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# The Mink Case: Restoring the Freedom Of Information Act

PATSY T. MINK\*

*Environmental Protection Agency v. Mink*<sup>1</sup> presented the first opportunity for the Supreme Court to interpret the Freedom of Information Act of 1966.<sup>2</sup> The court had previously denied certiorari to other cases. By its ruling in *Mink*, the court dealt such a severe blow to the purposes of the Act that it might better be titled the "Executive Secrecy Act."

The case stems from a large underground nuclear test the Atomic Energy Commission sought to detonate in 1971 at Amchitka Island, a small island in the Aleutian chain off Alaska. Isolated and remote, the island was deemed a suitable location for the blast which was code-named "Cannikin". The Aleutians, however, are one of the earth's most seismically active regions and have been the scene of numerous natural earthquakes. The shifting of undersea land masses in some past Aleutian earthquakes has touched off giant waves called tsunamis that have raced thousands of miles across the ocean's surface and caused loss of life and considerable property

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1. 410 U.S. 73 (1973) (hereinafter cited as *E.P.A. v. Mink*).

2. 5 U.S.C. § 552 (1966).

damage in Hawaii. As a United States Representative responsible for helping protect the people of Hawaii, I was greatly concerned about the safety of this government action and feared that a nuclear blast of such magnitude might cause a destructive tsunami.

My efforts to remove authority for the blast from the AEC authorization bill<sup>3</sup> proved fruitless. I was preparing to offer an amendment to the appropriation bill in order to delete funds for Cannikin when a newspaper article<sup>4</sup> appeared quoting anonymous sources as saying that five government agencies<sup>5</sup> had recommended that Cannikin be either cancelled or postponed pending further study. Immediate efforts were made by phone and by letter to obtain copies of the reports criticizing the test<sup>6</sup> but to no avail. A

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3. Two bills were proposed, H.R. REP. No. 9388, 92nd Cong., 1st Sess. (1971) which was an AEC authorization bill, and H.R. REP. No. 10090, 92nd Cong., 1st Sess. (1971) which was an AEC-Public Works appropriation bill. Both bills were defeated in the House.

4. Wash. Evening Star, July 26, 1971, at B-10, Col. 1.

5. For varying reasons, the State Department, the Office of Science and Technology, the United States Information Agency, the Environmental Protection Agency, and the Council of Environmental Quality recommended postponement and cancellation. According to the same source, the Department of Defense and the Atomic Energy Commission favored a go-ahead of the test.

6. NOTE: According to the Supreme Court opinion in *E.P.A. v. Mink*, 410 U.S. 73 (1973), footnotes 3 and 4 at 76-79, the documents which comprised the report to the President known as the Irwin Affidavit were as follows:

- A. A covering memorandum from Mr. Irwin to the President, dated July 17, 1971. This memorandum is classified Top Secret pursuant to Executive Order 10501.
- B. THE REPORT OF THE UNDER SECRETARIES COMMITTEE. This report was also classified Top Secret. Attached to the report were additional documents.
  1. A letter, classified Secret, from the Chairman of the Atomic Energy Commission (AEC) to Mr. Irwin.
  2. A report, classified Top Secret, from the Defense Program Review Committee, of which Dr. Henry Kissinger was the Chairman.
  3. The environmental impact statement on the proposed Cannikin test, prepared by the AEC in 1971, pursuant to § 102(c) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. § 4332(c). This document had always been "publicly available" and a copy was attached to the Irwin Affidavit.
  4. A transcript of an oral briefing given by the AEC to the Committee. This document was classified Secret.
  5. A memorandum from the Council on Environmental Quality to Mr. Irwin. This memorandum was separately unclassified.

letter signed by the counsel to the President stated that the papers "were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they were not available for release."<sup>7</sup> In the interim, I lost my second anti-Cannikin amendment,<sup>8</sup> and the test was ultimately conducted without apparent mishap on November 6, 1971. But on August 11 of that year, *Mink v. Environmental Protection Agency*<sup>9</sup> was initiated in federal court to secure release of the Cannikin Papers. The case continued even after the detonation of the test and was destined to become a sort of Waterloo of the Freedom of Information Act.<sup>10</sup>

The Act was controversial at its adoption and remains so. It was passed only after a number of prior attempts at such legislation had failed.<sup>11</sup> The Act was adopted as an amendment to Section

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C. In addition to the covering memorandum and the Committee's report (with attached documents), were three letters that had been transmitted to Mr. Irwin:

1. A letter from Mr. William Ruckelshaus, for the Environmental Protection Agency. This letter was classified Top Secret, but has now been declassified.

2. A letter from Mr. Russell Train, for the Council on Environmental Quality. Although the Irwin Affidavit states that this letter was classified Top Secret, Petitioners concede that it was so classified "only because it was to be attached to the Undersecretary's Report." Brief for Petitioners 6 n.5.

3. A letter of Dr. Edward E. David, Jr., for the Office of Science and Technology. This letter is classified Top Secret.

These eight documents were also described as having been classified as "Restricted Data . . . pursuant to the Atomic Energy Act of 1954, as amended. (42 U.S.C. 2014(y), 2161 and 2162.)" Petitioners have not asserted that these provisions, standing alone, would justify withholding the documents in this case. But see 5 U.S.C. § 552(b) (3), relating to matters "specifically exempted from disclosure by statute."

