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Comment, Resurrection of Reynolds: 1974 Amendment to National Defense and Foreign Policy Exemption

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Prior to passage of the Freedom of Information Act it was extremely difficult to acquire information from the government. In fact, before the passage of section 3 of the Administrative Procedure Act of 1946 it was virtually impossible for an inquirer to secure information for his own private use unless he was a litigant suing the government and using the typical discovery tools. There was no legislative justification for permitting a *non-litigant* to rummage through government files.

Dr. Harold Cross has identified three principal obstacles to the acquisition of information prior to passage of the Information Act: the series of statutes commonly called the housekeeping statute;[6] executive privilege (including the state secrets privilege); and section 3 of the Administrative Procedure Act of 1946.[7] These statutory and judicial rationalizations for refusing to reveal requested information to the public will be briefly reviewed in order to give the reader an adequate understanding of some of the bases upon which claims of protecting national defense or foreign policy were premised. This comment will then examine the national defense and foreign policy exemptions of both the 1967 and 1974 Acts, focusing both on the case law and on legislative history.

II

FREEDOM OF INFORMATION ACT OF 1967

A. *The Federal Housekeeping Statute*

One of the earliest statutory justifications for the withholding of desired information was the housekeeping statute,[8] a series of provisions designed to invest executive department heads with the authority to promulgate "rules and regulations" for the orderly control of departmental papers.[9] From 1789 to 1872 Congress enacted several statutes with this objective in mind.[10] Au-

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5. *See* H.R. REP. No. 1497, 89th Cong., 2d Sess., 3 (1966).

6. REV. STAT. § 161 (1875), *as amended* 5 U.S.C. § 22 (1958). The principle is now embodied in 5 U.S.C. § 301 (1970). For the text of REV. STAT. § 161 see *infra* II A n. 9. For the text of 5 U.S.C. § 301 see *infra* II A n. 29.

7. Administrative Procedure Act § 3. Ch. 324, § 3, 60 Stat. 238 (1946).

8. REV. STAT. § 161 (1875), *as amended*, 5 U.S.C. § 22 (1958):

> 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.* (emphasis added)

9. Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11,652*, 59 IOWA L. REV. 110, 112 (1973).

10. *See* 49 TEXAS L. REV. 780,782 n.13 (1971).

thority was originally given to the Secretary of the Department of Foreign Affairs.[11] Soon thereafter similar grants were made to the Secretaries of War,[12] Treasury,[13] Navy,[14] Interior,[15] Justice,[16] and Post Office.[17]

Pursuant to this authority, the heads of these departments proceeded to promulgate regulations which would best manage the departmental papers in the custody of subordinates. More specifically, the regulations denied subordinates the discretion to make decisions to release information in their control.[18] Rather, if subpoenaed by a litigant in a judicial proceeding to which the government was not a party, the subordinate was obligated to refer the request and subpoena to the department head who would then make the final decision.

The Supreme Court recognized the constitutionality of these statutes and the regulations promulgated thereunder in several cases.[19] Courts have also held that, although the government's refusal to disclose requested information when it was a party-litigant would subject the government to judicially imposed sanctions,[20] there was little the courts could do if the government

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11. Act of July 27, 1789, ch. 4 § 4, 1 Stat. 28.

> The Secretary for the Department of Foreign Affairs . . . shall . . . be entitled to have the custody and charge of all records, books and papers in the office of the Secretary for the Department of Foreign Affairs. . . .

The Department was renamed the Department of State by Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68.

12. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.
13. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.
14. Act of April 30, 1798, ch. 35, 1 Stat. 553.
15. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395.
16. Act of June 22, 1870, ch. 150, § 8, 16 Stat. 162.
17. Act of June 8, 1872, ch. 335, 17 Stat. 283.
18. Mitchell, *Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen*, 58 COLUM. L. REV. 199 (1958).
19. *See* Boske v. Comingore, 177 U.S. 459 (1900). (Treasury regulation prohibiting production of records by Internal Revenue valid), and United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951) (Attorney General's regulations valid). *See* MCCORMICK, EVIDENCE § 108 n. 16 (1972).
20. The courts have been ingenius in devising constraints designed to induce the government to reveal evidence that it holds and that the opposing party desires. Where the government is a plaintiff in a civil case the court can order dismissal: Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958). If the government is a defendant the court can refuse to permit it to introduce certain evidentiary items: Bank Line, Ltd. v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948). Similarly, certain facts may be taken as established against the government.

In criminal proceedings the court has often held that if the government refuses to disclose the requested information it must suffer dismissal: United States v.

was not a party to the litigation in which the subpoena was issued. Further, both *Boske v. Comingore*[21] and *United States ex rel. Touhy v. Ragen*[22] made it clear that if the department regulations required the subordinate to forward the subpoena to the department head and deprived the subordinate of the discretion to release the information then, in a dispute between private parties, the subordinate was immune from contempt proceedings.[23] Nor could the parties ordinarily acquire the information from the department head since the trial court rarely had jurisdiction over him.[24] Under these circumstances the housekeeping statute became a major obstacle impeding the discovery of information from government sources by private litigants when the government was not a party.

In an attempt to eliminate executive department reliance on the housekeeping statute as a government "non-disclosure law,"[25] Congress in 1958 amended it to provide: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[26] Although the eventual effect of the Congressional amendment was debated by commentators, Congressional intent appeared to be relatively clear,[27] and the courts were ready to effectuate it.[28] The house-

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Andolschek, 142 F.2d 503 (2d Cir. 1944). *See also* Jencks v. United States, 353 U.S. 657 (1957) and 84 Stat. 926, 18 U.S.C. 3500 (1970) for an additional course of action available to the courts.

21. 177 U.S. 459 (1900).

22. 340 U.S. 462 (1951). *See* 47 NW. U.L. REV. 519 (1952).

23. 177 U.S. at 467, 470; 340 U.S. at 469.

24. 69 YALE L.J. 452, 455 (1960); MCCORMICK, EVIDENCE § 180 (1972).

25. Congress felt that the executive agencies were relying too heavily upon section 22 in refusing to disclose information. *See* remarks of Rep. Moss in 104 CONG. REC. 6572 (1958).

> The reason the language is added that it is not authority for withholding is that in 3 years of careful study we have found far too many instances where . . . departments have relied upon this statute as a clear authority to refuse information to the public or to Congress itself.

26. 72 Stat. 547, 5 U.S.C. § 22 (1958).

27. One commentator stated that a new amendment (of the 1958 amendment) was needed to preserve the rules of *Boske* and *Touhy* protecting subordinates. He apparently believed the 1958 amendment had destroyed those rules. *See* Carrow, *Government Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958). A different view was expressed in Mitchell, *supra* n. 18. He suggests that the amendment reaffirms *Boske* and *Touhy* and merely asserts that the department head can no longer use section 22 to suppress information. In light of the legislative history of the amendment the latter view seems most accurate. *See* 104 CONG. REC. 15695 (1958) where Senator Johnson states that (in quoting from Dr. Harold L. Cross) "Those decisions [Boske and Touhy] which, in my opinion, correctly interpret title 5, United States Code, Section 22, would not be affected at all by the amendment." See *Hearings on Availability of Information From Federal Departments and Agencies Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 1st. Sess., pt. 11 at 2558-59 (1957) where the subcommittees' chief counsel states that the amendment

keeping statute is thus no longer one of the principal impediments to the free flow of information.[29]

B. State Secrets Privilege[30]

In addition to the housekeeping statute, the government frequently relied upon non-statutory privileges in their effort to resist disclosing information sought by litigants in proceedings to which the government may or may not have been a party. Amongst the privileges asserted by the government in support of their position against disclosure were the state secrets privilege, the privilege to refuse to reveal the identities of informants, the privilege not to disclose official information and executive privilege.[31] Of primary concern is the distinction between the executive privilege and the state secrets privilege.

The privilege of the executive to refuse to disclose information in his possession is basically a *personal* right[32] having its con-

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would not ". . . overrule or change in any way the two major decisions of *Boske* and *Touhy*." *See also* 69 YALE L.J. 452, 459-461 (1960).

28. *See e.g.*, N.L.R.B. v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961); Rosee v. Board of Trade of the City of Chicago, 35 F.R.D. 512 (N.D. Ill. 1964).

29. When Congress was considering the passage of 5 U.S.C. § 552 (Freedom of Information Act of 1967) it made reference to the fact the housekeeping statute was no longer viewed as an impediment to the free flow of information. *See* H.R. REP. NO. 1497,89th Cong., 2d Sess. (1966). It should be noted that 5 U.S.C. § 22 was amended by 80 Stat. 379, 5 U.S.C. 301 (1970). It reads:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Additionally, the amendment to section 22 in 1958 was not viewed as giving the public or press—when uninvolved in litigation—a right to request information from the government for their own edification. *See* 69 YALE L.J. 452, 457 n. 34 (1960).

30. Both this and the prior section deal with ground for non-disclosure to litigants in judicial proceedings either where the suit is between private litigants *inter se* or between a private party and the government.

