutionality
of legislative enactments and in some instances define the bounds
of Congressional investigations. The executive may veto legisla-
tive enactments, and the legislature may override the veto. The ex-
ecutive appoints judges and justices and may bind judicial decisions
by lawful executive orders. The judiciary may pass on the consti-
tutionality of executive acts.\footnote{Id., Brief in Opposition, 5-6 (Sept. 20, 1973).}

The executive branch has also seemingly placed an over-
emphasis on the word “power” in its attempted justification of
an absolute privilege to withhold information. The Executive
apparently argues that since it has the “power” to withhold in-
formation — by having physical possession of the documents —
it also has the “privilege” to withhold information.\footnote{Id. at 635.}
Clearly the terms “physical power” and “legal privilege” are not synony-
mous; any branch of government may have the physical power
to do numerous things not justified by any legal privilege.

However, the judicial branch has not allowed the question
of its physical ability to enforce court orders against the execu-
tive branch to deter it from performing its legal duty to issue
appropriate orders. In \textit{Glidden Co. v. Zdanok},\footnote{370 U.S. 530 (1962).}
the Supreme Court rejected the argument that a money claim against the
United States did not present a justiciable issue because the
courts were without power to force execution of a judgment
against the United States, stating that, “If this Court may rely
on the good faith of state governments or other public bodies to
respond to its judgments, there seems to be no sound reason why
the Court of Claims may not rely on the good faith of the United
States.”\footnote{Id. at 571. See also Powell v. McCormack, 395 U.S. 486, 517-18
(1969); South Dakota v. North Carolina, 192 U.S. 286, 318-21 (1904);
La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461-62 (1899).}
It is evident that no justifiable argument in support of an absolute privilege may be found in the contention of the Executive that it has the "power" to withhold information based on a lack of judicial power to enforce court orders. Thus, while the executive branch has maintained from the earliest of times that its privilege to withhold must be an absolute one under the Constitution, the courts, as interpreters of the Constitution, have continuously recognized only a qualified privilege.

**In Camera Inspection and Privileged Information**

Once it has been determined that it shall be the Judiciary and not the Executive which will ultimately rule on the appropriateness of the latter's assertion of a national security privilege, there still remains the difficult question of how the courts shall seriously scrutinize the Executive's claim and yet be in compliance with the *Reynolds* rule. Suits filed under the FOIA, where the government agency asserts exemption (1) as a defense to disclosure, greatly increase the complexities of this problem.

As has been demonstrated, throughout our history we have all too often perceived as being necessarily mutually exclusive the alternatives of national security for the protection of the public interest, on the one hand, and the rights of a private litigant to a full hearing on matters potentially dealing with national security, on the other. Hence, the Executive, and, in many instances, the Judiciary, have concluded that to allow disclosure of allegedly secretive matter in an adjudicative proceeding must necessarily jeopardize the security and public interest of the country.

While it has long been a principle that the public interest at large would take precedence over the singular rights of an individual, it is suggested that the apparent conflict of interests need not exist in the alternative. A compromise must be developed which will provide greater justice for all parties concerned. The path to such compromise lies in the use of an *ex parte, in camera* inspection by the trial court judge to determine whether the agency has properly asserted its privilege and what documents, if any, could be disclosed to the plaintiff in a suit against the executive agency.

There are two principal arguments against *in camera* inspection which are similar in kind to those used to support the necessity of an absolute executive privilege. They are (1) the premise that agencies of the Executive have developed a higher degree of expertise in determining what could be harmful to the

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123 See *Reynolds* "necessity formula," note 102 supra and accompanying text.
national interest, and (2) the premise that national security will be endangered if information leaves the physical possession of the Executive.  