7. Letters from John W. Dean, III, to Congresswoman Patsy Mink, August 2, 1971.

8. H.R. REP. NO. 10090, 92nd Cong., 1st Sess. (1971), defeated 108 to 275, on July 29, 1971.

9. (Hereinafter cited as *Mink v. E.P.A.*) NOTE: The District Court granted summary judgment in favor of the respondents in Civil No. 1614-71, U.S. District Court, the Court of Appeals reversed, 464 F.2d 742 (1972) and remanded it to the District Court judge for reexamination. The Supreme Court granted certiorari, 405 U.S. 974 (1973), deciding in 410 U.S. 73 (1973).

10. 5 U.S.C. § 552 (1966).

11. For a legislative history of the Freedom of Information Act see *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. Pt. 4, at 1367 (1972). H.R. Rep. No. 1419, 92nd Cong., 2d Sess. 1 (1972); For a discussion of the background of the Act and related problems see Salomon and Wechsler, *The Freedom of Information Act; a Critical Review*, 38 GEO. WASH. L.

3 of the Administrative Procedure Act of 1946.<sup>12</sup> That section contained the first general statutory provision for public disclosure of executive branch rules, opinion and orders and public records, but it was riddled with loopholes permitting government secrecy.<sup>13</sup> Unless otherwise provided by statute, it said:

"matters of official record shall in accordance with published rules be made available to persons properly and directly concerned except information held confidential for good cause found."<sup>14</sup>

Moreover, the original Section 3 contained a blanket exclusion from its applicability of any function of the United States requiring secrecy in the "public interest" and "any matter relating solely to the internal management of an agency."<sup>15</sup>

It was in the context of demonstrable federal agency abuses relating to "good cause," "public interest," and other loopholes that Congress passed the 1966 act.<sup>16</sup> The measure adopted a policy that "any person" should have clear access to identifiable agency records without having to state a reason for wanting the information; it placed upon the federal agency the burden of proving withholding to be necessary.<sup>17</sup> Although President Johnson had been rumored ready to veto the bill causing such a major change in government information practices, he signed it into law on July 4, 1966. He observed:

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REV. 150 (1969); Engel, *Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 N.W. U. L. REV. 184 (May/June 73) *The Freedom of Information Act—The Parameters of the Exceptions*, 62 GEO. L. J. 177 (Oct. 73); *The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694 (May 73); *The Freedom of Information Act and the Exemption for Intra-Agency Memorandum*, 86 HARV. L. REV. 1047 (Apr. 73); *National Environmental Policy Act, Freedom of Information Act and the Atomic Energy Commission: The Need for Environmental Information*, 47 IND. L.J. 755 (S'72).

12. 5 U.S.C. § 1002 (1946).

13. See generally *Hearings on S. 1666, S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963); S. REP. NO. 813, 89th Cong., 1st Sess. 5 (1965); H.R. REP. NO. 1497, 89th Cong., 2nd Sess. 2 (1966); H.R. REP. NO. 1419, 92nd Cong., 2nd Sess. 2 (1972).

14. 5 U.S.C. § 1002 (1946).

15. *Id.*

16. Freedom of Information Act, codified at 5 U.S.C. 552 (1966), 80 Stat. 252 and codified in its present form in 1967, 81 Stat. 54.

17. Freedom of Information Act, 5 U.S.C. § 552(a) (3) (1966). See also *Stokes v. Brennan*, 476 F.2d 699 (1973); *Cunes v. Schlesinger*, 484 F.2d 1086 (1973).

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest . . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.<sup>18</sup>

Withholding of information by the government under the Act is permissive, not mandatory, and can primarily be justified on the basis of the nine exemptions specified therein.<sup>19</sup> The *Mink*<sup>20</sup> case involved judicial interpretation of only two of the nine exemptions, but they are among the most important. One deals with information relating to national defense and foreign relations;<sup>21</sup> the other permits exemption from compelled disclosure of inter-agency or intra-agency decision making documents.<sup>22</sup>

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18. Statement of President Johnson upon signing PUB. L. No. 89-487 on July 4, 1966, in ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (June 1967), reprinted in H.R. REP. NO. 1419, 92nd Cong., 2nd Sess. 1 (1972).

19. The exemptions of § 552(b) and (c) as used by the Court in its opinion in *E.P.A. v. Mink*, 410 U.S. 73, 111 (1973) 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 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 privileged or confidential;
  - (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
  - (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
  - (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
  - (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
  - (9) geological and geophysical information and data, including maps, concerning wells.
- (c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

20. 410 U.S. 73 (1973).

21. Freedom of Information Act, 5 U.S.C. 552(b)(1) (1966). See also *Soucie v. David*, 448 F.2d 1067 (1971); *Epstein v. Resor*, 421 F.2d 930 (1970); *Wolfe v. Froehle*, 358 F. Supp. 1318 (1973).