31. The development of the state secrets privilege, and particularly the notations as to some of the various government privileges is succinctly presented in Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

32. *Id.* at 876. *See generally* Bishop, *The Executives Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Taubeneck and Sexton, *Executive Privilege and the Courts Right to Know—Discovery Against the United States in Civil Actions in Federal District Courts*, 48 GEO. L.J. 486 (1960); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959).

stitutional roots in the doctrine of separation of powers.[33] The state secrets privilege, on the other hand, is not premised upon the position of the person asserting it but rather upon the *nature*[34] of the material sought to be protected.[35] While the executive may

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33. This doctrine was defined by the Hon. William H. Rehnquist as:

> [T]he constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government. This doctrine is implicit in the separation of powers established by the Constitution.

Hearings on U.S. Government Information Policies and Practices—The Pentagon Papers Before a Subcommittee of the House Committee on Government Operations, 92nd Cong., 1st Sess. pt. 1, at 359 n. 4 (1971). The doctrine of executive privilege has its historical antecedents in the English doctrine that the King can do no wrong. *See* Street, *State Secrets—A Comparative Study*, 14 MOD. L. REV. 121 (1951). The incident that broached the question of the extension of the privilege to Presidents was the failure of the 1792 St. Clair expedition into the Northwest Territory. *See* T. TAYLOR, GRAND INQUEST 17 (1955). The House sought information from President Washington but he noted, in surrendering the requested information, that the executive has the discretion to withhold certain information that may injure the public. In 1796 both the House and the Senate sought information concerning instructions given the negotiator of the Jay Treaty which was designed to assure British withdrawal from western outposts following the Revolutionary War; Washington, asserting privilege, refused to turn over the information to the Senate but did disclose it to the House. *See* Younger, *supra* n. 32 at 757-58. *See generally* Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1-2) 12 U.C.L.A. L. REV. 1044 at 1093, 1094, 1096 (1965).

34. The information sought to be protected under this privilege can be characterized as either diplomatic or military. More specific parameters will be considered within the discretion of Executive Order 11652.

35. Zagel, *supra* n. 31 at 892. Not all commentators are in accord on the question of the separate identities of these privileges. *See generally* Note, *Reform In the Classification and Declassification of National Security Information: Nixon Executive Order 11652*, 59 IOWA L. REV. 110,113 (1973) where the commentator states:

> In a number of cases the courts have held, even in the absence of statutory authority, that the government is privileged to withhold confidential information bearing on the national defense or foreign relations. Although this privilege supposedly grew out of the common law, the ultimate power of the Executive to refuse disclosure of government documents, where no statute bears on the subject, rests on presidential authority.

This author and the author of Note, *Reform* (id.) view the generic privilege as an "executive" one; and the state secrets privilege and the confidential communications privilege are subsumed under this broad title. For additional commentators accepting somewhat similar views *see* 25 VAND. L. REV. 397, 398-99 (1972); 83 HARV. L. REV. 928, 931 (1970); 42 U. CINN. L. REV. 529,537 (1973) where the commentator in referring to United States v. Reynolds, 345 U.S. 1 (1953), states that

> In this executive privilege case the Court held that where the Government asserts executive privilege to withhold secret information, it need not produce the material for in camera inspection if it can show from all circumstances that there is a danger that disclosure would jeopardize national security.

It's arguable that the author of the comment views the state secrets privilege as an aspect of executive privilege rather than as a distinct privilege founded upon a disparate basis.

For additional information on the state secrets privilege *see generally* Sanford, *Evidentiary Privileges Against the Production of Data Within Control of the*

arguably[36] claim the exclusive power to decide whether or not to release information in his possession, his power has been viewed by some commentators as circumscribed in the area of state secrets.[37] This view is said to proceed from the realization that the two privileges derive from separate sources. One commentator speaking of the privileges has suggested that

> The state secrets privilege was judicially created, and it is foolish to assert that the judiciary is without power to supervise its exercise. Problems of executive versus judicial power do arise over executive privilege . . . . The executive privilege is founded on the separation of powers. The executive asserts its freedom to decide which materials it shall disclose and to whom it shall disclose them. This privilege is not based on the *nature* of ths material withheld . . . but upon the executive's *personal* right to determine when withholding is in the public interest. The state secrets privilege may be distinguished in that it is defined solely by reference to the privileged material.[38] [emphasis added.]

Nor have the courts entirely rejected the view that they can supervise the exercise of the state secrets privilege.[39]

Although the state secrets privilege was conceived in the early years of the Republic[40] it has fully matured and is widely ac-

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Executive Departments, 3 VAND. L. REV. 73 (1949); Berger and Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1949-50); Carrow, *Government Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958); Gromley, *Discovery Against the Government of Military and Other Confidential Matters*, 43 KY. L.J. 343 (1954).

36. *But cf.* United States v. Nixon, 418 U.S. 683 (1974), where it was contended that the President, under the privilege of the confidentiality of communications (an aspect of executive privilege) could refuse to disclose subpoenaed documents in a criminal case. The court, however, did not accept this proposition.

37. Zagel *supra* n.31 at 892 where it is stated that "It would seem that the executive could not properly claim the exclusive legal power to decide questions of the state secrets privilege." It should be noted that, while some commentators have viewed the state secrets privilege as part of executive privilege, even the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974), took great care to distinguish the two. This seems to affirm the suggestions of Mr. Zagel.

38. Zagel *supra* n.31 at 892.

39. *See* United States v. Reynolds, 345 U.S. 1 (1953).

40. *See, e.g.*, 1 ROBERTSON, THE REPORTS OF THE TRIALS OF COLONEL AARON BURR (1969). In the Aaron Burr trial Chief Justice John Marshall issued a subpoena duces tecum to President Jefferson calling upon him to produce certain communications with General Wilkinson. The government contended that these communications contained information involving Spain and France. Justice Marshall said, at 186-87, "There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger public safety . . . ." Even at this early date the court was moving with circumspection if a matter might threaten the continued existence of the nation or result in a costly embarrassment to allies.

knowledged today.[41] The courts have recognized its application to criminal cases prosecuted by the government[42] and also to civil cases in which the government initiated the action.[43] Greatest use of the privilege is in cases where the government is the defendant or an intervenor on the side of the defendant. Thus, the privilege was applied where the government was sued on a secret contract made personally with the President;[44] where the government intervened to assert the privilege in a suit against a private party who possessed the secret information the plaintiff sought to discover;[45] and in a suit against a private party where the government intervened to have the secret information expunged from the record when the plaintiff placed it into evidence.[46]

Though these cases were important in that they affirmed the existence of the privilege, *United States v. Reynolds*[47] supplied the appropriate test to be used in state secrets cases. In *Reynolds*[48] the court had to decide whether to compel disclosure of certain Air Force accident reports sought by the widows of three civilian observers killed during a test flight of a B-29 on a highly secret mission. The government had asserted the state secrets privilege.

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41. *See e.g.*, Duncan v. Cammell, Laird & Co. (1942) A.C. 624. Citation is to an English case fully recognizing the privilege in that country. *See generally* Street, *State Secrets—A Comparative Study*, 14 MOD. L. REV. 121 (1951).

42. *See e.g.*, United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944). The usual rule in criminal cases involving privileges other than the state secrets privilege is that the government cannot both avail itself of the privilege and simultaneously proceed with the prosecution. *Compare* Rovario v. United States, 353 U.S. 53 (1957); United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); Palermo v. United States, 360 U.S. 343 (1959); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

43. *See* Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956). In this case the United States and Nationalist China were suing to recover insurance proceeds for seven ships abandoned by defecting crews. The documents sought were diplomatic conversations with Great Britian. The court acknowledged the privilege and prohibited disclosure. It should be noted this is one of the few cases in which the state secrets privilege has been applied to information in the form of diplomatic minutae.

44. Totten v. United States, 92 U.S. 105 (1875). President Lincoln had employed the plaintiff to engage in covert intelligence gathering in the Confederate States during the Civil War. Later, the government refused to forward the plaintiff his payment. *See* 25 VAND. L. REV. 397, 398 (1972); Zagel, *supra* n.31 at 899.

45. Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939) (patent infringement suit).

46. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (another patent infringement suit related to armor piercing projectiles). *Compare* Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

47. 345 U.S. 1 (1953).

48. *See* 21 GEO. WASH. L. REV. 792 (1952); 16 GA. B.J. 357 (1952); 28 N.Y.U.L. REV. 1188 (1953); 47 NW. U.L. REV. 259 (1952); 30 TEXAS L. REV. 889 (1952); 29 WASH. L. REV. 59 (1952).

The Supreme Court, speaking through Justice Vinson, acknowledged the existence of the privilege[49] but asserted that "the court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ."[50] The Court also discussed the test to be applied in determining whether the matter was in fact privileged:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is reasonable danger that the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.[52]

It appears plain that the Court recognized the common law origins of the privilege and the need to retain control over its use. The Court also asserted that it will vary the depths of its "probes" into the evidence (to ascertain the validity of the claim) according to the degree of necessity the inquirer can show for requesting the information: it will not necessitate disclosure when to do so would seriously jeopardize national security.[53]

C. Section 3 of the Administrative Procedure Act of 1946

The final impediment to the discovery of information (related in some way to diplomatic or military matters) prior to passage of the Freedom of Information Act[54] was section 3 of the Adminis-

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49. 345 U.S. 1 at 7.
> When the Secretary . . . lodged his formal 'Claim of Privilege,' he attempted therein to invoke the privilege aginst revealing military secrets, a privilege which is well established in the law of evidence.