Both Executive contentions can be disposed of readily. To argue that the Judiciary must defer to Executive expertise denies recognition of the complex questions the courts currently adjudicate. Cases are often litigated in areas in which the Judiciary has no special competence, such as economic issues which arise in anti-trust litigation, or complicated patent cases. It may be argued that it would be a unique case in which a trial court judge, guided in an *ex parte* proceedings by the executive branch's legal counsel or other requisite Executive advisors, could not perceive a potential threat to national security. In those rare instances where the judge believes himself unqualified, the executive privilege would prevail.

The Executive contention that there are certain matters so secret that they cannot be trusted even to a member of the Judiciary again defies both past judicial experience and present day realities.

The Executive's argument fails to take into consideration cases both before and after the *Reynolds* decision in which courts either viewed alleged secretive information *in camera* after an assertion of privilege, ordered *in camera* inspection, or would have ordered *in camera* inspection had it been deemed necessary, without serious consequences to the national security.

In *Halpern v. United States*, a post-*Reynolds* decision, the plaintiff, an inventor, sued to recover compensation resulting from an order of secrecy involving his application for a patent. The government asserted executive privilege based on state secrets. The court of appeals reversed the trial court's dismissal for lack of jurisdiction, holding that an inventor may maintain an action for compensation during pendency of a secrecy order. The court commented on the possible procedure:

> We do not decide, however, that the district court is required to hold an *in camera* proceeding, but merely that it should do so if

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127 Halpern v. United States, 258 F.2d 36 (2d Cir. 1958); Snyder v. United States, 20 F.R.D. 7, 9 (E.D.N.Y. 1956) dictum:

> As . . . relating to military secrets, the Government should realize that at such times as it comes before a court of law, it is subjected to and bound by the rules of law and may not, without regard to the law, arbitrarily decline to produce information upon the claim of a self-imposed restriction that it is classified information or that its disclosure would injure national security . . . . [I]t [the government] is obligated to submit the information or records to the Court for its determination as to whether the claim of privilege is well founded.

128 258 F.2d 36 (2d Cir. 1958).
in its opinion such a proceeding can be held without running any serious risk of divulgence of military secrets.\textsuperscript{129}

The executive branch's contention that certain secretive matters cannot be entrusted to federal judges also lacks substance when one notes that classified information is disseminated on a regular basis to members of Congress.\textsuperscript{130}

A security classification per se is not a ground for denial of information to Congress. Classified information is furnished to congressional committees either in support of executive requests for legislative action, particularly appropriations, or in response to congressional inquiries. A Department of Defense directive declares a policy of making maximum information available to Congress, stating that information not released to the public will be made available to Congress, 'in confidence' . . . . State Department regulations also provide for disclosure of classified information to Congressmen.\textsuperscript{131}

The Congress has had an excellent record for observance of security.\textsuperscript{132}

It would seem to be a logical deduction that federal judges are no less interested in protecting national security than federal legislators and that they are equally aware of potential threats to such security. There is little reason to believe that permitting judges to view classified information through \textit{in camera} inspection should be any more dangerous or less successful than allowing the same exposure to Congressmen.

In 1972 the Supreme Court considered an analogous argument that the federal judiciary should be excluded from the review of electronic surveillance conducted in the name of "domestic security."\textsuperscript{133} Two of the executive branch's contentions were that (1) the courts would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security, alleging that security problems involve a number of complex and subtle factors beyond the competence of the court;\textsuperscript{134} and (2) that disclosure to a magistrate of a significant portion of the information involved in domestic security surveillances would create serious potential dangers to the national

\textsuperscript{129} Id. at 43.
\textsuperscript{130} 85 Harv. L. Rev. 1130, 1209 (1972).
\textsuperscript{131} Id. at 1208.
\textsuperscript{132} See comments by Senator Sam Ervin Jr. in his address to the Illinois State Bar Association in which he discussed the right of the Joint Committee on Atomic Energy to use classified information and mentions that there has never been a leak through such congressional committee. 62 Ill. B.J. at 70-72, Oct. 1973.
\textsuperscript{133} United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972).
\textsuperscript{134} Id. at 319.
security, i.e., requiring prior judicial authorization would create a danger of leaks.\textsuperscript{135}

