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Freedom of Information: Judicial Review of the Executive Security Classifications

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achievement of the same harmony in the Florida rules that exists in the federal rules.

In cases such as *Shingleton* and *Lawrence*, the Supreme Court of Florida has demonstrated its willingness to interpret liberally the rules of civil procedure relating to permissive joinder of parties. A study of the present permissive joinder rule, however, reveals a number of shortcomings that frustrate the complete attainment of the modern approach to permissive joinder in Florida. The remedy is not a new interpretation of the present rule but rather a completely new rule. Adoption of Rule 20(a) would allow the Florida courts to fully accomplish the important objectives of fairness and convenience through a liberal joinder of parties.

CARLA A. NEELEY

FREEDOM OF INFORMATION: JUDICIAL REVIEW OF EXECUTIVE SECURITY CLASSIFICATIONS*

Recognizing the principle that "a democracy works best when the people have all the information that the security of the nation permits,"[1] Congress in 1966 enacted the Freedom of Information Act (FOIA).[2] The FOIA balanced the public's "right to know" against the executive's interest in confidentiality, emphasizing the former.[3] It limited the withholding of information to nine specific categories[4] and placed the burden on the government to justify nondisclosure.[5] The Act also provided that any citizen improperly denied access to documents has a right to seek injunctive relief in federal district court.[6] Subsequent Congressional investigation[7] determined that because of bureaucratic delay, noncompliance, and restrictive judicial interpretations[8] the Act had failed to achieve its objective of broad disclosure. Based on this finding, Congress in 1974 amended the FOIA to remedy the abuses it had

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1. Statement by President Johnson on signing Pub. L. No. 89-487, *White House Press Release*, July 4, 1966, at 1.

2. 5 U.S.C. §552 (1970).

3. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965). *See also* United States Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, iii (1967).

4. 5 U.S.C. §552(b) (1970).

5. *Id.* §552(a)(3).

6. *Id.*

7. H.R. REP. No. 1419, 92d Cong., 2d Sess. (1972). See also H.R. REP. No. 876, 93d Cong., 2d Sess. (1974), reprinted as part of the legislative history of the amended FOIA at 3 U.S. CODE CONG. & AD. NEWS 6267 (1974) [hereinafter cited as *Legislative History*].

8. *Legislative History, supra* note 7. *See also* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

suffered in enforcement and designed a system to promote more efficient, prompt, and full disclosure of information.[9]

Perhaps the most controversial amendment involved the first of the nine exemptions: matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[10] Responding to a Supreme Court decision[11] interpreting this exemption as precluding judicial review of executive classifications, Congress decided to specifically authorize judicial review.[12] President Ford vetoed the 1974 amendments because he felt that this provision "would violate constitutional principles."[13] He did not dispute congressional power to authorize judicial review of such executive decisions, but rather he objected to the standard of proof required during judicial review.[14] Congress rejected President Ford's suggestion but failed to provide guidance to the courts in the fact-finding process. The constitutionality of this novel grant of judicial power has not been seriously challenged.[15] Federal judges reviewing executive withholding

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9. 5 U.S.C. §552 (Supp. 1975).

10. 5 U.S.C. §552(b)(1) (1970).

11. Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

12. 5 U.S.C. §§552(a)(4)(B), (b)(1) (Supp. 1975).

13. Veto of H.R. 12,471, 95th Cong., 1st Sess., Statement by President Ford, October 17, 1974, *reprinted at* HOUSE COMMITTEE ON GOVERNMENTAL OPERATIONS AND SENATE COMMITTEE ON THE JUDICIARY, 94th Cong., 1st Sess., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) 483-85 (Joint Comm. Print 1975) [hereinafter cited as *FOIA Source Book*].

14. *Id. See also* letter of Philip B. Kurland at 120 CONG. REC. 19,602 (daily ed. Nov. 19, 1974).

15. Arguments against the constitutionality of the 1974 amendments have been based on the doctrine of separation of powers. In Oetjen v. Central Leather Co., 246 U.S. 297 (1917), the Supreme Court stated: "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative — the political — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.* at 302. This doctrine would seem to have no relevance to the 1974 amendments where Congress, which constitutionally shares with the executive the power to deal in foreign and military affairs, has expressly authorized judicial review of executive security classifications. This judicial review does not enable a judge to substitute his own ideas of why a document should be classified but, rather, allows him to decide whether the executive has followed its own rules regarding classification. See the excellent study prepared by the Center for Governmental Responsibility at the Holland Law Center, University of Florida, *Analysis of President Ford's Veto of H.R. 12471, reprinted at* 120 CONG. REC. 19,615 (daily ed. Nov. 19, 1974). During the Senate debate over President Ford's veto of the 1974 amendments, Senator Hugh Scott presented a legal "memorandum" of unknown origin to sustain the argument that the amendments did violence to "constitutional principles." 120 CONG. REC. 19, 533 (daily ed. Nov. 19, 1974). This memorandum correctly noted that "the Supreme Court has consistently recognized the executive's constitutional power over information held in the exercise of its military and diplomatic functions," but failed to explain how such a doctrine precluded congressional authorization of judicial review under which the executive must sustain the burden of proof that it has complied with its own classification guidelines. *Id.* The memorandum relied on United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) as authority that "the President is the sole organ of the nation in its external relations . . . ." 299 U.S. at 319. This statement was originally made by John Marshall describing the President's role as the instrument of communication with other nations rather than to

under Exemption one will face the dual problems of preventing the government from shifting the burden of proof onto the court or the party seeking disclosure while preserving the confidentiality of information properly classified. This commentary will consider the resolution of these problems through an examination of the legislative history and an analysis of prior judicial approaches to analogous situations.