50. *Id.* at 8.
51. *Id.* at 7.
> The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party . . . . There must be a formal claim of privilege, lodged by the head of department which has control over the matter, after actual personal consideration . . . .

52. *Id.* at 10. It should be noted that some commentators have viewed Reynolds as an unsuccessful attempt to find a middle ground between complete disclosure and complete acceptance of the executive assertion. The latter is the English view stated in Duncan v. Cammell, Laird & Co. (1942) A.C. 624. *See* Zagel, *supra* n.31 at 891.
53. 345 U.S. 1 at 11.
54. 5 U.S.C. § 552 (1970).

trative Procedure Act of 1946.[55] Although Congress labored to ensure that this act would promote rather than restrict public access to government information,[56] substantive ambiguities presaged a different result.[57] The act included two broad, ambiguous exceptions which barred access to information regarding "any function of the United States requiring secrecy in the public interest" and information "required for good cause to be held confidential."[58]

These exceptions to the requirement of disclosure under the Administrative Procedure Act were included to protect certain military or diplomatic materials, a goal not seriously questioned.[59] But the ambiguities in these exceptions led to innumer-

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55. Administrative Procedure Act § 3, ch. 324, § 3,60 Stat. 238 (1946).

> 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 related solely to the internal management of an agency—
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> (a) RULES—Every agency shall seperately state and currently publish in the Federal Register (1) descriptions of its central and field organizations . . . (2) statements of general course and method by which its functions are channeled and determined . . . (3) substantive rules . . . and statements of general policy . . ., but not rules addressed to and served upon named persons in accordance with law . . . .
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> (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.
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> (c) PUBLIC RECORDS—Save as otherwise required by statute, matters of official records shall in accordance with published rule be made available to *persons properly and directly concerned*. . . . [emphasis added]

56. An examination of H.R. REP. NO. 752, 79th Cong., 1st Sess. 198 (1945) evinces that the central purpose of the Act was the promotion of disclosure. There it is stated:

> The section has been drawn upon the theory that administrative operations and procedure are public property which the general public . . . is entitled to know or have ready means of knowing with definiteness and assurance.

57. This section of the Administrative Procedure Act and the previously noted two items—housekeeping statute and state secrets privilege—were the principal tools of those desiring to conceal, rather than reveal, government information. *See* 83 HARV. L. REV. 928, 929 (1970); 25 VAND. L. REV. 397, 399 (1972); 42 U. CINN. L. REV. 529, 530 (1973). *See also* Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 AD. L. REV. 111 (1966).

58. It was noted in section II B of this comment that the state secrets privilege was designed to protect military and diplomatic information in a *litigant* setting, i.e. where two private parties were involved in a judicial dispute and one sought government information, or where a private party was suing the government on a collateral matter and sought to discover government information to assist his case. With the passage of section 3 of the APA, *non litigants* could seek information for their own edification if they met the other statutory requirements. Apparently the exception for information "requiring secrecy in the public interest" was designed to establish an exemption similar to the state secrets privilege in these non *non litigant* cases.

59. *See* Moss, *supra* n.57 at 114 where he states that "We could not quarrel

able abuses.[60] Some of the more noteworthy items excepted under section 3 include a telephone directory published by the Navy Ordinance Laboratory,[61] contractor bids submitted concerning the Mohole project,[62] fig import statistics,[63] and a guest list compiled by the Secretary of the Navy for a pleasure trip on a Navy yacht.[64] These abuses prompted the Senate to report that:

> Section 3 of the A.P.A. . . . is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrasing mistakes or irregularities and the withholding is justified by such phrases in section 3 of the A.P.A. as—"requiring secrecy in the public interest . . . ."[65]

Thus, while Congress attempted to strike a workable balance between the promotion of greater public accessability to government information (even in non-litigant cases) and the protection of essentially secret matters, the ambiguities produced by that effort provided new ammunition for those governmental agencies reluctant to reveal potentially embarrassing or controversial matters.[66] In an effort to remedy the undesirable consequences

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with the protection of defense information properly classified under executive order or statute."

60. *See generally* S. REP. No. 813, 89th Cong., 1st Sess. (1965); H.R. REP. No. 1497, 89th Cong., 2nd Sess. (1966); 112 CONG. REC. 12976 (1966); *Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee*, 89th Cong., 1st Sess. (1965); *Hearings on S. 1663, Administrative Procedure Act, Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee*, 88th Cong., 2d Sess. (1964); *Hearings on Government Information, Plans and Policies, Before the Subcommittee of the House Committee on Government Operations*, 88th Cong., 1st Sess. (1963). *See also* Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U.L. REV. 184, 188 (1973).

61. Moss, *supra* n.57 at 113.

62. *Id.*

63. *Id.* at 115.

64. Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill.* 40 NOTRE DAME LAW. 417, 436 (1964-65).

65. FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, SUBCOMMITTEE OF ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE, 93rd Cong., 2nd Sess. (Comm. Print 1974) [hereinafter cited as SOURCE BOOK].

66. *See* S. REP. No. 1219, 88th Cong., 2nd Sess. 10 (1964) where its noted 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. Precisely the opposite has been true: 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.

of section 3, Congress, as early as 1955, examined several legislative proposals designed to accomplish this result.[67] Initially, the Congress was reluctant to consider the suggestions. However, by 1966 the Eighty-ninth Congress finally approved an amendment to section 3.[68] The amendment was to be known as the Freedom of Information Act and was a major step in the direction of public disclosure.

III

FREEDOM OF INFORMATION ACT OF 1967: EXEMPTION B(1)

A. *Introduction*

The Freedom of Information Act[69] was designed to increase the availability of government documents to the public in general.[70] In addition to requiring agency publication of certain specified information in the Federal Register,[71] it also called upon agencies to permit public inspection and copying of certain enumerated materials.[72] The heart of the Act is subsection (a) (3)[73]

Of interest here is the suggestion that section 3 was cited as *statutory* authority to withhold. A similar use was made of the "housekeeping" statute.

67. *See generally* S. 2504, 84th Cong., 1st Sess. (1955); S. 2541, 84th Cong., 1st Sess. (1955); S. 2148, 85th Cong., 1st Sess. (1957); S. 4094, 85th Cong., 2nd Sess. (1958); S. 186, 86th Cong., 1st Sess. (1959); S. 1070, 86th Cong., 2nd Sess. (1960) (a revised version of S. 186, *supra*.); S. 1887, 87th Cong., 1st Sess. (1961); H.R. 9926, 87th Cong., 1st Sess. (1961); S. 1567, 87th Cong., 1st Sess. (1961); S. 1907, 87th Cong., 1st Sess. (1961); and S. 3410, 87th Cong., 2nd Sess. (1962). None of these bills received the undivided attention of the Congress until 1963. On June 4, 1963 two bills were introduced in the Senate. S. 1663, 88th Cong., 1st Sess. (1963) was introduced by Senators Dirkson and Long and was designed to amend the entire APA. S. 1666, 88th Cong., 1st Sess. (1963) was identical to section 3 of S. 1663 and aimed only at amending section 3 of the APA. *See also Hearings Before the Subcommittee on Administrative Practice and Procedure of Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963).

68. After the 1963 Hearings several revisions were made in S. 1666. It was re-examined and once again revised in July 1964. *See Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2nd Sess. (1964). This amended version passed the Senate on July 31, 1964 but no action was taken on it prior to the adjournment of the House.

A modified version of S. 1666 was introduced in both houses of Congress. S. 1160's companion bill in the House was H.R. 5012, 89th Cong., 1st Sess. (1965). S. 1160 passed the Senate during the 89th Cong. (Oct. 13, 1965) and also passed the House (June 20, 1966).

69. 81 Stat. 54, 5 U.S.C. § 552 (1970).

70. *Id.* § 552(a)(3).

71. *Id.* § 552(a)(1).

72. *Id.* § 552(a)(2).

73. *Id.* § 552(a)(3) where it is stated:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on 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, shall make the records promptly available to any person. On complaint,

which states that "any person," litigant or non-litigant, can make a "request" for identifiable records in accordance with the requisite rules and procedures. Disclosure, however, is subject to the exemptions of subjection (b).[74] If the agency refuses the request the inquirer may sue in either the United States District Court where the "complainant resides" or has his "principal place of business," or where the "agency records are situated." The District Court can make a de novo determination of the validity of the refusal and is empowered to "order the production" of the records and impose contempt sanctions if the responsible employee fails to comply with the court order.[75]

Despite the general rule of disclosure which is premised on the belief that "an informed electorate is vital to the proper operation of a democracy,"[76] the Act also lists nine types of materials to which its disclosure provisions do not apply.[77] The specific iden-

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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, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaintant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uninformed service, the responsible member.