The Court rejected both arguments by the Government, and at least implicitly answered both contentions raised in this article against \textit{in camera} inspection of national security information:

We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ‘ordinary crime’. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidences involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. Title III of the Omnibus Crime Control and Safe Streets Act already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage, and treason, §2516 (i) (a) and (c), each of which may involve domestic as well as foreign security threats. Moreover, a warrant application involves no public or adversary proceeding: it is an ex parte request before a magistrate or judge. Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.\textsuperscript{136}

The executive branch has, itself, argued for \textit{in camera} inspection where it has applied for judicial review.\textsuperscript{137} This action casts serious doubt as to the validity of the Government’s arguments against \textit{in camera} inspection.

It is . . . familiar doctrine that when there is some recognized interest militating against unnecessary public disclosure of information which a litigant is seeking to discover, it is appropriate to submit the material to the district judge for \textit{in camera} examination so that he may determine whether disclosure should be ordered.\textsuperscript{138}

\textbf{The Freedom of Information Act and Exemption (1)}

The difficulties which have arisen for the courts and private

\textsuperscript{135} Id.
\textsuperscript{136} Id. at 320-21.
\textsuperscript{138} Kolod v. United States, 390 U.S. 136 Memorandum of the United States on Motion to Amend Order of Jan. 28, 1968, at 8, modified sub nom.
litigants in suits where the Executive has asserted executive privilege for state or military secrets have been greatly increased in suits filed under the FOIA, where the government agency has asserted a privilege to withhold information under exemption (1) of the Act.\textsuperscript{139}

The primary question raised in a suit filed under the FOIA for information is whether the Reynolds "necessity formula"\textsuperscript{140} should be applicable in determining court procedure and plaintiff's rights to information. At least three courts have unhesitatingly applied the Reynolds decision without recognizing the apparent conflicts between the requirements of the FOIA and the "necessity formula."

As noted in section one of this article, the FOIA represents significant changes which were made to eliminate the loopholes in the original section 3 in order to provide maximum disclosure of government information to the public. Of major importance was the elimination of the phrase allowing the government to withhold information except from those persons "properly and directly concerned."

\textsuperscript{141} The phrase had been recognized as a substantial loophole through which the agencies deny information, merely upon the arbitrary determination that the individual seeking information was not "properly and directly concerned." Legislators also took cognizance of this weakness and sought to correct it by removing the phrase and requiring instead that requested information shall be made "properly available to any person."\textsuperscript{142} Attorney General Ramsey Clark also showed awareness of the improvement when he noted as a key concern of the amended section that "all individuals have equal rights of access."\textsuperscript{143} Thus, nothing in the legislative history of the Act or the statutory language itself gives any indication that a court should be able to give any consideration to the plaintiff's "necessity" or need for the information sought. One plaintiff is like any other plaintiff; if the public has a right to the particular information, any individual litigant possesses the right.

In discussing the problems related to the phraseology used

(Quoted from Brief for the Respondents at 46, Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)).

\textsuperscript{139} See text accompanying note 79 supra and Appendix A for a statement of exemption (1) of the FOIA.

\textsuperscript{140} See text accompanying note 102 supra for a statement of the Reynolds "necessity formula."

\textsuperscript{141} See text accompanying note 8 supra.

\textsuperscript{142} As noted in Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973): "The Act eliminates the 'properly and directly concerned' test of access, stating repeatedly that official information shall be made available 'to the public,' 'for public inspection.'"