PRIOR LAW

The 1966 version of the FOIA permitted withholding nine classifications of documents,[16] including matters "specifically required by executive order to be kept secret in the interest of national defense or foreign policy."[17] The Act also provided that on application to a federal district court to order the production of records improperly withheld "the court shall determine the matter de novo and the burden is on the agency to sustain its action."[18] The scope of judicial review under the executive order exemption was defined by the Supreme Court in *Environmental Protection Agency v. Mink*.[19] The majority in *Mink* rejected the argument that "Congress intended the Freedom of Information Act to subject executive security classifications to judicial review."[20] The court held that de novo determination of the validity of nondisclosure under Exemption one should be guided by a simple test: "whether the President has determined by executive order that particular documents are to be kept secret."[21] Thus, according to *Mink*, the sole burden to be sustained by the government under Exemption one was to prove that the document requested bears a classification stamp in accordance with the procedures outlined in the appropriate executive order. *Mink* also held that Exemption one neither authorized nor permitted *in camera* inspection of a contested document to determine whether any nonsecret information could be disclosed.[22] The *Mink* interpretation, as one commentator has noted, "leaves an executive classification of secrecy totally immune from judicial review."[23] The majority's reliance on the legislative history of Exemption one has been seriously criticized by the dissenting Justices[24] and other commentators.[25] Mr. Justice Stewart suggested that Congress might devise

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define the manner in which the Constitution distributes the foreign relations power. For a critical analysis of *Curtiss-Wright* see R. BERGER, EXECUTIVE PRIVILEGE 112-121, 149-157 (1974).

16. 5 U.S.C. §552(b)(1)-(9) (1970).

17. *Id.* §552(b)(1).

18. *Id.* §552(a)(3).

19. 410 U.S. 73 (1973).

20. *Id.* at 82.

21. *Id.*

22. *Id.* at 81, 84.

23. Note, *Development Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251, 257.

24. 410 U.S. at 95 (Brennan, J., dissenting), 105 (Douglas, J., dissenting).

25. *See* Note, *supra* note 23, at 256; Note, *Administrative Law—The Freedom of Information Act*, 42 U. CIN. L. REV. 529 (1973). The Senate Judiciary Committee, in reporting a bill to amend the FOIA to overrule *Mink*, suggested that the majority in *Mink* had misinterpreted the original congressional intent. S. REP. No. 854, 93d Cong., 2d Sess. 30 (1974) [hereinafter cited as *Senate Report*].

new procedures to avoid "blind acceptance of Executive fiat."[26]

THE 1974 AMENDMENT

In 1974 Congress passed, over a presidential veto, several amendments to the FOIA,[27] one of which was intended to overrule the *Mink* holding.[28] Congress specifically provided that a district court, in its *de novo* determination, may examine the contents of contested records "*in camera* to determine whether such records *or any part thereof* shall be withheld under *any* of the exemptions . . . and the burden is on the agency to sustain its action."[29] The amended Act adds that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt" from disclosure.[30] The executive order exemption was amended as follows:

> (b) This section does not apply to matters that are —
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> (B) are in fact properly classified pursuant to such Executive order.[31]

These amendments reflect legislative intent to authorize the courts to engage in "a full review of agency action" with respect to information classified under an executive order.[32] The House Report recommending passage of the amendments states that under the (b)(1) exemption, a district court "may look at the reasonableness and propriety of the determination to classify the records under the terms of the Executive order."[33] The Conference Report accompanying the final bill reiterates that the burden is on the government to prove that a contested document was properly classified "pursuant to both procedural and substantive criteria" contained in the executive order.[34]

The scope of the review authority conferred on the courts by these amendments is significant and novel when viewed in conjunction with the relevant

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26. 410 U.S. at 94 (Stewart, J., concurring).

27. President Ford vetoed the amended FOIA, H.R. 12,471, 94th Cong., 1st Sess. (1974) on October 17, 1974. See note 14 *supra*. The House voted to override the veto on November 20, 1974. 120 CONG. REC. 10,864-75 (daily ed. Nov. 20, 1974). The Senate voted to override the veto on November 21, 1974. 120 CONG. REC. 19,806-23 (daily ed. Nov. 21, 1974). The amended Act went into effect on February 19, 1975. Act of Feb., 1975, Pub. L. No. 93-502, §4.

28. Congressional intent to overrule *Mink* was expressed in the Conference Report, H.R. REP. No. 1380, 93d Cong., 2d Sess. (1974), *reprinted in Legislative History, supra* note 7, at 6290.

29. 5 U.S.C. §552(a)(4)(B) (Supp. 1975) (emphasis added).

30. *Id.* §552(b).

31. *Id.* §552(b)(1). Prior to the amendment, this section of the FOIA read as follows: "(b) This section does not apply to matters that are — (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. 5 U.S.C. §552(b)((1) (1970)."

32. H.R. REP. No. 876, 93d Cong., 2d Sess. (1974), *reprinted in Legislative History, supra* note 7, at 6273.

33. *Id.*

34. H.R. REP. No. 1,380, 93d Cong., 2d Sess. (1974), *reprinted in Legislative History, supra* note 7, at 6290.

executive order. On March 8, 1972, President Nixon issued Executive Order 11,652,[35] a directive reorganizing the executive system of classification and declassification of "national security" information.[36] For purposes of the order, "national security" was defined as a collective term denoting "national defense or foreign relations of the United States."[37] The order allows three categories of security classification — "Top Secret," "Secret," or "Confidential," each based on a particular test.[38] The test for assigning "Top Secret" classification, for example, is whether unauthorized disclosure of the information "could reasonably be expected to cause exceptionally grave damage to the national security."[39] The FOIA has always required that where a litigant challenges the withholding of a document classified "Top Secret," the district court must review whether the Top Secret stamp has been placed on the document pursuant to procedural requirements of the executive order. Now the amended Act extends this inquiry to whether the contents of the document meet the substantive criteria established in the definition of "Top Secret."[40]

Congressional consideration of the proposed amendments was attended by a controversy concerning whether the scope of judicial review propounded did not in fact shift responsibility for military and foreign affairs classification from the executive to the judicial branch.[41] The Act does not purport to give the courts authority to make an independent assessment of the propriety of a classification[42] since, as a technical matter, the court's review is confined to the criteria established by the executive order.[43] As a practical matter, however, the courts are now specifically empowered to overrule an executive determination of the need for secrecy where the executive has failed to sustain its burden of persuasion in justifying its withholding the information.

PROCEDURAL PROBLEMS OF PROOF UNDER EXEMPTION ONE

The primary motivation for Congress' decision to override the *Mink* holding was the congressional finding[44] that abuses within the executive

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35. 3 C.F.R. 375 (1973).

36. The previous executive security classification system had been established on November 5, 1953, by Exec. Order No. 10,501, 3 C.F.R. 979 (1949-53 Comp.).