74. *Id.* § 552(b)(1-9).

75. *See* H.R. REP. NO. 1497, 89 Cong., 2d Sess. 7 (1966) where it was noted that "Improper denials occur again and again . . . . The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosure in such cases." Undoubtedly the Congress provided de novo review to assure frustrated applicants that similar abuses would not be perpetuated under the F.O.I.A.

76. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

77. 5 U.S.C. § 552(b) states:

This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

tification of exempted materials was intended to eliminate the broad semantic ambiguities that fostered the abuses under Section 3 of the A.P.A.[78] When these exemptions are construed in harmony with the other provisions of the Act it becomes apparent that Congress was hoping to facilitate an improvement in the free flow of information by making basic changes in the A.P.A.[79] Although nine exemptions are enumerated in the Act, this comment is concerned solely with the exemption designed to protect national defense and foreign policy.[80]

B. The National Defense and Foreign Policy Exemption

Subsection (b)(1) of the Freedom of Information Act of 1967 states:

> This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.

It has been contended that the phrase "specifically required by Executive order" does not incorporate[81] Executive Order 10501,[82]

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(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

78. *See generally* II c. *supra* n.60.

79. *See* H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2 (1966) where the House notes the general areas of change the F.O.I.A. would make in section 3 of the A.P.A.

(1) It eliminates the "properly and directly concerned" test of who shall have access to public records, stating that the great majority of records shall be available to "any person" . . . .

(2) It sets up workable standards for the categories of records which maybe exempt from public disclosure, replacing the vague phrases, "good cause found," "in the public interest," and "internal management" with specific definitions of information which may be withheld . . . .

(3) It gives an aggrieved citizen a remedy by permitting an appeal to a U.S. district court.

80. 5 U.S.C. § 552(b)(1).

81. See Justice Brennan's dissent in Environmental Protection Agency v. Mink, 410 U.S. 73 at 96-100 (1972) where he states that the Act was not intended to incorporate Exec. Order No. 10,501. He reaches this conclusion by reasoning that Exec. Order No. 10,501 allows unclassified components of a classified file to receive the classification of the whole file whereas subsection (b)(1) only exempts documents "specifically required" to be kept secret.

This view was similarly accepted by the Court of Appeals in Mink v. E.P.A., 464 F.2d 742 (D.C. Cir. 1972). The Court held, at 746, that if "the nonsecret component are separate from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." The court's finding implicitly means that Exec. Order No. 10,501 is not incorporated into subsection (b)(1). Some support for this position can be found in the legislative history. For example, S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965) notes that

> Exemption No. 1 is for matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. The

the standing classification order at the time of the passage of the FOIA. Although some commentators have suggested that such a result is "socially desirable"[83] in limited situations, the accepted view of the authoritative cases is to the contrary.[84]

Executive Order 10501, characterized as "the model for the present system of document classification,"[85] is the product of an ontogenetic process that began at least as early as the First World War.[86] This order, which became effective December 15, 1953,

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change of standard from "in the public interest" speaking of sec. 3 A.P.A. is made both to delimit more narrowly the exception and to give it a more precise definition.

This excerpt indicates that the Senate viewed the exemption as an effort to clarify "in the public interest" of section 3 of A.P.A., rather than as a definitive effort to incorporate Exec. Order No. 10,501. *See* 25 VAND. L. REV. 397, 400, 402 (1972).

82. Exec. Order No. 10,501, 3 C.F.R. 1949-53 Comp. 979 (1958).

83. *See* 25 VAND. L. REV. 397 at 402 (1972) where the commentator addressing the Court of Appeals decision in *Mink* notes that the judgment of the court in viewing Exec. Order No. 10,501 as not incorporated into subsection (b)(1) and holding that unclassified attached documents are not exempt from disclosure is ". . . socially desirable because it encourages a policy of full public disclosure that serves to check possible administrative abuses of power."

84. *See* the majority opinion in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). This is noted in 42 U. CINN. L. REV. 529 (1973). At 531 the commentator speaks of Justice White's majority opinion:

> He reasoned that the exemption was written to dispel uncertainty, and that the Congress intended it to be the sole responsibility of the President to determine what material is kept secret. As a result, so long as material falls within the purview of the Executive order [E.O. 10,501], no judicial review is authorized. Justice White concluded by saying that Congress could have provided its own classification procedures, or ordered the Executive to create new ones, but it did neither.

The view that Exec. Order No. 10,501 reflects what Congress meant when it exempted documents "specifically required by Executive order to be kept secret" also receives some support from H.R. REP. NO. 1497, 89th Cong., 2d Sess. 9-10 (1966), where it's stated:

> The language both limits the present vague phrase, "in the public interest," and gives the area of necessary secrecy a more precise definition . . . . 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 10,501.* [emphasis added]

See 83 HARV. L. REV. 928, 932 (1970). The H. REP. NO. 1497, 89th Cong., 2d Sess. 9-10 (1966), seems to have been the view the majority accepted in *Mink*. *See* 25 VAND. L. REV. 397, 402 (1972). *See also* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 30 (1967).

85. Comment, *Secrecy in the Conduct of United States Foreign Relations: Recent Policy and Practice*, 6 CORNELL INT'L L.J. 187, 193 (1973).

86. For a masterful examination of the history of document classification see FOREIGN AFFAIRS DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF

limited classifiable information to Top Secret, Secret and Confidential categories,[87] held to a reduced minimum the number of

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CONGRESS, 92nd Cong., 1st Sess., SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY (Comm. Print 1970).

On March 22, 1940 President Roosevelt issued Exec. Order No. 8,381, 5 Fed. Reg. 1147 (1940), which was designed to define and recognize the military classification system. This order was superceded by Exec. Order No. 10,104, 15 Fed. Reg. 597 (1950), issued by President Truman on February 1, 1950. This Order introduced the "top secret" classification and granted delegable classification authority to Secretaries of Defense, Army, Navy and Air Force. On September 24, 1951 President Truman issued Exec. Order No. 10,290; 16 Fed. Reg. 9795 (1951). This order retained the four tier classification system developed following the Second World War. The levels were "*Top Secret*" (disclosure would or could cause "exceptionally grave danger to national security"); "*Secret* ("information requiring extraordinary protection"); *Confidential*: requiring only "careful protection" and "Restricted" (requiring protection against "unauthorized used or disclosure") The order also extended the delegation of authority to classify. *See* Exec. Order No. 10,290 § 24, C.F.R. 1944-53 Comp. 789 (1958), where it's stated that

> The ultimate responsibility for the safeguarding of classified security information within an agency shall remain with and rest upon the head of the agency, but the head of an agency may delegate the performance of any or all of the functions charged to him herein including . . . (c) Authorization of appropriate officials within his agency to assign information to the proper classification under these regulations.

In addition to the four level classification system and extended classification authority, Exec. Order No. 10,290 also provided a somewhat ineffective system for declassification and downgrading of classifications. Exec. Order No. 10,290, sec. 28(aa-c).

There was no *automatic* procedure for declassifying after a stated number of years but there was an *optional automatic* and a *nonautomatic* procedure. Under the former procedure an official would place a notation on a document identifying the date or the event that would permit downgrading or declassification. The nonautomatic procedure (the one used most prevalently) the classification was downgraded or removed upon the occurrence of warranting circumstances. Review was provided to determine when those circumstances arose.

87. Exec. Order No. 10,501 § 1(a-c), 3 C.F.R. 1949-53 Comp. 979 (1958).

> (a) *Top Secret*. Except as may be expressly provided by statute, the use of the classification *Top Secret* shall be authorized, by appropriate authority, only for defense information or material which requires the *highest degree* of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount and the unauthorized disclosure of which could result in *exceptionally grave* damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.
> (b) *Secret*. Except as may be expressly provided by statute, the use of the classification *Secret* shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in *serious damage* to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.
> (c) *Confidential*. Except as may be expressly provided by statute, the use of the classification *Confidential* shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be *prejudicial* to the defense interest of the nation. [emphasis added]

departments and agencies with power to classify,[88] and created procedures for automatic declassification and downgrading,[89] a novel proposal in the history of document classification.[90] Executive Order 10501 was subsequently superseded by Executive Order 11652,[91] but the substantive nucleus of the order remained extant.

Order 11652, the so-called Nixon Executive order, was designed to improve the protection of national security information while advancing public access to government information by accelerating declassification.[92] Like 10501, it also functioned on a tripartite classification schedule.[93] But unlike its precursor,

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See generally Parks, *Secrecy and the Public Interest in Military Affairs*, 26 GEO. WASH. L. REV. 23 (1957).

88. Exec. Order No. 10,501 § 2, 3 C.F.R. 1949-53 Comp. 979 (1958). *See generally* Note, *Reform In the Classification and Declassification of National Security Information: Nixon Executive Order 11,652*, 59 IOWA L. REV. 110, 117 (1973). Thirty-four executive bodies had power to classify documents "Top Secret" and twelve had a limited power to do so.