\textsuperscript{143} See text accompanying note 16 supra.
in exemption (5), Professor Kenneth Culp Davis came to the same general conclusion with respect to the plaintiff's "neces-
sity." The exemption provides that the disclosure subsections
of the FOIA shall not be applicable to matters that are "inter-
agency or intra-agency memorandums or letters which would not
be available by law to a private party in litigation with the
agency."144

After categorizing memoranda and letters of the govern-
ment into three categories — those which are (1) always, (2)
never, and (3) sometimes subject to discovery, Professor Davis
proceeds to question whether the courts should disclose to the
plaintiff information which falls in the last category. He con-
cludes that the most desirable course would be to apply dis-
covery law, but states that:

[T]he Act seems to forbid that course, for it requires disclosure
to 'any person' and it replaces the former statutory words
'persons properly and directly concerned.' The applicant's need
cannot be the test. The agency cannot say that one person is 'any
person' but that another person is not.145

By a similar argument, one should legitimately conclude
that the Reynolds "necessity formula" is inapplicable to any
suit under the FOIA where the agency asserts exemption (1) as
a defense to disclosure. If the courts cannot take the "necessity"
of a plaintiff into consideration under one exemption, there is
simply no justification for such consideration under any other.
Nothing in the legislative history from either the House or Sen-
ate provides authority for treating any of the nine exemptions
differently.

An analysis of the three cases under the FOIA clearly indi-
cates the court's lack of recognition of this apparent conflict as
well as extreme difficulty in applying exemption (1).

In Epstein v. Resor,146 the district court misinterpreted the
application of the exemption as well as the Reynolds rule. The
court properly recognized that the purpose of full disclosure was
to be effectuated by giving the district courts jurisdiction to de-
terminde novo whether information was being properly with-
held, with the burden of proof upon the withholding agency.
However, the court then determined that this jurisdiction did not
apply to information that fell within the exemptions set forth
in the Act. As the district court in Epstein stated:

To hold that the agencies have the burden of proving their action
proper even in areas covered by the exemptions, would render the
exemption provision meaningless. If a determination de novo is
made by this Court on whether Top Secret classification by the

144 For exemption (5) of the FOIA see Appendix A.
Department of Army is proper, with the burden on the Secretary to sustain its action, the Court would be giving identical treatment to information withheld by an agency whether it fell within the exemption or not.\(^\text{147}\)

The court then recognized that while the *Reynolds* case was decided prior to the FOIA, "[t]here is no reason for denying application of the principles announced in *Reynolds* to this case."\(^\text{148}\) After quoting a lengthy segment of the *Reynolds* opinion, the court then failed to state or apply the "necessity formula." It concluded that the judicial review was limited to the question of whether the classification decision was arbitrary or capricious.\(^\text{149}\)

Clearly the court's interpretation of the application of the exemption, as well as its alleged "application" of the *Reynolds* rule, should be seriously scrutinized and questioned. Not only did the court fail to recognize that the *Reynolds* "necessity formula" should not be applied to suits under the FOIA, but also went against its legislative intent by proceeding to limit and modify the court's jurisdiction under this statute enacted for the purpose of insuring maximum dissemination and curbing Government abuse under prior disclosure laws. To limit judicial review only to the determination of whether the Government's withholding was arbitrary or capricious could hardly be what the legislature intended in providing for a de novo review with the burden on the agency to justify its withholding.

The *Epstein* decision was followed by an equally confusing interpretation of exemption (1) in *Soucie v. David*.\(^\text{150}\) Suit was filed by plaintiffs against the Director of the Office of Science and Technology to compel the release of a certain report. The district court dismissed the suit and the plaintiff appealed. The court of appeals reversed and remanded to the lower court for determination of whether the report was within any of the statutory exemptions, and included specific procedures to be followed depending upon the particular exemption to be raised by the agency. After suggesting the possibility that exemption (1) was applicable, the court of appeals attached the following footnote:

The other exemptions require a de novo determination of whether the record the Government seeks to withhold contains information of the class protected by an exemption. But to qualify for the first exemption, the Government need show only that the record is 'specifically required * * * to be kept secret' pursuant to an Executive order; review of the propriety of keeping it secret is then limited to determining that the administrative decision was not arbitrary and capricious.\(^\text{151}\)