37. Exec. Order No. 11,652, §1, 3 C.F.R. 375 (1973).

38. *Id.* §§1(A), (B), and (C).

39. *Id.* §1(A).

40. *See, e.g., Senate Report, supra* note 25, at 30.

41. This was the interpretation offered by President Ford and his congressional supporters. See Veto of H.R. 12,471, *supra* note 14; *Memorandum*, 120 CONG. REC. 19,534 (daily ed. Nov. 19, 1974). The Justice Department maintained a similar position. *Legislative History* at 6281. *See also* Note, *supra* note 23, at 258; Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895, 935 (1974).

42. *See generally* The Center for Governmental Responsibility, *supra* note 15.

43. 5 U.S.C. §552(b)(1)(A) (Supp. 1975). "All the new wording does is to require the executive department to comply with its own rules as set out by executive order and to give the court the authority to decide whether there has been such compliance." Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 754 (1975).

44. H.R. REP. No. 221, 93d Cong., 1st Sess. (1973).

security classification system were widespread and uncontrolled.[45] This was hardly an earth-shaking observation, coming as it did in the midst of a period saturated by revelations concerning Watergate and national security abuses. President Nixon, in announcing his remodeling of the executive security classification system, admitted that the past system "has failed to meet the standards of an open and democratic society."[46] The opportunity for abuse[47] weighed heavily in congressional consideration of the 1974 FOIA amendments. "It is therefore crucial," said Senator Edward Kennedy during the Senate debate on the amendments, "that there be effective judicial review of executive branch classification decisions if the most far reaching barricade of unjustified secrecy in Government is to be penetrated."[48]

The availability of effective judicial review mandated by the amended FOIA is seriously compromised by the distortion of the traditional ad-

45. *Id. See also Senate Report, supra* note 25, at 29; 120 CONG. REC. 9,316 (daily ed. May 30, 1974, remarks of Senator Kennedy).

46. Statement of President Nixon, March 8, 1972, 8 WEEKLY COMP. OF PRESIDENTIAL DOCS. 543 (1972).

47. It is perhaps axiomatic that the potential for serious abuse inheres in any unchecked system of executive classification. The history of the Nixon administration will surely long be cited as an illustration of such abuse. It is ironic that the very system of executive security classification in effect today, Exec. Order No. 11,652, 3 C.F.R. 375 (1973), was designed and then violated by the Nixon administration. David Young, a special assistant to the National Security Council under President Nixon, is credited as the major architect of this Executive Order. *Hearings on U.S. Governmental Information Policies and Practices: Exemption (b)(1) of the Freedom of Information Act Before the House Comm. on Government Operations,* 92d Cong., 2d Sess. 2451 (1972). Mr. Young also served as head of declassification operations at the White House pursuant to the review machinery set up by §7 of Executive Order 11,652. N.Y. Times, November 22, 1973, at 40, col. 5. After leaving his White House post, Mr. Young testified at the "plumbers' trial" of John Ehrlichman, Eugenio Martinez, G. Gordon Liddy, and Bernard Barker, at which the defendants were charged with and found guilty of conspiring to break into the office of Daniel Ellsberg's psychiatrist in 1971. Mr. Young and Egil Krogh, Jr., in a memorandum to Mr. Ehrlichman dated August 11, 1971, had suggested a "covert operation" to be arranged to obtain Mr. Ellsberg's psychiatric records. Mr. Ehrlichman annotated this memorandum with a note expressing his approval of the operation on the condition that it not be traceable to him. Mr. Young testified that on a review of his records in December 1972, he personally altered his copy of this memorandum to expunge Mr. Ehrlichman's approval of the "covert operation" and destroyed other documents relating to a plan to "smear" Mr. Ellsberg. N.Y. Times, July 2, 1974, at 32, col. 1. Nine months earlier, in explaining Executive Order 11,652 to the press, Mr. Young promised that the White House would not classify information by destroying it. In addition, he admitted that despite its provisions for an inter-agency review committee the order's effectiveness depended on the integrity of the executive departments: "There is no doubt that it can only work if the bureaucracy is serious about it, and if they do use their discretion in an appropriate way." Press Conference of John D. Ehrlichman and David Young, *White House Press Release,* March 8, 1972, at 3, 16.

48. 120 CONG. REC. 9,316 (daily ed. May 30, 1974). *See also Senate Report* at 31. During the March 14, 1974, House debates on the FOIA amendments, *reprinted at FOIA Source Book, supra* note 13, at 1233, Congresswoman Mink made this statement: "Our intention in making this change is to place a judicial check on arbitrary actions by the Executive to withhold information that might be embarrassing, politically sensitive, or otherwise concealed for improper reasons rather than truly vital to national defense or foreign policy." *Id.* at 260.

versary process inherent in virtually all cases brought under the Act.[49] Discovery under the Federal Rules of Civil Procedure guarantees that adverse parties will have approximately equal access to all facts relevant to a dispute.[50] Yet the party seeking disclosure in a suit under the Act is necessarily denied knowledge of the precise contents of the document that is the object of the dispute. Hence, the inevitable anomaly in such cases is that "the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of concealed information."[51] Without access to the document in dispute, the party seeking disclosure is "comparatively helpless"[52] when attempting to controvert executive characterizations of the information that might well be inaccurate.[53] If the district court wishes to employ *in camera* inspection to test the accuracy of an executive characterization of a document, it must undertake its examination "without benefit of criticism and illumination by a party with the actual interest in forcing disclosure."[54]

It is apparent that the procedural problems of fact-finding in an adversarial context are manifold in FOIA lawsuits. These problems become even more complex when executive withholding is based on Exemption one, since the courts have traditionally deferred to executive judgments concerning military and foreign affairs.[55] Although Congress, in amending the Act, specifically provided for judicial review of the merits of an executive security classification,[56] it provided no statutory guides for the courts in exercising this new authority,[57] other than placing the burden of proof on the government and permitting *in camera* inspection.[58] It is foreseeable that in deciding the merits of an executive invocation of the amended version of Exemption one the courts will face serious problems concerning the weight to be given executive characterizations and evaluations and the procedure to be followed to assure the closest possible adherence to the adversary system.