89. Exec. Order No. 10,501 § 4, 3 C.F.R. 1949-53 Comp. 979 (1958). Section 4 (a) notes that automatic declassification was to be used to the "fullest extent practicable" despite the fact it was not made mandatory.

90. In 1961 President Kennedy issued Exec. Order No. 10,964 which created a fourth category for information not otherwise within the other three classification categories. Automatic declassification over a twelve year period (at three year intervals) was provided for this fourth group of classified information.

91. Exec. Order No. 11,652, 3 C.F.R. 339, 37 Fed. Reg. 5209 (1972), *as amended* by Exec. Order No. 11,714, 38 Fed. Reg. 10245 (1973). It should be noted that Exec. Order No. 11,652 did not itself directly amend order 10,501. Rather the amendment of Order 10,501 was a process consisting of several preliminary amendments: Exec. Order No. 10,816, 3 C.F.R 1959-63 Comp. 351(1964); Exec. Order No. 10,901, 3 C.F.R. 1959-63 Comp. 432 (1964); Exec. Order No. 10,964, 3 C.F.R. 1959-63 Comp. 486 (1964); Exec. Order No. 10,985, 3 C.F.R. 1959-63 Comp. 518 (1964); Exec. Order No. 11,097, 3 C.F.R. 1959-63 Comp. 750 (1964); Exec. Order No. 11,382, 32 Fed. Reg. 16247 (1967).

92. 8 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 543 (1972).

93. Exec. Order No. 11,652 § 1, 3 C.F.R. 339, (1972) states:

> (A) "*Top Secret*". "Top Secret" refers to that national security information or material which requires the *highest degree* of protection. The test for assigning "Top Secret classification shall be whether its unauthorized disclosure could reasonably be expected to cause *exceptionally grave* damage to the national security. Examples . . . include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems. . . . This classification shall be used with the utmost restraint.
>
> (B) "*Secret*". "Secret" refers to that national security information or material which requires a *substantial degree* of protection. The test for assigning "Secret" classification shall be whether its unau-

which affected "defense information,"[94] 11652 applied to national security information."[95] Although this difference has been viewed as a possible expansion of classifiable information,[96] other commentators feel that such an understanding is not wholly warranted.[97] The tests of 10501 and of 11652 for determining whether classifiable information is Top Secret, Secret or Confidential are virtually equivalent.[98] But 11652 has dramatically continued the process begun by 10501 of reducing the number of agencies with classification authority.[99] Further, 11652 also established a declassification and downgrading schedule[100]

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thorized disclosure could reasonably be expected to cause *serious damage* to the national security . . . .

(C) "*Confidential*". "Confidential" refers to that national security information or material which *requires protection*. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security. [emphasis added]

94. *See* the Top Secret, Secret and Confidential definitions of Exec. Order No. 10,501 *supra* n. 87.

95. See the Top Secret, Secret and Confidential definitions of Exec. Order No. 11,652 *supra* n. 93.

96. *See Hearings on U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b)(1) of the Freedom of Information Act (pt. 7) Before a Subcommittee of the House Committee on Government Operations*, 92nd Cong. 2nd. Sess., 2850-53 (1972) [hereinafter cited as MOORHEAD HEARINGS].

97. Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11652*, 59 IOWA L. REV. 110, 120 (1973).

98. Under 10,501 and 11,652 the test for "*Top Secret*" is "*exceptionally grave*" and for *Secret* the test is "*serious damage*" For "*Confidential*" there is a divergence, Exec. Order No. 10,501 had a "*prejudicial*" test and Exec. Order No. 11,652 has a mere "*damage*" test.

99. Exec. Order No. 11,652, § 2 (A), 3 C.F.R. 339 (1972). Reduced to twelve the number of executive departments and independent agencies with authority to fully classify. Added to this list are 11 offices within the Executive Office of the President that have been designated in writing as also having full classification powers.

100. *Id.* § 5.

Declassification and Downgrading. Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule*. (1) "*Top Secret*." Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) "*Secret*." Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at ths end of the eighth full calendar year following the year in which it was originated.

(3) "*Confidential*". Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

applicable to all but excepted information[101] a vast improvement over the non-mandatory plan of 10501. The two most noteworthy aspects of 11652 have been the Interagency Classification Review Committee, designed to "monitor" the implementation of the Order,[102] and the possible administrative sanctions imposed upon those who unnecessarily classify or overclassify information.[103]

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* * *

(E) *Declassification of Classified Information or Material After Thirty Years.* All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of the original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

101. *Id.* § 5 (B) (1-4). Exempted from this scheme are:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to crytography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosurs of which would place a person in immediate jeopardy.

102. *Id.* § 7.

(A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of a Chairman designated by the President, the Archivist of the United States, and representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with the order. . . .

103. *Id.* § 13.

(A) Any officer or employee of the United States who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case whers the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

The most acclaimed cases under exemption (b)(1) of the 1967 Freedom of Information Act that involved documents classified under Executive Order 10501 were *Epstein v. Resor*[104] and *Environmental Protection Agency v. Mink*.[105] In *Epstein* a historian at Stanford University's Hoover Institution on War, Revolution and Peace sought access to an Army file accumulated by the Allied Forces Headquarters pertaining to "Operation Keelhaul." Classified Top Secret pursuant to Executive Order 10501, the file contained information on the forcible repatriation of 900,000 Soviet citizens following World War II.[106] The initial request made to the Army was denied. Petitioner proceeded to the District Court for the Northern District of California in accordance with the provisions of the Freedom of Information Act.[107] The Secretary of the Army's motion for summary judgment, propounded because of the classified status of the information, was granted.[108] The court stated that it had no power to review the *merits* of the classification but was limited merely to determining that the classification was not *arbitrary and capricious*.

Appealing to the Ninth Circuit,[109] petitioner asked that a de novo review be made of the documents to determine if they were in fact classified according to the apposite Executive standards. The court, in affirming the District Court decision, said:

> Unquestionably the Act is awkwardly drawn. However, in view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose . . . judicial review of the circumstances of exemption. Rather it would seem (b) was intended to specify the *bases* for withholding . . . and that judicial review de novo with the burden of proof on the agency should be had to whether the *conditions* of exemption in truth exist.[110] [emphasis added.]

It appears that the court was asserting the power to review the justification for the government's refusal to furnish the requested information.

In accord with the provisions of the Act[111] the disclosure requirements *do not apply* to those items enumerated in subsec-

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104. 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F. 2d 930 (9th Cir.), *cert. denied*, 397 U.S. 965 (1970).

105. Summary judgment for the gov't *rev'd*, 464 F. 2d 742 (D.C. Cir. 1972), *rev'd* 410 U.S. 73 (1973).

106. 105 CONG. REC. A5615 (1959).

107. 5 U.S.C. § 552 (a)(3) (1966). For text, see III A. *supra* n. 73.

108. 296 F. Supp. 214 (N.D.Cal. 1969). *See* 83 HARV. L. REV. 928 (1970).

109. 421 F. 2d 930 (9th Cir. 1970).

110. *Id.* at 932.

111. 5 U.S.C. § 552 (b) (1970). "This section does not apply to . . . ." For full text see III A *supra* n.77.

tion (b), one of which concerns national defense and foreign policy information. Thus, the scope of judicial review extends to a determination of whether the agency's refusal to disclose was in fact based on one of the items listed in subsection (b). The language quoted above apparently does not mean that the court would examine the *factual circumstances* underlying the classification itself to assay the validity or merit of the classification under the Executive order standards. Rather, the court would confine itself to determining whether the documents were classified and thus exempt from disclosure requirements. This construction appears to be in accord with the court's view, for when the petitioner asked for an *in camera* review of the merits of the classification the court stated that

> Section (b)(1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very *basis* for the agency determination — the underlying factual contention—is open to judicial review. Under (b)(1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question of whether an appropriate executive order has been made as to the material in question.[112] [emphasis added.]

However, in affirming the lower court's decision, the appellate court noted that it possessed the power to determine if the classification itself was arbitrary and capricious. This determination was to be made, *inter alia*, by reviewing the origin of the file's classification and by other circumstances;[113] no *in camera* review was to be permitted.[114]

The *Epstein* decision has been criticized as having insufficient

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112. 421 F. 2d 930, 933 (9th Cir. 1970).

113. *Id. See* 25 VAND. L. REV. 397 (1972) where it's stated by the commentator at 400-401 that:

> Furthermore, the court concluded that judicial review was limited to the question whether an appropriate executive order invoking nondisclosure under the foreign affairs and national security secrets exemption had been promulgated on the material in question; judicial review of the factual basis for the administrative determination to classify certain documents as secret was precluded . . . . The Court . . . limited the scope of judicial inquiry . . . to a determination whether the agency decision to withhold . . . was clearly arbitrary and capricious. This inquiry . . . was limited by the court to an investigation of the origin of the file contents and the surrounding circumstances, thus precluding any *in camera* examination of the file. [emphasis added]

114. It should be noted that the circuit court did not forever exclude the possibility of *in camera* inspections. It stated in dicta: "Further we agree that judicial inquiry into this narrow area does not *at least in this case*, warrant *in camera* examination of the file, 421 F. 2d at 933. [emphasis added]

support in the legislative history of the Act to justify making distinctions regarding the depth of review according to the character of the exemption relied upon.[115] Nevertheless, a person seeking information under the disclosure provision of the Freedom of Information Act who was refused that information could file a claim in a district court. The court could proceed to exercise de novo review to determine if the government was refusing disclosure based on the premise that the requested documents were in fact classified pursuant to Executive Order 10501. While the court's scrutiny would extend to a determination as to whether the classification was arbitrary and capricious, *in camera* inspection would not be permissible. The determination would be arrived at by considering the files classification and other surrounding circumstances.