22. Freedom of Information Act, 5 U.S.C. 552(b)(5) (1966). See also

The fact that there have been more than 200 reported cases<sup>23</sup> involving the Act indicates that many problems regarding acceptable government information procedures still remain. These problems can be traced in part to the diversity of information collected and retained by Executive Branch agencies. At the same time, there have been disagreements as to the precise meaning of the Freedom of Information Act.<sup>24</sup> Adding to the controversy surrounding its passage are the two committee reports<sup>25</sup> which have been analyzed by the courts in an effort to determine the intent of Congress. These reports differ in several significant respects.<sup>26</sup> Most observers conclude that the Senate report adopts an interpretation of the law more favorable to public disclosure of executive agency information than the House report. The House report was not before the Senate when it passed the Act on October 13, 1965, but the Senate report was available in both houses (the House acted on June 20, 1966). For that reason, many courts and commentators considering the Act have concluded that the Senate report merits more weight in discussions seeking to interpret a specific provision of the Act.<sup>27</sup>

The difficulty of finding legislative intent is not limited to the Freedom of Information Act.<sup>28</sup> Much disagreement exists as to whether legislative intent can be determined at all. The two quotations below point up the disparity of views:

Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. Successive drafts of the same act do not simply succeed each other as isolated phenomena,

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International Paper Co. v. FPC, 438 F.2d 1349 (1971); American Mail Line v. Gulick, 411 F.2d 696 (1969).

23. See generally Salomon and Wechsler, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972-73).

24. 5 U.S.C. 552 (1966). See Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (1966).

25. H.R. REP. No. 1497, 89th Cong., 2nd Sess. 1 (1966); and S. REP. No. 813, 89th Cong., 1st Sess. 1 (1965).

26. See Davis, *The Information Act. A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967). While the House did not change the bill itself, it wrote restrictions into the committee report which resulted in substantial differences between that and the bill passed by the Senate.

27. See Salomon and Wechsler, *Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969).

28. 5 U.S.C. § 552 (1966).

but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice. The voting down of an amendment or its acceptance upon the statement of its proponent again may disclose real evidence of intent. Changes made in the light of earlier statutes and their enforcement, acquiescence in a known administrative interpretation, the use of interpreted language borrowed from other sources, all give evidence of a real and not fictitious intent, and should be deemed to govern questions of construction.<sup>29</sup>

To the contrary, another writer has stated:

[T]he legislative intent is an eliminable fiction. Experience amply shows that the drafters or framers of a law, the committee that reports it, the majority of the members of the two houses that, for various reasons, pass it, and the executive that signs it are by no means always agreed as to its meaning. Hence the rule that parliamentary debates are of no direct value in the interpretation of statutes.<sup>30</sup>

Whatever the value of legislative history in interpreting a statute, the Supreme Court decision in *Mink* appears to have determined, at least with respect to two exemptions under the Act, that Congress by its adoption did not intend to promote freedom of information in areas of major importance which conflicted with executive branch intent.<sup>31</sup> Since the Act attempted to revise a previous disclosure statute<sup>32</sup> which was deemed ineffective precisely because it allowed too much executive discretion, it is difficult to see what purpose Congress had in mind if not to reduce such discretion rather than continue to expand it.

Action was brought because the plaintiffs, 33 members of Congress, felt the executive branch had exceeded the bounds of statutory authority in refusing the request for the Cannikin Papers. [The plaintiffs filed both as Congressmen and members of the public. While the District Court ruled they lacked standing to sue as Congressmen, this issue was not pursued or resolved.] The government's response to the filing of the suit was to move for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsections (b) (1) and (b) (5) of the Act.<sup>33</sup> At no time was a claim made of executive privilege nor did the plaintiffs attempt to portray their case as a "separation of powers" clash between the executive and legislative

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29. Landis, *Statutory Interpretation*, 43 HARV. L. REV. 886, 888 (1930).

30. M. COHEN, *LAW AND THE SOCIAL ORDER* 129 (1933).

31. The language of 5 U.S.C. § 552(b) (1) (1966), provides broad discretion to the executive branch in determining which materials are to be kept secret. See *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 488 F.2d 710 (1973).

32. Administrative Procedure Act, 5 U.S.C. § 551 (1946).

33. Freedom of Information Act, 5 U.S.C. § 552(b) (1) and (5) (1966).



branches of government. Both parties agreed that the case was purely one involving interpretation of the statutory provisions of the Freedom of Information Act.<sup>34</sup>

In support of its motion for summary judgment against the plaintiffs, the government produced the affidavit of Mr. John N. Irwin II,<sup>35</sup> Under Secretary of State, which stated that Mr. Irwin had been appointed by President Nixon as Chairman of an "Undersecretaries Committee" (part of the National Security Council System). The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests."<sup>36</sup> Pursuant to this request, Mr. Irwin said, the Committee prepared and transmitted to the President a report on the proposed Cannikin test. The papers consisted of the report itself, a covering memorandum from Mr. Irwin, five documents attached to the report, and three letters separately sent to Mr. Irwin.<sup>37</sup> Basically, the documents were an evaluation of the safety of the test and the comments of various executive agencies<sup>38</sup> on the matter.