Problems in Weighing the Evidence

The FOIA clearly places the burden of proof on the agency withholding information to sustain its action.[59] The act is silent, however, as to the evidential weight to be accorded executive determinations pursuant to established national defense and foreign relations criteria. The following

49. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).
50. FED. R. CIV. P. 26-37.
51. Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).
52. *Id* at 826.
53. *Id.* at 824.
54. *Id.* at 825.
55. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Marchetti, 466 F.2d 1309, 1317-18 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1973); Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).
56. See text accompanying notes 32-34 *supra.*
57. *See* statement of Senator Hruska at 120 CONG. REC. 9,322-9,323 (daily ed. May 30, 1974).
58. 5 U.S.C. §552(a)(4)(B) (Supp. 1975).
59. *Id.*

language was inserted in the Conference Report accompanying the amended Act in response to a specific objection by President Ford:[60]

> The conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations (under the executive order exemption) . . . will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.[61]

This suggestion by the conferees is merely a reminder that those within the executive branch authorized to make security classifications will often be in a better position to evaluate the need for classification than the party seeking disclosure.[62] The conferees have *not* suggested that the evidence of the party seeking disclosure should be afforded any less "substantial weight." In fact the legislative history indicates that it was Congress' intent that the evidence of both parties be accorded equal weight,[63] commensurate with the

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60. 120 CONG. REC. 10,002-10,004 (daily ed. Oct. 7, 1974).

61. H.R. REP. No. 1380, 93d Cong., 2d Sess. (1974), *reprinted in Legislative History, supra* note 7, at 6290.

62. *See, e.g.*, United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied.* 409 U.S. 1063 (1973). There the court stated: "There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* at 1318. Such considerations may be appropriate in specific instances, but Congress did not find them so weighty as to justify the creation of a statutory presumption favoring executive classification. Rather, under the amended FOIA, if a classifying official has such a "broad view" of the situation as to enable him to evaluate a document "in its proper context" and conclude that classification is warranted, he is expected to articulate that view to sustain his burden in court.

This view was stated by Justice Powell in the context of a warrant requirement for domestic security wiretaps. In rejecting the Government's argument that "internal security matters are too subtle and complex for judicial evaluation," Justice Powell noted: "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for the surveillance." United States v. United States District Court, 407 U.S. 297, 320 (1972).

63. *See, e.g.*, the statement of Senator Muskie at 120 CONG. REC. 9,321 (daily ed. May 30, 1974). After expressing his hope that the courts would give "considerable weight" to the expertise of executive agencies such as the CIA or the Pentagon, Senator Muskie stated, "I would also want the judges to be free to consult such experts in military affairs as (Senator Stennis) . . . or other experts, and give their testimony equal weight. Their expertise should also be given considerable weight." *Id.* at 9321.

The principle that judges should be free to assign evidential weight to such expert opinions on the basis of merit rather than presumption is supported by the example of the Pentagon Papers. The government attempted to use expert affidavits to sustain its claim that publication of a multi-volume study of the Vietnam war would cause "grave and irreparable" damage to the national interest. New York Times Co. v. United States, 403 U.S. 713, 732 (1971) (White, J., concurring). The Supreme Court held that the government had failed to justify such a prior restraint on publication. 403 U.S. 713 (1971). How-

degree of expertise, credibility, and persuasiveness underlying it.[64] More fundamentally, the "substantial weight" suggestion of the conferees should in no way be taken to suggest the imposition of a presumption favoring the agency. President Ford vetoed the Act because he felt the conferee language failed to create such a presumption;[65] Congress, in its initial consideration of the 1974 amendments, specifically rejected a similar presumption contained in the Senate draft of the bill.[66]

Congress' intent in revising Exemption one can hardly be fully understood without reference to the legislative history of the rejected presumption. The original Senate version of the bill to amend the FOIA stipulated that if an agency head submitted to the court an affidavit stating that, on the basis of his personal examination, a contested document is properly withheld under the appropriate executive order, "the court shall sustain such withholding unless . . . it find the withholding is without a reasonable basis . . . ."[67] During the Senate debate on the bill, Senator Muskie forcefully argued against this provision as creating an "overwhelming" presumption of the validity of a classification.[68] The objective of independent judicial review would be defeated, the Senator said, because "this provision would, in fact, shift the burden of proof away from the Government."[69] Since the purpose of the amendment was to force the government to persuade the court that its withholding was justified, Senator Muskie reasoned: "We ought not to classify information by presumptions, but only on the basis of merit."[70]

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ever, dissenters from both the Supreme Court holding, 403 U.S. at 759 (Justice Blackman) and the D.C. Circuit Court's holding in a companion case, United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971) (Wilkey, J., dissenting), were persuaded that the government's affidavits had made a credible case that publication of the classified material could severely damage the national security. The weakness of the government's position was later exposed at the trial of Daniel Ellsberg on charges stemming from the "theft" of the Pentagon Papers. Numerous former government officials testified that disclosure of the classified study could have produced no injury to the national security, and the government itself was forced to reveal studies it had undertaken reaching similar conclusions. It was also revealed that many of the classified documents whose disclosure, the government had argued, would cause grave and irreparable harm had been published by the government itself prior to disclosure of the Pentagon Papers. See the summary of expert testimony at the trial of Daniel Ellsberg in BERGER, *supra* note 15, at 317-320 (1974).

64. During the House debates of March 14, 1974, Congressman Moss stated: "I do not think we have to make dummies out of [federal judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret." *FOIA Source Book, supra* note 13, at 257.

65. See note 13 *supra*. In a letter of August 20, 1974, to Congressman Moorhead, President Ford stated: "I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security." *Reprinted at* 120 CONG. REC. 10,002 (daily ed. Oct. 7, 1974).

66. S. 2543, §(a)(4)(B)(ii), *reprinted at* 120 CONG. REC. 9311 (daily ed. May 30, 1974).

67. *Id.*

68. *Id.* at 9,319 (remarks of Senator Muskie).

69. *Id.*

70. *Id.* at 9,321.