If *Epstein* left the court with some degree of control in examining the classification of documents by the executive, that control was eliminated in the *Mink* case. This case arose from a dispute regarding the advisability of a nuclear test explosion off Amchitka Island, Alaska. The Environmental Protection Agency had refused a request by Representative Patsy Mink that the recommendations concerning the test be released to the public. Shortly thereafter, she and 32 other Congressmen instituted a District Court action in the District of Columbia under the disclosure provisions of the Freedom of Information Act. The district court granted summary judgment to the government on the basis that the requested documents fell within the exemptions of subsections (b)(1) and (5) of the Freedom of Information Act. Of particular concern here is that portion of the opinion dealing with exemption (b)(1) since several of the documents were classified under Executive Order 10501. On appeal, the Circuit Court reversed[117] the lower decision, noting that the scope of judicial review of a claimed exemption clearly extended to determining whether the refusal was based on a subsection (b) exemption[118] and that an *in camera* inspection (to sift the unclassified documents from the classified ones to which they may be physically connected) might be necessary.[119]

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115. *See* 42 U. CINN. L. REV. 529, 535 (1973); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1221 at 1224 (1972).

116. The summary was based on both exemption 1 and exemption 5.

117. 464 F. 2d 742 (D.C.Cir. 1972). *See* 25 VAND. L. REV. 397 (1972).

118. This was the unequivocal holding of *Epstein*.

119. Mink v. E.P.A., 464 F.2d 742 (D.C. Cir. 1972) noted at 746 that if

> [T]he nonsecret components are separate from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.

In his majority opinion reversing the circuit court's decision permitting *in camera* inspection,[120] Justice White clarified the role of *in camera* inspection in the national defense and foreign policy exemption cases. He stated that

> The House Committee pointed out that Exemption (1) [(b)(1)] 'both limits the present vague phrase "in the public interest," and gives the area of necessary secrecy a more precise definition'. . . . 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. The language of the act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review.[121]

Thus, the scrutiny of the court could only extend to determining that the documents were classified under Executive order. Beyond this there would be no examination of the propriety of the classification itself.

> What has been said makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review. . . . It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document . . . .[122] [emphasis added.]

Justice Stewart concurred but addressed himself to the function of the court in examining agency subsection (b)(1) refusals. He opined that "once a federal court has determined that the Executive has imposed that requirement [(classification)] it may go no further under the Act."[123] While *Mink* recognized the correctness of *Epstein* in permitting de novo reviews of the

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In remanding the case to the lower court the circuit court said:

> Accordingly, *in camera* consideration of the documents by the District Court, looking toward their possible separation for purposes of disclosure or nondisclosure is necessary . . . . [emphasis added]

120. 410 U.S. 73 (1973). This decision was derived from the majority's view that Exec. Order No. 10,501 was incorporated into subsection (b)(1). This being so, then even unclassified physically connected documents were also protected. Exec. Order No. 10,501 states:

> (b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein . . .
>
> (c) *Multiple Classifications.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document . . . shall bear only one overall classification . . . .

121. 410 U.S. 73, 82 (1973) *See* 42 U. CINN. L. REV. 529 (1973)

122. *Id.* at 84.

123. *Id.* at 94.

circumstances of exemption under subsection (b)(1) *Mink* departed from *Epstein* in another respect. The Ninth Circuit in *Epstein* had ruled that a court could go beyond a mere determination that the documents were in fact classified and determine whether the classification was arbitrary and capricious. This, however, had to be accomplished without an *in camera* examination. *Mink* prohibited this inquiry.[124] Even though the *Mink* decision was unanimous,[125] the aversion of the federal courts toward the disclosure of security information continued. In later cases, the courts denied requests for classified information initially collected in World War II by the concerted actions of several nations,[126] for documents concerning the creation of the National Security Agency in 1952,[127] and for reports held by the State Department concerning Prisoner of War camps in South Vietnam.[128]

Cases following *Epstein*, *Mink* and their progeny conspicuously opposed court examinations of classified documents. Courts were able to conduct de novo reviews only for the purpose of determining whether the documents were classified in fact. Under no circumstances would *in camera* examinations be permitted, despite the fact there was no clear legislative history supporting this position. Nothing in the Act itself or the Reports indicated subsection (b)(1) should receive a different level of review than any of the other subsection (b) exemptions.

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124. *See* Comment, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1973) where the commentator states at 566-67:

> *Mink* rejects the suggestion made in earlier cases [Epstein] that a judge faced with a claim under the national security exemption may *review* the classification at least to the extent necessary to determine that it is not arbitary or capricious. [emphasis added]

125. *See* the dissenting opinions of Justices Brennan and Douglas. Justice Brennan contended that subsection (b)(1) only exempts documents "*specifically required* by Executive Order to be kept secret" and that the language in Exec. Order No. 10,501 permitting unclassified attached documents to receive the classification of the file was not controlling. He concurred with the court of appeals in calling for an *in camera* examination to glean the unclassified components from the classified file. Justice Douglas agrees with these observations and also notes that two days after certiorari was granted Exec. Order No. 10,501 was amended by Exec. Order No. 11,652 which discontinued the classification by association idea.

126. Wolfe v. Froehlke, 510 F.2d 654 (D.C. Cir. 1974). This case was a sequel to *Epstein*.

127. Kruh v. General Services Administration, 64 F.R.D. 1 (E.D.N.Y. 1974).

128. Schaffer v. Kissinger, 505 F.2d 389 (D.C.Cir. 1974). The district court granted the government's motion for summary judgment. On appeal the circuit court vacated the judgment and remanded the case. The circuit court noted that although *Mink* prescribed inquiries into the motives for executive classifications of documents, the courts could nevertheless determine if the documents were in fact classified in accordance with Exec. Order No. 11,652. The *Schaffer* decision is thus consistent with *Mink*.

Moreover, in light of the treatment that the judiciary had historically accorded government assertions of exemption, the courts appeared to be viewing executive claims of privilege with a deference incompatible with the Court's position in *United States v. Reynolds*. In that case the court stated that *it* was the final arbiter of claims of privilege based upon national security.[129] While conceding that an *in camera* examination was not the *sine qua non* to the Court's recognition of the validity of the claim of privilege the *Reynolds* Court nevertheless acknowledged that the depth of the evidentiary probe would be determined by the need for the information[130] considered in light of various other factors.[131] *Mink* stopped far short of *Reynolds* despite the fact that both dealt with documents of a similar character. Justice White in *Mink* felt the mere fact of document classification was sufficient to preclude further judicial inquiry. This seems to be precisely the position the *Reynolds* Court disparaged, warning that executive assertions that information should be protected would not go uncontested. Yet *Mink* held that the bare showing of executive classification forcloses further inquiry.

Although there are no definitive statements in the legislative history of the Act to support the position that (b)(1) was meant to be the analogical companion to the state secrets privilege in nonlitigant[132] situations, this view has received support from the commentators[133] and, in light of the 1974 amendments to the

129. *See* II B *supra*. n.50.
130. *Id*. n.53.
131. *Id*. n.52.
132. "Non-litigant" is used here to refer to one who is not a litigant at all or to one who is suing the government in any suit other than one under the F.O.I.A. A litigant could be defined as one who has a present, outstanding collateral suit against the government and is merely using the F.O.I.A. as a discovery tool.
133. *See* Hoerster, *The 1966 Freedom of Information Act — Early Judicial Interpretations*, 44 WASH. L. REV. 641 (1968-69). At 650-51 he states:

> Two parts of the doctrine of *constitutional executive privilege* are affected by the Freedom of Information Act: (1) executive privilege. . .; (2) the state secrets privilege. The first exemption from disclosure in the Information Act provides that the Act shall not apply to matters "specifically required by the Executive order to be kept secret in the interest of the national defense or foreign policy."
>
> By this exemption, Congress sought to carefully limit the encroachment of *constitutional executive privilege* on the Information Act. By preserving limited executive discretion over records dealing with national defense or foreign policy, Congress satisfied both parts of *constitutional executive privilege*. [emphasis added]

Again at 654 the commentator notes:

> In summary, it is clear that Congress took the doctrine of *constitutional*

Freedom of Information Act, has proved to be an accurate appraisal.