#### THE "NATIONAL SECURITY" EXEMPTION

Matters that are "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy" are exempt from disclosure.<sup>39</sup>

According to the government, except for an environmental impact statement which was available to the public, the Cannikin Papers were classified as Top Secret or Secret under Executive Order 10,501.<sup>40</sup> Therefore, it contended, they were exempt from disclosure as "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy" as provided by Section 552(b) (1) of the Freedom of Information Act.<sup>41</sup>

The District Court<sup>42</sup> granted summary judgment in favor of the

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34. 5 U.S.C. § 552 (1966).

35. See *supra*, note 6.

36. *Id.*

37. *Id.*

38. *Id.*

39. Freedom of Information Act, 5 U.S.C. § 552(b) (1).

40. Exec. Order No. 10,501, 3 CFR 280.

41. 5 U.S.C. § 552(b) (1).

42. *Mink v. E.P.A.*, Civil No. 1614-71, U.S. Dist. Ct. (D.C. Cir.).

government on the basis that the documents were exempt from disclosure as claimed. The Court of Appeals, however, reversed the decision in a victory for the plaintiffs.<sup>43</sup> It concluded that subsection (b)(1) of the Act permitted the withholding of only the secret portions of those documents bearing a separate classification under the Executive order.

If the nonsecret components [of the documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.<sup>44</sup>

The court directed the district judge to examine the classified documents, "looking toward their possible separation for purposes of disclosure or non-disclosure."<sup>45</sup>

Faced with the prospect of further court inquiry into its non-disclosure, the government petitioned the Supreme Court for certiorari, which was granted.<sup>46</sup>

The majority opinion of the Supreme Court by Justice White (Burger, Stewart, Blackmun and Powell joining) concluded that the exemption does not permit the disclosure of the six documents<sup>47</sup> which were separately classified. Neither does it permit inspection by a court (in camera) to sift out "so-called 'non-secret components'." Citing both the House and Senate Reports<sup>48</sup> the Court concluded that the only test permitted under this exemption was whether the material had been classified by Executive Order. According to the majority opinion, both the language of the exemption and the legislative history indicate that Congress did not intend to subject security classifications by the executive to judicial review.<sup>49</sup> It discussed the House Report<sup>50</sup> and remarks in the *Congressional Record* by Representatives Moss and Gallagher,<sup>51</sup> and then went on to state that:

Congress could certainly have provided that the Executive Branch adopt new procedures [of classification] or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such Congressional

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43. *Mink v. E.P.A.*, 464 F.2d 792 (1972).

44. *Id.* at 746.

45. *Id.* at 746.

46. *E.P.A. v. Mink*, cert. granted, 405 U.S. 974 (1973).

47. See nn. 3 and 4, *E.P.A. v. Mink*, 410 U.S. 73 (1973) for a list of documents and the manner in which they were classified.

48. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 5 (1966); S. REP. NO. 813, 89th Cong., 1st Sess. 2 (1965).

49. *E.P.A. v. Mink*, 410 U.S. 73, 82 (1973).

50. *Supra*, note 48.

51. *Hearings, Subcomm. on Government Operations of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (remarks of Rep. Moss) 112 CONG. REC. 1369 (remarks of Rep. Gallagher).

ordering. But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret."<sup>52</sup>

In a separate concurring opinion, Justice Stewart restates the conclusion of the majority that the language of the exemption precludes courts from examining documents classified by Executive Order. "(I)n enacting Section 552(b)(1) Congress chose, instead, to decree blind acceptance of executive fiat."<sup>53</sup>

Justice Brennan (Marshall joining) dissented from the majority in its interpretation of Exemption 1. The language of the exemption provides that matters "*specifically required* by executive order to be kept secret *in the interest of the national defense or foreign policy*" can be exempt (emphasis Justice Brennan)<sup>54</sup> E.O. 10,501<sup>55</sup> is discussed at length, and some documents are found to receive a security classification because of association with other documents in a classified file. Presumably those documents alone are not "*specifically required*" to be kept secret under the Freedom of Information Act<sup>56</sup> but are merely classified by being attached to other documents which are so required. The opinion disagreed with the majority's reliance on the legislative history as "erroneous and misleading".

The Douglas dissent<sup>57</sup> does not discuss this exemption in any detail; it relies instead on Sections 552(a) (3) and 552(c),<sup>58</sup> which are discussed later in this article.

It seems to this writer that the majority opinion went to ridiculous lengths to arrive at a fabricated interpretation of the Act. Congress obviously had some purpose in enacting the law. The previous statute,<sup>59</sup> hinging on a "public interest" standard, was discarded because those who held the information, namely the executive branch, had abused their discretion.<sup>60</sup> The executive branch by its actions had, in effect, defined the "public interest" according

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52. E.P.A. v. Mink, 710 U.S. 73, 83 (1973).

53. *Id.* at 95.

54. *Id.* at 96.

55. Exec. Order No. 10,501, 3 CFR 280 (1970).

56. 5 U.S.C. § 552 (1966).