Several other Senators, including Senator Ervin,[71] spoke in favor of "erasing" such a presumption from the Act.[72] Those favoring the presumption[73] expressed fears that if the "reasonable basis" standard were deleted, a judge would be forced to order the release of information, even if a reasonable basis for its classification existed, where the plaintiff's arguments for disclosure were equally reasonable.[74] The following exchange illuminates this point:

> MR. HRUSKA: Should a judge be able to go ahead and order the disclosure of a document even if he finds a reasonable basis for the classification?
>
> MR. ERVIN: I think he ought to require the document to be disclosed. . . . The question ought to be whether classifying the document as affecting national security was a correct or an incorrect decision. Just because a person acted in a reasonable manner in coming to a wrong conclusion ought not to require that the wrongful conclusion be sustained.[75]

Senator Ervin's position prevailed; the statutory presumption was deleted from the bill by a vote of 56 yeas, 29 nays, and 15 not voting.[76]

The clear waters of the legislative history were soon to be muddied by judicial dredging. The first reported case to apply the standards of the new FOIA was *Alfred A. Knopf, Inc. v. Colby*.[77] In *Colby* the plaintiff sought an order to permit publication[78] of 142 items deleted by the CIA as classified pursuant to Executive Order 10,501.[79] Although *Colby* is not a FOIA case, Judge Haynsworth based his decision on FOIA criteria, reasoning that plaintiffs should not be denied the right to publish information that any citizen could compel the CIA to produce under the newly amended Act.[80]

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71. *Id.* at 9,325-9,327 (remarks of Senator Ervin).

72. *Id.* at 9,321 (remarks of Senator Bayh); 9,322 (remarks of Senator Javits); 9,324 (remarks of Senator Hart); 9,325 (remarks of Senators Chiles and Kennedy).

73. *Id.* at 9,321 (remarks of Senator Stennis); 9,322-9,324 (remarks of Senator Hruska); 9,327 (remarks of Senator Taft).

74. *Id.* at 9,323 (remarks of Senator Hruska). A similar argument was made by President Ford in his veto message. See note 14 *supra*.

75. 120 CONG. REC. 9,327 (daily ed. May 30, 1974).

76. *Id.* at 9,328. The House bill to amend the FOIA contained no presumption, and the House debates of March 14, 1974 indicate that, in fact, a presumption opposite that rejected by the Senate was intended. Congressman McCloskey noted that "the court is going to be very reluctant to override an administrative decision" to classify information. *FOIA Source Book, supra* note 13, at 248. Congressman Erlenborn replied that "[t]here will certainly be a strong presumption in favor of declassification. I say this because of the testimony before our committee which indicated that the power to classify has been abused considerably by various agencies of this Government." *Id.* at 249.

77. 509 F.2d 1362 (4th Cir. 1975), *cert. denied*, 420 U.S. 908, 912 (1975).

78. Plaintiffs sought to publish the material in a book about the CIA by a former CIA employee who had incorporated information he had obtained while working for the agency. The book was published pending the outcome of the suit, with blank spaces included to represent deletions. V. MARCHETTI & J. MARKS, THE CIA AND THE CULT OF INTELLIGENCE (1974).

79. 3 C.F.R. 979 (1949-1953 Comp.).

80. 509 F.2d at 1362.

Yet, Judge Haynsworth totally misconstrued the disclosure mandates of both Exemption one and Executive Order 11,652.[81] The trial judge in *Colby* had found that the CIA failed to meet its burden of proof that the deletion items had been properly classified or classified at all.[82] In reversing this part of the decision, Judge Haynesworth concluded that the district judge had imposed "an unreasonable and improper burden of proof of classification" on the CIA.[83] In opting for the application of FOIA standards, Judge Haynsworth stated that "the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order."[84]

In enunciating the standard by which the trial judge should have determined whether information was properly classified,[85] Judge Haynsworth did violence to the spirit and the letter of the revised FOIA. "There is a presumption of regularity in the performance by a public official of his public duty," he wrote, adding that only "clear evidence to the contrary"

81. Executive Order 11,652 superceded Executive Order 10,501. See text accompanying notes 35-36 *supra.*

82. 509 F.2d at 1365-66. The trial judge found that 26 of the 142 deletion items should not be published. Four deputy directors of the CIA testified at the trial. None was able to say who had originally classified the documents relating to each deletion item, or when. The thrust of the testimony was that each deletion item related to military or foreign affairs and was embodied in a document marked with a classification stamp. The deputy directors could describe only imprecise and generalized considerations as the basis of their determination that the requested information was properly classified. Thus, the trial judge was not satisfied that a conscious decision weighing the need for secrecy against the need for disclosure had been made in the original classification process. To persuade the judge, the CIA submitted a group of documents marked "Top Secret," many of which had been reproduced with all of their contents blocked out except for one paragraph or sentence. However, the judge felt that the mere presence of information in a classified document did not established that information as classified absent a showing that the classifying officer specifically intended such a blanket classification. *Id.*

83. *Id.* at 1366. Judge Haynsworth speculated that the trial judge's imposition of an "improper" burden of proof was influenced by the standards outlined in an opinion relating to an earlier phase of the case, United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied,* 409 U.S. 1063 (1973). Writing for the majority in *Marchetti,* Judge Haynsworth strongly advocated the position that executive security classification is "beyond the scope of judicial review." *Id.* at 1317. In *Colby,* Judge Haynsworth seemed to imply that the Supreme Court in *Mink* had supported this narrow view of the scope of judicial review. 509 F.2d at 1367. However, *Mink* never reached that broad issue; both the holding and the court's dicta relate to the narrow question of statutory interpretation of the FOIA. 410 U.S. at 82, 94. Furthermore, Judge Haynsworth's opinion as to the unavailability of judicial review would seem to have been repudiated years ago in United States v. Reynolds, 345 U.S. 1 (1953).

84. 509 F.2d at 1367. *Colby* did not reach the issue whether the information in question was actually classifiable but, rather, dealt with whether it was in fact classified. See note 82 *supra.* The specific order of the appeals court was that the trial court, on remand, should reevaluate the facts tending to establish classification under less stringent criteria, including the element of classifiability. 509 F.2d at 1369-70.

85. A document containing classifiable information is not necessarily classified unless the classification process followed the procedural rules set forth in the applicable executive order. 5 U.S.C. §522(b)(1)(B) (Supp. 1975). The standard enunciated by Judge Haynsworth as to whether information was properly classified thus was intended as a means of determining whether the documents in question had been stamped "Top Secret" in accordance with the procedural rules of Executive Order 10,501.

could rebut this presumption.[86] Much criticized[87] and bearing a history of uncertain and erratic application,[88] this presumption clearly is unwarranted and improper under the new FOIA.[89] Congress emphatically rejected a

86. 509 F.2d at 1368 (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14 (1926)). In *Chemical Foundation* this presumption was treated as affecting the burden of persuasion and as such precluded judicial review of the validity of the reasons for an order by an executive agency. The court disposed of the issue by simply stating: "Under the presumption it will be taken that Mr. Polk acted upon knowledge of the material facts." 272 U.S. at 15.