\(^\text{147}\) *Id.* at 217.
\(^\text{148}\) *Id.* at 218.
\(^\text{149}\) *Id.* at 217-18.
\(^\text{150}\) 448 F.2d 1067 (D.C. Cir. 1971).
\(^\text{151}\) *Id.* at 1079 n.48.
The court cited no legislative history for a construction clearly against the overall purpose of the Act, and cited the Epstein and Reynolds decisions as support.\textsuperscript{152} The court then suggested that the lower court could most effectively undertake the statutory de novo evaluation of the Government's claim by examining the report \textit{in camera}.\textsuperscript{153} Thus, the court appears to have narrowed the standard under which it may determine that an agency is wrongfully withholding information while broadening the scope of examination of such documents.

The most recent case to discuss exemption (1) is \textit{Environmental Protection Agency v. Mink},\textsuperscript{154} which continued the policy expressed in the preceding decisions by taking another narrow view of district court jurisdiction to deal with agency documents. The majority opinion neither cites Epstein \textit{v. Resor} nor applies the arbitrary and capricious tests set down in that case. The Supreme Court stated:

\begin{quote}
We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here that were classified pursuant to this Executive Order [10501]. Nor does the Exemption permit \textit{in camera} inspection of such documents to sift out so-called 'non-secret components.'

Manifestly, Exemption 1 was intended to dispel uncertainty with respect to public access to material affecting 'national defense or foreign policy.' Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret.\textsuperscript{155}

To support this conclusion, the Court cited a single sentence from the House report\textsuperscript{156} and statements by Congressmen Moss and Gallagher,\textsuperscript{157} the latter of which was also relied on by the Epstein court as a basis for its decision.

It is quite doubtful that the Congressmen's statements may be used in full support of the proposition that "the only matter to be determined \textit{de novo} under § 552(b) (1) is whether in fact the President has required by Executive Order that the

\textsuperscript{152} Id.

\textsuperscript{153} The court states that "Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, \textit{in camera} inspection may be necessary." \textit{Id.} at 1079-80.

\textsuperscript{154} 410 U.S. 73 (1973).

\textsuperscript{155} \textit{Id.} at 81-82.

\textsuperscript{156} Thus, the House Report stated with respect to subsection (b) (1) that "Citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." \textit{Id.} at 82.

\textsuperscript{157} Congressman Gallagher, a member of the Subcommittee of the House Committee on Government Operations, stated that the legislation and the Committee Report make it "crystal clear that the bill in no way affects categories of information which the President . . . has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." \textit{Id.} at 83.
documents in question are to be kept secret." Based on the entire legislative history of both houses and the Attorney General's Memorandum, all of which place consistent emphasis on maximum disclosure and minimum withholding (with the burden of proof on the agency), the majority's interpretation appears unsupported. As stated by Mr. Justice Brennan (concurring in part and dissenting in part):

The Court holds today that the Freedom of Information Act . . . authorizes the District Court to make an in camera inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid in camera inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history that distinguishes the two Exemptions in this respect, and the Court suggests none. In reaching this result, however [that any document classified pursuant to E.O. 10501 is immune from judicial scrutiny] the Court adopts a construction of Exemption 1 that is flatly inconsistent with the legislative history and indeed, the unambiguous language of the Act itself. 

In commenting upon the purpose of the de novo proceeding, Mr. Justice Brennan expressly rebuked the interpretations given in Epstein, Soucie, and the majority opinion in Mink.

We have the word of both Houses of Congress that the de novo proceeding requirement was enacted expressly 'in order that the ultimate decision as to the propriety of the agency's action is made by the court to prevent it from becoming meaningless judicial sanctioning of agency discretion'. . . . What was granted, and purposely so, was a broad grant to the District Court of 'authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.' And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by '[p]lacing the burden of proof upon the agency' to justify the withholding. . . . The Court's rejection of the Court of Appeal's construction is inexplicable in the face of this overwhelming evidence of the congressional design.