IV

THE 1974 AMENDMENT TO THE NATIONAL DEFENSE AND FOREIGN POLICY EXEMPTION[134]

Cognizant of the fact that both *Epstein* and *Mink* had yielded judicial constructions that were overly restrictive and at

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executive privilege into account in drafting the Information Act. [emphasis added]

Thus Hoerster considers the state secrets privilege one of the two privileges subsumed under the constitutional executive privilege, a view which differs from the one taken in section II B of this article. But despite this classification difference the thrust of the quotation persists. Hoerster believes the subsection (b)(1) exemption is an application of the state secrets privilege to the Information Act.

See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967). He states at 785:

> Whether the Act enlarges the executive power to withhold information is unclear. Apart from the act, a court applying the law of the *Reynolds* case may in some circumstances participate in the determination of the scope of executive privilege (state secrets). . . . [T]he holding was, in part, that "the court *itself* must determine whether the *circumstances* are appropriate for the claim of privilege . . . ." Under the Act, the Secretary [of Air Force or any other Executive Department officer] would presumably ask the White House for an executive order, and a presidential assistant would presumably comply. The court then might be bound by the executive order, on the theory that the Act has delegated power to the President. *But the argument the other way has merit: The first exemption, like all the other exemptions, merely means that the Acts disclosure requirements do not apply, and when the Act has no effect, the law is what it would have been without the enactment.* [emphasis added]

In other words, the courts should apply a *Reynolds* and not a *Mink* type test.

134. Following the enactment of the 1967 F.O.I.A. there were regular inquiries into the implementation of the Act. In November 1968, the House Government Operations Committee issued a Committee Print listing and analyzing the regulations promulgated by the various agencies to implement the Act. *See* House Gov't Operations Comm., 90th Cong., 2d Sess., *Freedom of Information Act Compilation and Analysis of Dept'l Regulations Implementing 5 U.S.C. 552* (Comm. Print 1968).

In March and April of 1972 the Subcommittee on Foreign Operations and Government Information, of the House Government Operations Committee, began extensive public hearings on the administration of 5 U.S.C. § 552. *See Hearings, U.S. Gov't Information Policies & Practices—Administration and Operation of the Freedom of Information Act*, Foreign Operations and Gov't Information Subcomm., House Gov't Operations Comm. 92nd Cong., 2d Sess. pts. 4,5 and 6 (1972). This ran for 14 days and heard over 50 witnesses.

H.R. REP. NO. 1419, 92nd Cong., 2d Sess. (1972) was a product of these hearings. Subsequently several improvement bills were introduced by Subcommittee Chairman Moorhead and Rep. Horton and Rep. Erlenborn. These bills were denominated H.R. 5425 and H.R. 4690, respectively and hearings were held. The Foreign Operations and Gov't Information Subcomm. adopted a number of amendments to H.R. 5425. The resulting measure was H.R. 12471, the pertinent sections of which will be quoted *infra*. n. 140.

variance with the original intentions of Congress[135] in propounding the Freedom of Information Act, the legislators endeavored to clarify the existing language.[136]

Although Congress rejected a proposed amendment that would have mandated *in camera* inspections in all cases,[137] it nevertheless wished to select language that would evince its dissatisfaction with some of the interpretations of subsection (b)(1) the executive had previously attempted to thrust upon the courts.[138] Particularly distraught by the Supreme Court's refusal

135. *See* S. REP. No. 854, 93rd Cong., 2d Sess. 6 (1974). Senator Kennedy in speaking of the intent of the 1967 F.O.I.A., stated:

> Congress did not intend the exemptions in the F.O.I.A. to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information should be withheld.

136. *Id.* at 7. The report notes:

> The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the F.O.I.A., and the increasing acceptance by courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendment to the language of the exemptions . . . . Although by leaving it unchanged the committee is implying neither acceptance of agency objections to the specific changes proposed . . ., nor judicial decisions which unduly constrict the application of the Act.

137. S. REP. No. 854, 93rd Cong., 2d Sess., 14 (1974). There it states: "One proposal considered by the committee (S. 1142) would have required in camera inspection of records in F.O.I.A. cases." Additionally the Report notes that John Mills, a representative of the American Bar Association suggested that while in camera techniques need not be used in all cases the courts should nevertheless be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in *any manner* that it chooses," Id. at 14 [emphasis added]

138. *See, Id.* at 9. The Report notes that the Senate was rather alarmed at some of the narrow interpretations the government had urged upon the courts. Specifically, it notes the executive's suggestions in *Epstein*, stating "In one *remarkable* instance, the government even contended that an 'agency determination that material sought falls within one of the nine exemptions in subsection (b) precludes the broad judicial review provided by subsection (a)(3).' This contention was properly rejected." [emphasis added] Had the court in *Epstein* accepted this interpretation, it could never have made a de novo review to determine if *in fact* the information was actually classified. Agencies could have refused to provide requested information on "classification" grounds of classification when in fact the documents may not have been classified; the courts would then have been powerless to make a determination whether the information was or was not classified.

to permit *in camera* inspections under any circumstances, Congress clearly hoped to uproot the *Mink* decision.[139] Although the House and Senate proposals were initially conflicting,[140] a compromise was ultimately reached.[141]

The objectives of the final amendment proposals were twofold. First, Congress wished to amend the subsection that called for de novo reviews to assure that *in camera* inspections, although discretionary, would be equally applicable to all subsection (b) cases. Second, the legislators hoped to revise the language of the national defense and foreign policy exemption to indicate that, if an *in camera* inspection was decided upon, that

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139. *See* H. CONF. REP. NO. 1380. 93rd Cong., 2d Sess. 12 (1974), and S. CONF. REP. NO. 1200, 93rd Cong., 2d Sess. 4 (1974).

140. The Senate proposal to amend the 1967 Freedom of Information Act was S. 2543. The section to amend judicial review, formerly 5 U.S.C. § 552(a)(3), was to be denominated (4) (B)(ii). It read:

> . . . In determining whether a document is in fact specifically required by Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document *in camera* if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its *in camera* examination, the court may consider further argument, or an ex parte showing by the government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined . . . that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its *in camera* examination, it finds the withholding is without a reasonable basis . . . . [emphasis added]

As for the national defense and foreign policy exsmption, it read:

> (b) This section does not apply to matters that are—(1) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute.

The House proposal, the history of which is traced in n. 134 *supra*, was H.R. 12471. It read: (a)(3). . . In such cases the court shall determine the matter

> de novo, and may examine the contents of any agency record to determine whether such record or any part thereof shall be withheld under any of the exemptions set forth in subsection (b).
>
> (b) This section does not apply to matters that are—1) authorized under criteria established by an Exscutive order to be kept secret in the interest of national defense or foreign policy.

141. 88 Stat. 1561, 5 U.S.C. § 552 (Supp. 1974).

> (a)(4)(B) On complaint, the district court of ths 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, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency record improperly withheld from the complaintant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section . . . .
>
> (b) This section does not apply to matters that are—(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

inspection could extend to an examination of the propriety of the classification measured against the relevant standards listed in the standing Executive Order.[142]

In respect to the first objective, Congress reaffirmed that, upon an agency's refusal to provide the requested information, the applicant could bring suit in a federal district court to enjoin the withholding of the information.[143] In addition, the district court was given the discretionary power to conduct an *in camera* examination of the information the plaintiff sought.[144] Since the provision for *in camera* review was not mandatory it was not to be used unless the court had first solicited and rejected government affidavits and testimony regarding the exempt status of the documents.[145] Congress was clearly seeking to restore to the

142. *See*. H.R. REP. No. 876, 93rd Cong., 2d. Sess. 1 (1974), where it is stated that:

> An amendment is made to section 552(b)(1) pertaining to natioa6nal defense and foreign policy matters—in order to bring that exemption within the scope of matters subject to in camera review as provided under the amended language of section 552 (a)(3).

At 4-5 the Report notes:

> Two amendments to the Act included in the bill are aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense and other agencies under Executive order authority.
>
> The first of these in camera review amendments would insert an additional clause in section 552 (a)(3) to make it clear that court review *may* include examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in section 552(b).
>
> National defense and foreign policy exemption. The second amendment . . . is a rewording of section 552 (b)(1) to provide that the exemption for information involving national defense or foreign policy will pertain to records which are "authorized under the criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." . . . The change [of] language . . . means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the *reasonableness or propriety* of the determination to classify the records under the terms of the Executive order . . . .
>
> The *In camera* provision is *permissive* and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibility. [emphasis added]

143. 5 U.S.C. § 552 text at *supra* n. 141

144. *Id.*

145. *See* H.R. CONF. REP. No. 1380, 93rd Cong., 2d Sess. 9 (1974), where it is stated that:

> In determining de novo whether agency records have been properly withheld the court may examine records *in camera* in making its determination under any of the nine categories of exemptions under 552 (b) of the law . . . . While *in camera* examination need not be automatic, in

judiciary the powers and responsibilities it had assumed the 1967 Act had granted; a role the judiciary had traditionally played in this area, the one confirmed by the Supeme Court in *Reynolds*.