57. E.P.A. v. Mink. 410 U.S. 73, 105 (1973).

58. Freedom of Information Act, 5 U.S.C. § 552 (1966).

59. Administrative Procedure Act, 5 U.S.C. § 551 (1946).

60. See U.S. v. Aarons, 310 F.2d 341 (1962).

to what was deemed best for the government. It would be patently absurd to replace this ineffective statute with another which permitted the executive branch to continue deciding according to its own standards which material should be released to the public. The fact that Congress acted at all indicates that it must have had some other purpose.

If the majority opinion is to be accepted, Congress declared that any document—for example, the Manhattan telephone directory or the Encyclopedia Britannica—could be classified “Top Secret” merely by being so stamped by any of the army of federal employees authorized to classify documents under authority of the general Executive Order. Justice Brennan’s dissent points out the error in presuming that an entire document containing information on many “matters”, some of which may be legitimately kept secret and others which may not, can be classified in its entirety.<sup>61</sup> This is a defect in the Executive Order—one which the government itself has admitted by issuing a revised order,<sup>62</sup> apparently based on the Court of Appeals decision in the *Mink* case.

In its petition for certiorari to the Supreme Court, the government pointedly failed to challenge a portion of the Appeals Court ruling which held:

This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10,501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order.<sup>63</sup>

The current Executive Order<sup>64</sup> prescribing the system for classification of security information was issued just two days after the Supreme Court accepted jurisdiction in the *Mink* case.<sup>65</sup> In an effort to comply with the Act’s mandate that genuinely secret matters be carefully separated from non-secret components, section 4(a) of the new Order provides:

*Documents in General . . . Each classified document shall . . . to*

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61. *E.P.A. v. Mink*, 410 U.S. 73, 99 (1973), quoting lower court decision in 464 F.2d 742, 746 (1972).

62. Exec. Order No. 11,652, 37 Fed. Reg. 5209 effective June 1, 1972, replaces Exec. Order No. 10,501, 3 CFR 292 (1970), pursuant to the lower court’s decision in *Mink v. E.P.A.*, 464 F.2d 742 (1972).

63. *Mink v. E.P.A.*, 464 F.2d 742, 746 (1972). See also Justice Brennan’s dissent in *E.P.A. v. Mink*, 410 U.S. 73, 99, for a discussion of the lower court’s decision.

64. Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972).

65. *Cert. granted*, 405 U.S. 974 (1973).

the extent practicable, be so marked as to indicate what portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use.<sup>66</sup>

President Nixon emphasized this requirement in his statement:

A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and innocuous portions of neither paper could be released. [emphasis added]<sup>67</sup>

Thus, the policy of the government now is that *matters within* documents are to be classified, not the entire documents. Portions which discuss unclassified matters may be released to the public. Demonstrably, if the government could adopt such a policy after the Court of Appeals decision in the *Mink* case,<sup>68</sup> it could have done so before that decision. It could have done so all along in consonance with the Freedom of Information Act.<sup>69</sup> Unfortunately, within the terms of the Supreme Court majority opinion,<sup>70</sup> the executive branch could conceivably reverse its practice and return to the suppression of the old Executive Order.<sup>71</sup> That opinion leaves the Supreme Court standing alone as the only branch of government reaching such an extreme and undemocratic interpretation of the Act.

The major error made by the majority opinion was to confuse *documents* with the *matters* they contain.<sup>72</sup> A document is not a matter—matters are the subject of documents. Under the Act, only *matters* may be exempt from compelled disclosure,<sup>73</sup> not entire documents. The old Executive Order,<sup>74</sup> which prescribed a procedure for classifying whole documents regardless of the non-sensitive nature of some portions, has been discarded. It is regrettable

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66. *Supra*, note 64.

67. *Supra*, note 64.

68. *Mink v. E.P.A.*, 464 F.2d 742 (1972).

69. 5 U.S.C. § 552 (1966).

70. *E.P.A. v. Mink*, 410 U.S. 73 (1973).

71. Exec. Order No. 10,501, 3 CFR 292 (1970).

72. *E.P.A. v. Mink*, 410 U.S. 73, 81 (1973). Although 5 U.S.C. § 552(b) (1) uses the word "matters," Justice White fails to use that term, preferring instead to use "documents."

73. Freedom of Information Act, 5 U.S.C. § 552(b) (1) (1966).

74. Exec. Order No. 10,501, 3 CFR 292 (1970).

that the court should cling to a position which has been abandoned by the very branch of government it seeks to protect.

By rejecting the former Executive Order,<sup>75</sup> the executive branch has moved toward the position that the Congressional act mandated only the classification of matters, not documents. That policy must now be applied to those cases and conflicts which require judicial interpretation. This is the proper sphere of judicial intervention—to determine whether the executive has correctly separated the various matters within a document according to their classification. Regrettably, under the ruling such a logical approach has been rejected. According to the decision, a court could not question the classification of an encyclopedia should an executive official decide to make it secret.<sup>76</sup> As long as the official quoted an Executive Order as authority for his actions the court would be permitted to intrude no further. There would be no in camera examination of the document to determine whether discretion had been abused. The official could merely file an affidavit that “The President has signed an Executive Order classifying the encyclopedia as Top Secret,” and there would be no way for a private citizen to challenge the action under the laws of the United States.