87. J. Wigmore, Evidence §2534 at 3582 (3d ed. 1940). Wigmore notes: "This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules." *Id.*

88. This presumption has been used on occasion to dispense with the need to assemble facts whose discovery would be difficult or impossible and the subject of which is felt to be outside the scope of judicial authority. *See* Thompson v. Consolidated Gas Utility Corp., 300 U.S. 55, 69 (1937); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). Yet the extent of the presumption is unclear, for it cannot be invoked if inference must be piled on inference to show that the circumstances are appropriate for invoking it. United States v. Ross, 92 U.S. 281 (1875). For example, in United States v. Page, 137 U.S. 673 (1891), it was held that the written statement of the Secretary of War that court-martial proceedings had been submitted to the President and approved justified the presumption that the President himself had made the approval, as required by law. The Supreme Court distinguished Runkle v. United States, 122 U.S. 543 (1887), where the record failed to show that the entire court-martial proceeding had been submitted to the President: "It was thought that the order of approval could not be presumed to have been made by the President upon the strength of an inference drawn from the remission of a part of the sentence." 137 U.S. 673, 681-82 (1890). Likewise, the procedural consequences of the presumption are unclear. As in *Colby*, it has often been used to virtually preclude effective judicial review of official action. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), involving a challenge to a decision by a Secretary of Transportation, the Supreme Court noted that "the Secretary's decision is entitled to a presumption of regularity." *Id.* at 415. The court added: "But that presumption is not to shield his action from a thorough, probing, in-depth review." *Id.*

89. The case law is clear that the presumption of regularity is inappropriate where Congress has specifically authorized judicial review of facts whose existence or validity are not to be presumed, as with the de novo provisions of the FOIA. In Hayes v. United States, 170 U.S. 637 (1898), the Court interpreted a New Mexico statute as requiring judicial inquiry into the authority of an official body or person granting land. This statute was distinguished from the Act of Congress considered in United States v. Arrendondo, 31 U.S. (6 Pet.) 691 (1832), where the intent of Congress was clearly expressed as not requiring a claimant to offer proof as to the authority of the officials executing a public grant. 170 U.S. at 648. In United States v. Nix, 189 U.S. 199 (1903), the fact that an official's expense account had been approved by a United States circuit court was held prima facie evidence of the account's correctness. The Supreme Court reasoned that to require a court to produce affirmative evidence supporting such a finding would impose an insupportable burden that "was evidently not contemplated by the statute." *Id.* at 206. In Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), the challenge related to Presidential action taken pursuant to an act of 1795 giving the President express authority to call up the militia in certain situations of domestic emergency. In declining to review the President's action, the court was careful to note: "The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a state gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." *Id.* at 31-32.

much lighter presumption as destroying the type of meaningful judicial review to be effectuated under claims of Exemption one.[90] As an analysis of *Colby* illustrates, the presumption of regularity forecloses virtually every avenue of review sanctioned by executive order, legislative dictate, and judicial precedent. Under this presumption, "the government was required to show no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp."[91] The district judge correctly noted that such a requirement in effect sanctions ad hoc classifications of information never properly classified *ab initio*.[92]

Executive Order 10,501, requiring that a document bear a single classification as high as that of its highest classified component,[93] has been superceded by Executive Order 11,652.[94] The new order requires "to the extent practicable" that components of documents requiring different degrees of classification be so marked "in order to facilitate excerpting."[95] This provision has been complemented by the FOIA amendment requiring that "any reasonably segregable portion of a record" be disclosed after deletion of those portions specifically exempt.[96] To hold that the placing of a confidential stamp on a document is presumed to have properly classified all information contained therein is to cast the burden of proof onto the party denied access to the relevant evidence.[97] Not only does this shifting of the burden

90. See text accompanying notes 32-34 *supra*.

91. 509 F.2d at 1368.

92. *Id.* at 1365-66.

93. "A document . . . shall bear a classification at least as high as that of its highest classified component. The document . . . shall bear only one overall classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications." Exec. Order No. 10,501, §3(c), 3 C.F.R. 980 (1949-1953 Comp.).

94. Exec. Order No. 11,652, §5(D), 3 C.F.R. 381 (1973) provides that information subject to the general declassification schedule of Executive Order 10,501 "shall be subject to the General Declassification Schedule" of Executive Order 11,652.

95. Exec. Order No. 11,652, §4(A), 3 C.F.R. 379 (1973). This requirement applies only to classifications made after June 1, 1972, the effective date of the order. It is cited because the policy it embodies is applicable in reviewing classifications made pursuant to Executive Order 10,501, which lacked such a procedural requirement. This policy was stated in the National Security Council Directive of May 17, 1972, governing administration of Executive Order 11,652: "Classified information and material shall be declassified as soon as there are no longer any grounds for continued classification . . . ." 37 Fed. Reg. 10054 (1972). Exec. Order No. 10,501, §4, 3 C.F.R. 980 (1949-1953 Comp.) adopted the same policy, but its provision against multiple classifications of a single document seriously diminished the possibility of its implementation. See note 93 *supra*.

96. 5 U.S.C. §552(b) (Supp. 1975). This addition to the Act codified a procedure mandated by the District of Columbia Circuit Court of Appeals in Mink v. Environmental Protection Agency, 464 F.2d 742 (D.C. Cir. 1971) prior to its eventual reversal in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). The Circuit Court in *Mink* held that the prohibition of multiple classifications by Executive Order 10,501 did not prevent segregation of improperly classified portions of documents following *in camera* inspection: "Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F.2d at 746.