Prior to the restrictive construction of the Act in *Mink* the judiciary had never permitted the executive to arrogate the authority to determine that information could properly be withheld by claiming that dislcosure would threaten national security interests. In *Reynolds* the Court was explicit in its suggestion that *it* was the final arbiter in determining whether requested information deserved protection in light of national defense or foreign policy considerations. The 1974 amendment to subsection (a)(3) assured that the Courts could conduct *in camera* reviews of information claimed to be exempt under any of the subsection (b) exemptions.

Subsection (b)(1) itself was also amended to read:

> (b) This section does not apply to matters that are ——— (1) (A) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

The most conspicuous addition to the 1967 Act was the phrase which stated that the materials for which an exempt status was claimed must be "in fact properly classified pursuant to such Executive order." This phrase, coupled with the amendments to Subsection (a)(3) (which made it clear that the provision allowing *in camera* examinations applied to all subsection (b) exemptions) and with the legislative history of the Amendment[146] emphasizes that Congresses' manifest intent was to permit judges to inquire into the merits of exemptions claimed by the government. The

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> many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of *testimony* or detailed *affidavits* that the documents are clearly exempt from disclosure. [emphasis added]

See also S. CONF. REP. NO. 1200, 93rd Cong., 2d Sess. 6 (1974). The contents of this report did not disturb the House Conferees in this respect. The report states:

> However the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly the conferees expect that Federal courts, in making de novo determinations under section 552(b)(1) cases . . ., will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Again at Page 3 the report notes:

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

146. H.R. REP. NO. 876 *supra* n.142.

courts would no longer be forced to limit their inquires to whether a matter was in fact classified but could also scrutinize the factual content to determine if the information was *classifiable* in light of Executive order standards. These amendments were intended to make it clear that *Epstein* and *Mink* were no longer talismanic. The courts could now move beyond making mere determinations of classification with Congressional approval.[147] *Reynolds* had been resurrected.

In *Reynolds*, as noted earlier, the Court asserted its authority to determine the validity of the asserted privilege. The determination process, however, was designed so as not to force the disclosure of information the privilege was designed to protect. The usefulness of the state secrets privilege would be nugatory if in every case the court required an *in camera* disclosure of the information for the court's appraisal. Therefore, the *Reynolds* court held that it would make its determination by considering the surrounding circumstances and the fact that a compelled disclosure might result in a reasonable danger that sensitive information would be released. While not requiring *in camera* review under the facts at hand the Court did note that the depth of judicial probes into the evidence would be determined by the need for the evidence. Conceiveably, the need could be compelling enough to necessitate an *in camera* examination, particularly if the possibility of disclosing truly sensitive information was not acute.

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147. One of the principal reasons many persons opposed *in camera* examination under the 1967 Act was their apprehension over the fact that this procedure could result in the disclosure of vital national secrets to those who might not guard them. Not all commentators shared this view. *See Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1221 at 1223 (1972), where the commentator states:

> The desire to avoid in camera examination of secret papers rests on an unexplained assumption . . . that disclosure to a judge may somehow jeopardize national security. But there is no reason why a federal judge cannot be trusted to keep the Governments legitimate secrets, especially inlight of the widespread disclosure of classified material to Congressmen without any serious security problems.

See Dep't. of Defense Directive No. 5400.4, Provision of Information to Congress, sec. III. A.I. (Feb. 20, 1971), and Department of State, Uniform State/AID/USIA Security Regulations (1969) in BASIC DOCUMENTS 38. These are the regulations providing for disclosure to Congressmen.

Surely Congress was aware that it was anomalous to provide for revelation of secrets to Congressmen and not federal judges. This inconsistsncy undoubtedly was considered in the process of amending to the 1967 Act.

The 1974 amendments appear to be in accord with the *Reynolds* test. Under the present law the *in camera* device is available but its use is discretionary. The Act clearly states that the court "may" examine the information *in camera* and the legislative history makes it clear that *in camera* is permissive and not mandatory. Generally, before it will order an *in camera* examination and in an effort to decrease the risk of disclosing sensitive information the court will request testimony and affidavits from the government in order to evaluate the merits of the asserted classification. The courts are under no greater Congressional constraint today to use *in camera* scrutiny than they were under the *Reynolds* standard. Both the new amendment and *Reynolds* permit an *in camera* examination if the court considers the conditions efficacious. Both focus on accurately assaying the necessity for protection without requiring complete disclosure. In *Reynolds* the Court seriously considered the affidavits and testimony of the Secretary of the Air Force concerning the need for protection. The 1974 amendments call for no more. Affidavits and testimony will be relied upon as a means of measuring the validity of the asserted need to protect ths information without using an *in camera* examination to arrive at the proper conclusion. However, if the government's evidence proves unconvincing and the court is satisfied that it can conduct an *in camera* examination under aseptic conditions, then it is free to order an *in camera* disclosure of the information.

In the only reported case concerning the national defense and foreign policy exemption following the recent amendment—*Alfred A. Knopf, Inc. v. Colby*[148] the court indicated that the diffidence of the pre-amendment years continues. Here the plaintiffs were a former State Department Intelligence Officer and a former member of the Central Intelligence Agency. They had collaborated on a book which allegedly contained information held in classified government files. The information was discovered when, in accord with the contractual arrangement, the publication was submitted to the agencies' for editing. The plaintiffs contested the agencies claims that the classified information could not be disclosed in a district court action filed under the 1967 Freedom of Information Act.

The district court held that, since *Mink* prohibited inquiry into the propriety of the classification itself and because refusing to permit the plaintiffs to communicate information within their own knowledge encroached upon First Amendment freedoms,

148. 509 F.2d 1362 (4th Cir. 1975), *cert. denied*, 95 S.Ct. 1555, 95 S.Ct. 1999.

the court could require a strict burden of proof as to the *fact* of classification.[149] On appeal to the Fourth Circuit, Judge Haynsworth noted that the Freedom of Information Act had been amended so as to provide for an inquiry into the propriety of the classification.[150] However, in vacating and remanding the decision he also noted that the burden of proof required by the district court relating to the fact of classification was too stringent. In support of this he stated that there is a "presumption of regularity in the performance by a public official of his public duty,"[151] and that this presumption coupled with a showing that the files in question were officially and properly stamped, would generally be enough to satisfy the question of classification.

Commenting upon the newly restored "right" to conduct *in camera* examinations, Judge Haynsworth admonished the district court that:

> It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide any kind of security highly sensitive information should have. The national interest requires that the government withhold or delete unrelated items of sensitive information. . . . It is enough . . . that the particular item of information is classifiable and is shown to have been embodied in a classified document. This approach is consistent with the Freedom of Information Act which . . . provides the judges only with discretionary authority . . . he may find the information both classified and classifiable on the basis of testimony or affidavits.[152] [emphasis added.]

Thus, despite the fact Congress has reaffirmed the authority of the courts to settle disputes over the need for protecting certain information, it appears unlikely that the courts will move with much alacrity to exercise this power.[153] They will be discriminating in its exercise, attempting to guarantee that the *right* to force

149. 509 F.2d 1362 (4th Cir. 1975). At page 1366 Haynsworth discussed the burden of proof as follows: information was not classified "until a classifying officer makes a *conscious determination* that the governmental interest in secrecy outweighs a general policy of disclosure and applies a label of 'Top Secret' or 'Secret' or 'Confidential' to the information in question." [emphasis added] Needless to say the government failed to meet this burden.

150. *Id* at 1367.

151. *Id.* at 1368.

152. *Id.* at 1369.

153. It should be noted, however, that Judge Haynsworth admitted to having examined some of the information the government claimed was sensitive. *See* p. 1368.

disclosure, even to the court itself, will not result in the revelation of the very materials the privilege is designed to protect.

CONCLUSION

The Federal Housekeeping Statute and Section 3 of the Administrative Procedure Act of 1946 provided statutory authority for withholding requested information on the ground that it contained sensitive national defense or foreign policy materials. The former statute was amended to prevent its being used by the government as a general "non-disclosure" law and the 1946 Act was replaced by the Freedom of Information Act of 1967. While legislative action rendered the "housekeeping" statute ineffectual as authority for non-disclosure, the Supreme Court's construction of the national defense and foreign policy exemption of the Information Act provided new justifications for continued governmental non-disclosure. Although the propriety of classifications was held to be beyond judicial inquiry, this interpretation of the Act found no support in the Act itself or in its legislative history and was at odds with the views of commentators[154] and with specific judicial decisions.[155]

In an effort to recast a judiciary in the active role it played under the state secrets privilege, Congress amended the Information Act in 1974 to provide that the courts could, at their discretion, conduct *in camera* reviews to inquire into the factual need for the classification of information. However, as in the past and as the legislative history and the only reported case to date indicates, the courts will proceed with due circumspection. In efforts to reduce the likelihood that an *in camera* examination might result in the disclosure of truly privileged information, the courts will initially attempt to make their determination on the basis of affidavits and testimony submitted by the government. Only if these procedures prove inadequate will the courts order *in camera* disclosures.

Rex J. Zedalis

154. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

155. United States v. Reynolds, 345 U.S. 1 (1953).