Judicial acceptance of responsibility to perform in camera inspections under the de novo procedures prescribed by the Act would not alter the executive’s power to classify—it would only permit the disclosure of non-secret material. On the other hand, the Act does not prohibit the courts from questioning the classification as well. Certainly the courts have the ability and judgment necessary to determine whether matters impinge on the national defense or foreign policy. If there is a question, evidence could be taken in chambers supporting the government’s contention. The important principle is that an independent party, the judiciary, would “keep the executive honest” by being available to citizens who felt that their right to information had been unfairly denied. Under present circumstances, as under the old law which Congress replaced apparently without effect,<sup>77</sup> no such redress is available. The efforts of Congress to fashion a suitable remedy have been brushed aside by the Court. The judiciary will not even determine whether the executive has classified properly.<sup>78</sup>

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75. *Id.*

76. *E.P.A. v. Mink*, 410 U.S. 73, 81-84 (1973), Justice White announced the standard to be used: “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.” *See contra*: *Eastern v. Resor*, 421 F.2d 930 (1970).

77. Administrative Procedure Act, 5 U.S.C. § 551 (1946).

78. *E.P.A. v. Mink*, 410 U.S. 73, 82 (1973).

ADVICE TO THE PRESIDENT

Matters that are "inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from disclosure.<sup>79</sup>

It was asserted that three unclassified documents as well as the classified documents fell within the inter-agency memorandum exemption quoted above.<sup>80</sup> The majority opinion found that the exemption contemplated the use of discovery principles to determine whether information could be disclosed. It noted that such a test was difficult to apply since the Act does not contemplate inquiry into the particularized needs of the party seeking the information.<sup>81</sup> Yet discovery law always makes such an inquiry—this observation has been made by many writers. Discovery cases often require in camera inspection. Thus, the Supreme Court permitted in camera inspection of documents claimed to be exempt as inter-agency memoranda. In camera inspection is not automatic, however. The agency may show by other means short of in camera inspection—oral testimony or affidavit—that all information sought is exempt. The case was remanded to the District Court for consideration of that issue.<sup>82</sup> The opinion reaffirmed the deliberative factual distinction applied by other courts, holding that factual material is not exempt by this proviso from the Act's disclosure requirements.

While the remand on the subsection (b)(5) issue was perhaps more realistic than the wholesale obliteration of subsection (b)(1), it was of little practical value to a meaningful construction of the Act. The majority opinion accepted the basic premise of the Appeals Court decision,<sup>83</sup> that the District Court should order disclosure of only factual material which is not "intertwined with policy-making processes"<sup>84</sup> and may safely be disclosed "without impinging on the policy-making decisional processes intended to be protected by this exemption."<sup>85</sup> The only reservation of the major-

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79. Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1966).

80. See nn. 3 and 4 in *E.P.A. v. Mink*, 410 U.S. 73 (1973) for listing of documents and classifications.

81. *E.P.A. v. Mink*, 410 U.S. 73, 85 (1973).

82. *Id.* at 93.

83. *Mink v. E.P.A.*, 464 F.2d 742 (1972).

84. *Id.* at 746.

85. *Id.* at 747.

ity was the Appeals Court mandate of in camera inspection. Apparently, this was deemed too arduous a chore to require of a court every time "any member of the public" chose to challenge an agency's right to withhold information. So the Supreme Court directed that, on remand, the government might establish by some means short of such an examination that it was entitled to withhold documents or portions thereof.<sup>86</sup>

This portion of the decision seems to encourage lower courts to perform their assigned function under the Act with as little overt involvement as possible. As much as possible should be left to the executive branch. That branch can determine for itself which portions of documents—or *matters*—are factual and must therefore be disclosed. (Factual matter may be withheld under the first or other exemptions but not under the advice exemption.) The executive then could merely submit an affidavit to the court for its acceptance. In so doing, the court would be blindly relying on executive action. There would be no positive, independent review. In the *Mink* case, the Appeals Court<sup>87</sup> evidently felt that the subject was sufficiently important to require court scrutiny of the documents in question. This did not mean that for other matters, in other cases, courts could not choose other means of determining the extent of executive compliance with the requirements of the Act. But by going out of its way to reject such a requirement, the majority minimized the importance of true judicial involvement and encouraged future decisions in lower courts based on such a lackadaisical interpretation.<sup>88</sup>

Justice Stewart's concurring opinion<sup>89</sup> did not discuss this exemption; Justice Brennan expressly concurred with the majority on this point.<sup>90</sup> Justice Douglas did not discuss the exemption in any detail, although he expressly agreed with the deliberation fact distinction.<sup>91</sup> Since he would have affirmed the Court of Appeals opinion, however, Justice Douglas probably disagreed with the majority's use of affidavits and oral testimony to preclude in camera inspection.

#### COURT RESPONSIBILITY—HOW GREAT?

The court shall determine the matter de novo and the burden is on the agency to sustain its action.<sup>92</sup>

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86. *E.P.A. v. Mink*, 410 U.S. 73, 91 (1973).