97. See text accompanying notes 49-54 *supra*.

contravene the letter of the FOIA,[98] it also ignores the procedure under Executive Order 11,652, hailed by President Nixon as squarely placing the burden "upon those who wish to preserve the secrecy of documents."[99] The National Security Council directive administering Executive Order 11,652 so places the burden[100] and requires that any substantial doubts in the classifier's mind are to be resolved in favor of "the less restrictive treatment."[101] Furthermore, Judge Haynsworth concluded that the presumption "dispenses with" the problem of identifying either the individual making the classification or the time it was made.[102] Even prior to the 1974 amendments, however, the FOIA had never been judicially interpreted to relieve the government of its burden when either the identity of the classifier or the time of classification was at issue.[103]

Although *Colby* does not establish a FOIA precedent, it has been cited by the Department of Justice as authority for an interpretation of Exemption

98. 5 U.S.C. §552(a)(4)(B) (Supp. 1975).

99. See statement of President Nixon, March 8, 1972, *supra* note 46.

100. National Security Council Directive, May 17, 1972, §III(E), 37 Fed. Reg. 10,056 (1972).

101. *Id.*, §I(E) at 10,053.

102. 509 F.2d at 1368. In commenting on the difficulty of ascertaining who classified each particular document, Judge Haynsworth noted that Executive Order 10,501 "in effect in the relevant times, did not require the classifying officer to record his identity, as Executive Order No. 11,652 now does." *Id.* at 1365. However, Executive Order 11,652 contains no such requirement. Judge Haynsworth undoubtedly referred to §4(B), which requires that a document indicate "on its face the identity of the highest authority authorizing the classification." In practical terms, this requires identification of only the "man upstairs" who rubber-stamps the decision of the actual classifier below. Executive Order 11,652 has been sharply criticized for its failure to provide a means of specifically identifying which individual has classified a particular document; "Such personal accountability is necessary for purposes of monitoring possible abuses." Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order* 11,652, 50 IOWA L. REV. 110, 129, 142 (1973).

103. Weisberg v. United States Gen. Servs. Admin., Civil No. 2052-73 (D.D.C. 1974), held that the government had the burden of showing "that the disputed transcript [of an executive session of the Warren Commission] has ever been classified by an individual authorized to make such a designation under the strict procedures set forth in Executive Order 10,501 . . . ." *Id.* The sworn word of neither the Archivist of the United States that the transcript bore a "Top Secret" classification nor the former General Counsel of the Warren Commission that he had personally ordered the transcript so classified was sufficient to sustain the government's burden of persuasion absent an affirmative showing that the Warren Commission had authority to classify its records pursuant to Executive Order 10,501 and had in fact delegated such authority to its General Counsel. *See* H. WEISBERG & J. LESAR, WHITEWASH IV: TOP SECRET JFK ASSASSINATION TRANSCRIPT 178-182, 189-209 (1974).

In Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974), an action to disclose State Department files describing conditions in South Vietnamese prisoner of war camps, the District Court had granted summary judgment in favor of the defendant, the Secretary of State, on the basis of affidavits tending to show that the documents sought were classified "confidential" pursuant to Executive Order 11,652. *Id.* at 391. In reversing, the Court of Appeals held that the government had not sustained its burden of proof that the procedural requirements of Executive Order 11,652 had been followed. "[I]t was the responsibility of the court below to determine whether the . . . reports were in fact classified "confidential" and whether that classification, *including the timing thereof*, was in accordance with Executive Order 11,652 . . . ." *Id.* at 391 (emphasis added).

one that contradicts the letter of the law and the evidence of legislative intent. In February 1975 Attorney General Levi issued a memorandum of preliminary guidelines concerning implementation of the amended FOIA.[104] He cited *Colby* as affirming "the need for judicial restraint in the field of national security information and the appropriateness of judicial deference to classification decisions made and reviewed administratively in accordance with the provisions of Executive Order 11,652."[105] The "appropriateness of judicial deference" would seem to be refuted by the extensive efforts of Congress to amend the law for the explicit purpose of authorizing meaningful judicial review of executive classification.[106] In attempting to reconcile his view with the overwhelmingly contrary legislative history, Mr. Levi juxtaposed two quotes to create the impression that Congress accepted President Ford's position that classifications "reasonably" made would "have" to be upheld.[107] A reading of the relevant congressional debates indicates that Mr. Levi quoted out of context and presented a distorted version of the legislative intent.[108] It

104. United States Department of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (1975)* [hereinafter cited as *Levi Memorandum*].

105. *Id.* at 3-4.

106. See notes 27-34, 66-76 *supra* and accompanying text.

107. *Levi Memorandum, supra* note 104, at 4. The Attorney General quotes President Ford's suggestion from his Veto Message that: "[W]here classified documents are requested, the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an *in camera* examination of the document." *Id.* Also quoted is a statement by Congressman Moorhead made during the November 20, 1974, House debates preceding the overriding of President Ford's veto. After repeating the above quote from the Veto Message, Congressman Moorhead stated: "[I]n the procedural handling of such cases under the Freedom of Information Act, this is exactly the way the courts would conduct their proceedings." *See FOIA Source Book, supra* note 13, at 405. Even as juxtaposed by the Attorney General, these two quotes are capable of conflicting interpretations, depending on what Congressman Moorhead intended by limiting his agreement with President Ford to the *procedural* aspects advocated in the Veto Message. Strickly speaking, this would confine his remark to the second sentence of the quoted portion of the Veto Message and would exclude as nonprocedural the suggestion that upholding a classification be mandatory on a finding of reasonableness. In context, it is apparent that this was precisely the extent of Congressman Moorhead's agreement. See note 108 *infra.*

108. As he continued his remarks, Congressman Moorhead made it clear that the amendment of Exemption one did not mandate continued withholding of a document if the court finds that the classification was made on a mere "reasonable basis." *FOIA Source Book, supra* note 13, at 405-6. The Congressman stated that if all the evidence indicated "that the classification assigned to the particular document is reasonable *and proper* under the Executive order and implementing regulations, the court would clearly rule for the Government." *Id.* (emphasis added). This remark recalls Senator Ervin's position that the test under Exemption one should be whether the classification "was a correct or an incorrect decision," not whether "a person acted in a reasonable manner in coming to a wrong conclusion." See text accompanying note 75 *supra.* It is significant that the Attorney General chose to quote so selectively from the House debates concerning President Ford's veto. Among the relevant statements omitted from the *Levi Memorandum* are these: (1) Regarding the Conference Report suggestion that "substantial weight" be given to an agency's affidavit, see text accompanying note 61 *supra,* which the Attorney General also chose to quote, *Levi Memorandum* at 3, Congressman Reid stated: "I am hopeful that

would seem that the Department of Justice, which very strongly opposed the amendment of Exemption one,[109] has opted for an entirely self-serving interpretation of the record.