In rejecting the comments by Congressmen Moss and Gallagher used in support of the Epstein and Mink decisions it was stated:

The Court also calls to its support some comments out of context of Congressmen Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive

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158 Id. at 95.
159 Id. at 96-96 (emphasis added).
160 Id. at 100-01.
The Freedom of Information Act

Order 10501. Certainly, whatever significance may be attached to debating points in construing a statute, these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.161

Another ground for questioning the majority's interpretation of the de novo proceeding and exemption (1) must be based upon the potential for agency abuse under Executive Order 10501 since it was in force when the FOIA was enacted. Certain provisions of the executive order provided "justification" for the bunching of documents according to the highest classification of the document to which they were attached,162 and ordered that such documents "shall bear a classification at least as high as that of its highest classified component."163 The agency could thus include matter not to be classified with that which should be classified, and preclude the courts and a citizen plaintiff from inquiring into the classification material. Clearly such procedure amounts to little more than the English rule which only allows the court to determine whether the person classifying material was a proper person.164

The seriousness of the aforementioned decisions is exemplified in the concluding statements of Mr. Justice Brennan in *Mink*:

> The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of de novo judicial review. The judicial role becomes 'meaningless judicial sanctioning of agency discretion,' the very result Congress sought to prevent by incorporating the *de novo* requirement.165

**CONCLUSION**

The decision as to whether or not the judicial role should include an *in camera* inspection in suits under the FOIA after an executive agency assertion of exemption (1) for matters relating to national defense or foreign policy is multi-faceted and complex.

As a philosophical question, one must consider whether danger to a democratic form of government is increased by "too little" or "too much" dissemination of information pertaining to government activities. In this writer's opinion, the question was

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161 Id. at 101.
163 Id.
165 410 U.S. 73, 105 (1973) (emphasis added).
answered by the court of appeals in Reynolds, when it quoted the words of Edward Livingston:

No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.

Beneath this philosophical question lurk the more legalistic issues raised by the constitutional doctrine of separation of powers and executive privilege, further complicated by problems of statutory phraseology and legislative history. Finally, there exist the basic questions of trust and ability in the Judiciary versus practical considerations urged by the Executive, which often favor nondisclosure.

The resolution of exemption (1) issues in FOIA suits through the process of in camera inspection has not and will not satisfactorily resolve all the issues raised above, but it would serve to equalize the disparity in strength between the parties and minimize the temptation for government over-classification. Recently, the Court of Appeals for the District of Columbia in Vaughn v. Rosen recognized that in camera inspection had distinct limitations:

This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, . . . and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document in camera to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation.

Only by a complete acceptance of this burden by the Judi-

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166 Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951).
167 Id. at 995.
168 484 F.2d 820 (D.C. Cir. 1973).
169 Id. at 824-26.
ciary, including the utilization of an in camera inspection when necessary, can the FOIA live up to its expectations as a disclosure statute for the maximum dissemination of government information. The ultimate determination of whether the FOIA becomes merely another withholding statute or a true public disclosure law may well rest with the Judiciary's willingness to accept the burden of in-depth investigation upon the executive agencies' assertion of a privilege.

David W. Andich
Sec. 3. Every agency shall make available to the public the following information:

(a) Publication in the Federal Register.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(b) Agency Opinions and Orders.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) administrative staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: Provided, That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that
private party shall have actual and timely notice of the terms thereof.

(c) AGENCY RECORDS.—Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court’s order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

(e) EXEMPTIONS.—The provisions of this section shall not be applicable 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 any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which were not available by law to a private party 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 private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

(f) LIMITATION OF EXEMPTIONS.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

(g) PRIVATE PARTY.—As used in this section, “private party” means any party other than an agency.
APPENDIX B

Section 3 of the Administrative Procedure Act of 1946

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.