87. *Mink v. E.P.A.*, 464 F.2d 742 (1972).

88. *E.P.A. v. Mink*, 410 U.S. 73, 91-92 (1973).

89. *Id.* at 94-95.

90. *Id.* at 95-105.

91. *Id.* at 105-111.

92. Freedom of Information Act, 5 U.S.C. § 552(a) (3) (1966).



The majority opinion did not find it necessary to consider this subsection at any length because of its conclusion as to the meaning of the first exemption. It stated that plaintiffs met their burden of proof under Section 152(a)(3) by showing that the documents were classified. That showing meant that the documents were exempt from disclosure. "(T)he duty of the District Court under Section 522(a)(3) was therefore at an end."<sup>93</sup>

Justice Stewart's opinion specifically expands upon this holding by the majority.

... [T]he only 'matter' to be determined de novo under Section 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry.<sup>94</sup>

He expressly states that Justice Brennan's discussion of this subsection is an "admirably valiant effort to deflect the impact of this rigid exemption."<sup>95</sup> (Exemption 1).

Justice Brennan in dissent<sup>96</sup> concluded that the de novo determination section applied to both exemptions.<sup>97</sup> That section permits the trial court to examine classified documents in camera to determine whether there is material which might have been classified independently. The opinion quotes the House and Senate Reports<sup>98</sup> in reaching its conclusions.

Justice Douglas' dissent<sup>99</sup> also relies heavily on Section 552(a)(3). He concludes that the section authorizes the court to inspect the documents to assure that the Congressional policy of disclosure is carried out. It does not mean that the trial judge would reclassify the document. It means that the court could examine the material to determine if it were an appendage to the security classification.<sup>100</sup> In this writer's view, however, nothing in the

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93. *E.P.A. v. Mink*, 410 U.S. 73, 84 (1973).

94. *Id.* at 95.

95. *Id.*

96. *Id.* at 95-105.

97. Freedom of Information Act, 5 U.S.C. § 552(a)(3) (1966). This section relating to burden of proof applies to 5 U.S.C. § 552(b)(1) which is the national security exemption and 5 U.S.C. § 552(b)(5) which is the intra and inter-agency exemption.

98. *Supra*, note 48.

99. *E.P.A. v. Mink*, 410 U.S. 73, 105 (1973).

100. *Id.* at 109.

Act precludes a judicial decision on whether material is properly classified in the first instance.

The split of the court<sup>101</sup> clearly indicates uncertainty as to the application of the Freedom of Information Act,<sup>102</sup> particularly with regard to the first exemption.<sup>103</sup> On that point the Court split 5-3. The majority was reluctant to inspect classified documents without a clearer mandate to do so from Congress. With regard to exemption 5,<sup>104</sup> the court split 7-1, with only Justice Douglas dissenting as to the use of oral testimony and affidavits in lieu of in camera inspection.

Clearly, there is much division within the court on the crucial issue of the first exemption. Nevertheless, an opinion has been rendered which to all intents and purposes repeals a major segment of the Act. In effect, Congress is told to do a better drafting job if it expects the courts to shoulder a larger part of the responsibility of providing citizens with the information they need to help govern in a democracy. This is a tragic result of what I feel is an erroneous interpretation of the Freedom of Information Act.<sup>105</sup> The Act was carefully drawn in order to produce a workable and enforceable mechanism for freedom of information and contained a remarkable set of checks and balances. The only revisions previously thought necessary arose because of executive recalcitrance in complying with Congressional intent and involved various proposed tightenings of the exemptions.

Congress has moved toward strengthening of the Freedom of Information Act<sup>106</sup> through new amendments drafted in light of the court decision. H.R. 12471.<sup>107</sup> The amendments provide for changes in the Act, two of which were expressly designed to correct the *Mink* decision. One clarified the authority of courts over executive branch claims of secrecy by amending the section of the Act dealing with judicial review of withheld materials. It inserted language to the effect that the courts "may examine the contents of any agency records in camera to determine whether such records

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101. Justice White delivered the opinion of the Court, and was joined by Justices Burger, Stewart, Blackmun and Powell. Justice Stewart filed a concurring opinion; Justice Brennan an opinion concurring in part and dissenting in part, in which Justice Marshall joined. Justice Douglas filed a dissent and Justice Rehnquist took no part in the decision.

102. 5 U.S.C. § 552 (1966).

103. 5 U.S.C. § 552(b) (1) (1966).

104. 5 U.S.C. § 552(b) (5) (1966).

105. 5 U.S.C. § 552 (1966).

106. *Id.*

107. H.R. REP. No. 876, 93d Cong., 2d Sess. (1974).

or any part thereof shall be withheld under any of the exemptions set forth"<sup>108</sup> in the Act. Such a change would remove all doubt that the courts have discretionary authority to utilize in camera inspections when they believe it is desirable.