Problems of Adversary Procedure

When reviewing the merits of an executive invocation of Exemption one, the courts should adopt the policy and procedure outlined in *Vaughn v. Rosen*.[110] As the first case to confront the distortion of the adversary process implicit in FOIA suits, *Vaughn* clearly rejected attempts to shift the burden of proof onto the plaintiff or the court. Because of the plaintiff's inability to study the precise contents of the documents he seeks, he is at a distinct disadvantage vis-à-vis the executive agency defendant;[111] the court should not be required to substantiate the validity of claimed exemptions through *in camera* inspection of large volumes of documents, unilluminated by adversary exchange.[112] *Vaughn* simply sought to place the burden of persuasion where Congress intended it — on the withholding agency.[113] "Courts will simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis" by the agency of its specific justification for withholding information.[114] This insistence on "adequate specificity" was felt to be essential for: (1) giving the party seeking disclosure a meaningful opportunity to dispute the grounds of the government's claim that information falls within an enumerated exemption;[115] (2)

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this language would be construed exceptionally narrowly. The courts, in my view, have a duty to look behind any claim of exemption . . . ." *FOIA Source Book, supra* note 13, at 413. (2) Congressman Erlenborn explained that President Ford's "reasonable basis" test was analogous to the standard of review for decisions reached by regulatory agencies in the course of adversary proceedings of which a full record is kept. *Id.* at 415-16. Yet, because classification decisions are usually the result of arbitrary individual action, the analogy was considered inappropriate. The Congressman stated: "I think the normal rule in civil cases [of] preponderance would apply," that is, the agency should be required to prove by a preponderance of evidence that its classification was proper. *Id.*

109. The Justice Department's position against the amendment was stated in a letter to the Chairman of the House Committee on Governmental Operations dated February 20, 1974, *reprinted in Legislative History, supra* note 7, at 6276-82.

110. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

111. *Id.* at 823-24.

112. *Id.* at 825-26.

113. *Id.* at 828. *See* 5 U.S.C. §552(a)(3) (1970). For positive appraisals of *Vaughn, see* Note, Vaughn v. Rosen: *New Meaning for the Freedom of Information Act*, 47 TEMP. L.Q. 390 (1974); Note, Vaughn v. Rosen: *Toward True Freedom of Information*, 122 U. PA. L. REV. 731 (1974). For a more reserved appraisal, see Note, *Administrative Law — Freedom of Information Act*, 87 HARV. L. REV. 854 (1974).

114. 484 F.2d at 826. On remand, the Civil Service Commission claimed that the records requested involved approximately 2,448 documents filling 85 standard filing drawers and that compliance with the Court of Appeals requirement of a detailed analysis and indexing system would entail a prohibitive investment of time and money. Accordingly, on agreement of the parties, defendant submitted nine reports as representative samples of the 2,448 and was permitted to provide a detailed justification of nondisclosure on the basis of these nine reports. Vaughn v. Rosen, 383 F. Supp. 1049, 1052 (D.D.C. 1974).

115. 484 F.2d at 824, 826.

narrowing the scope of the court's inquiry;[116] and (3) assuring a meaningful appellate review of the District Court's determination.[117] The *Vaughn* standards have not yet been applied to FOIA cases dealing with Exemption one because *Vaughn* was decided prior to the 1974 amendments, when *Mink* virtually precluded judicial review of executive order classifications.[118] Now that *Mink* has been legislatively overruled, there is no reason why *Vaughn* should not be applied to all nine exemptions to facilitate the meaningful judicial review that Congress intended.[119]

CONCLUSION

In amending the FOIA, Congress responded to a serious problem affecting the public's access to information. The growth of the federal executive bureaucracy since the New Deal has resulted in a tremendous increase in the volume of governmental records, aptly described as a "paper explosion."[120] The need to protect certain sensitive information among this mass has led each president since Truman to institute or modify a system of national security classification.[121] Unfortunately, such systems have been characterized by the bureaucratic abuses of overclassification, hypersecrecy, and inadequate declassification procedures, as well as the political abuse of using national security as a cloak to shroud embarrassing or incriminating information.[122]

116. *Id.* at 827.

117. *Id.* at 825. *See also* Pacific Architects and Engineers, Inc. v. Renegotiation Bd., 505 F.2d 383 (D.C. Cir. 1974).

118. *Vaughn* claimed to elaborate on a procedure for making the factual determinations suggested in *Mink*. 484 F.2d at 824. The *Mink* procedural suggestion was made in the context of withholding information under Exemption 5, where *in camera* inspection might be appropriate. Specifically, *Mink* provided that before resorting to *in camera* inspection, "[a]n agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court that the documents sought fall clearly [within the exemption claimed]." 410 U.S. at 93.

119. It is apparent from the legislative history that Congress intended the fact-finding procedure suggested in *Mink* and elaborated in *Vaughn* to be applied uniformly to all the FOIA exemptions, including Exemption one. The Senate Judiciary Committee endorsed the *Vaughn* procedure and attempted to codify it with respect to Exemption one, adding a presumption favoring affidavits by agency heads. *Senate Report, supra* note 25, at 15-16. Congress deleted this codification because of the presumption it contained. See text accompanying notes 66-76 *supra*. Congress clearly approved the *Vaughn* procedure absent such a presumption. The Conference Report accompanying the amended Act notes that although *in camera* inspection would be available at the court's discretion to test an agency claim under Exemption one, it need not be automatic. "Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law." *Legislative History, supra* note 7, at 6287-88.

120. Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11,652*, 59 IOWA L. REV. 110, 142 (1972).

121. *Id. See also* Comment, *Declassification of Sensitive Information: A Comment on Executive Order 11,652*, 41 GEO. WASH. L. REV. 1052 (1973).

122. The Nixon Administration is a striking historical example of the misuse of "national security" as a cloak for official impropriety. One of the more publicized crimes of the administration was the break-in at the office of Daniel Ellsberg's psychiatrist by the White House "plumbers." When President Nixon learned that disclosure of the