The other change of H.R. 12471<sup>109</sup> stemming from the *Mink* decision revised the wording of Exemption 1 relating to national security. Instead of referring merely to matters specifically required by Executive Order to be kept secret, it would exempt matters "authorized under criteria established by an Executive Order" to be kept secret.<sup>110</sup> This would give courts leeway to examine the justification of the classification itself. It would empower courts to determine whether the matters meet the criteria established by the Executive Order under which they were withheld. The executive branch would be unable to withhold information purely because it was embarrassing or politically sensitive or otherwise concealed for improper purposes.

While the Congress seems willing to recognize that certain changes are needed in the Act, the executive branch remains unwilling to accept any inroads which would limit executive power. In one of his first acts as head of the executive branch, President Ford chose to veto the amendments to the Act, calling H.R. 12471 "unconstitutional, unworkable and a threat to American intelligence secrets and diplomatic relations."<sup>111</sup> In his veto message, the President noted that provisions of the bill would allow for court de-classification without expertise on the matters involved. The President additionally saw the provisions as permitting the court to make initial classifications rather than mere inspection.<sup>112</sup>

In his message to Congress, the President said he was willing to accept a provision for court examination and review as regards the justification of the classified status, however he proposed that the classification be upheld by the courts if there appears to be any rational basis for it.<sup>113</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. Jules Witcover, *Freedom of Information Measure Vetoed by Ford as Peril to Nation*, Los Angeles Times, Oct. 18, 1974, at A-13, col. 1.

112. *Id.* at col. 2.

113. *Id.* at col. 3.

The amendments had overwhelming support in the Congress,<sup>114</sup> and many proponents of the bill viewed the presidential veto as directly contrary to the President's promise for an "open government." This support was further evidenced by Congressional override of the veto. The bill as voted on by Congress establishes a 10-day limit for agencies to decide on whether or not to provide information, a 20-day limit on deciding administrative appeals and a 30-day limit on governmental replies to lawsuits. In addition to the power given federal judges to decide upon whether a document should be made public, it requires the indexing of documents available to the public.<sup>115</sup>

Despite the setbacks in the *Mink* decision requiring legislative redress to achieve the original purposes of the Freedom of Information Act,<sup>116</sup> the decision did serve to establish the principle of judicial in camera inspections of executive branch documents. Although the Supreme Court held that such inspections are not allowed in cases where information is kept secret because of the first exemption of the Act,<sup>117</sup> it did hold that inspections could be performed under certain conditions for material withheld under all other exemptions.<sup>118</sup> This holding that de novo review authority as provided for in the Act allows an in camera inspection was cited in the case of *Nixon v. Sirica*,<sup>119</sup> U.S. Court of Appeals for the District of Columbia, decided on October 12, 1973.

The Nixon case involved a request by Special Prosecutor Archibald Cox for taped Presidential conversations in the political scandal known as "Watergate." U. S. District Judge John Sirica ruled that he would listen to the tapes in chambers to determine whether the tapes or portions of them should be released to the Special Prosecutor for use in his legal cases against presidential aides and others. President Nixon appealed the decision,<sup>120</sup> contending that Judge Sirica had exceeded his authority in ordering an in camera inspection of the tapes. The Court of Appeals (Case Number 73-1989)<sup>121</sup> upheld Judge Sirica's decision, with slight modifications, leaning heavily on the Supreme Court decision in *Mink* as precedent. Chief Judge Bazelon, in the court's opinion, wrote:

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114. NOTE: The House passed the final conference version of the bill on October 7, 1974, by 349 to 2, while the Senate version was passed May 30, 1974, by 64 to 17.

115. Los Angeles Times, Nov. 22, 1974, at A-1, Col. 5.

116. 5 U.S.C. § 552 (1966).

117. 5 U.S.C. § 552(b)(1) (1966).

118. 5 U.S.C. § 552(b)(2-9) (1966).

119. 487 F.2d 700 (1973).

120. *In Re Subpoena to Nixon*, 360 F. Supp. 1 (1973).

121. *Nixon v. Sirica*, 487 F.2d 700 (1973).

... *Mink* confirms that courts appropriately examine a disputed item in camera, even though this necessarily involves a limited intrusion upon what ultimately may be held confidential, where it appears with reasonable clarity that some access is appropriate, and in camera inspection is needed to determine what should and what should not be revealed.<sup>122</sup>

President Nixon chose not to appeal the decision to the Supreme Court, which had already upheld compelled disclosure to a court in the *Mink* case.<sup>123</sup> The tapes were turned over to the Special Prosecutor and a federal grand jury, which ultimately dispatched its findings to the U.S. House of Representatives for use in impeachment proceedings against the President.

In a later case involving Watergate tapes the President did appeal disclosure to the Supreme Court, and his position was rejected resoundingly.<sup>124</sup> The President then personally listened to the tapes, and, after issuing a public statement thereon, shortly submitted his resignation.

The resignation exemplified the power of information. It also highlighted the importance of making the Freedom of Information Act<sup>125</sup> a viable and functioning mechanism for maintaining a free flow of governmental information to the people. Only in this way can the ability of the people to govern be preserved.

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122. *Id.* at 720.

123. *E.P.A. v. Mink*, 410 U.S. 73 (1973).

124. *U.S. v. Nixon*, 42 U.S.L.W. 5237 (July 27, 1974).

125. 5 U.S.C. § 552.