

NOTE

NATIONAL SECURITY INFORMATION DISCLOSURE UNDER THE FOIA: THE NEED FOR EFFECTIVE JUDICIAL ENFORCEMENT

"A popular Government, without popular information, or the means of acquiring it is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which Knowledge gives."¹

— James Madison

The goal of the Freedom of Information Act ("FOIA" or "the Act")² is to protect the public's right of access to government information.³ At the same time the FOIA recognizes the need to balance this goal against the strong national interest in protecting certain sensitive information.⁴ The Act provides that any person⁵ should have access to identifiable, existing records⁶ of a federal government agency⁷ without having to demonstrate a reason for his request.⁸ Nevertheless, the broad provisions for disclosure of government

¹ Letter from James Madison to W. T. Barry (Aug. 4, 1822), reprinted in 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910), quoted in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 110-111 (1973) (Douglas, J., dissenting).

² 5 U.S.C. § 552 (1982).

³ This accommodation has been recognized by Congress. See 111 CONG. REC. S2797 (daily ed. Feb. 17, 1965) (remarks of Senator Long) ("[O]ur purpose in introducing the [FOIA] is that a necessary corollary to the right of a democratic people to participate in governmental affairs is the right to acquire information."); 112 CONG. REC. H13641 (daily ed. June 20, 1966) (remarks of Rep. Moss) ("We must remove every barrier to information about — and understanding of — Government activities consistent with our security. . . ."). See also Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L. J. 741, 745 (1975) (hereinafter cited as Clark); S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6 (1965).

⁴ "The Committee has, with the utmost sense of responsibility, attempted to achieve a balance between a public need to know and a necessary restraint upon access to information in specific instances." 112 CONG. REC. H13641 (daily ed. June 20, 1966) (remarks of Rep. Moss). See also 1 R. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5:8, at 329 (2d ed. 1978) (discussing exemptions to general disclosure rule); 112 CONG. REC. H13645 (daily ed. June 20, 1966) (remarks of Rep. Moss) ("[The FOIA] seeks to open all citizens, so far as consistent with other national goals of equal importance, the broadest range of information."); S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

⁵ 5 U.S.C. § 552(a)(3)(B).

⁶ 5 U.S.C. § 552(a)(3).

⁷ 5 U.S.C. § 552(e).

⁸ See 1 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE 4-11 (1983) (hereinafter cited as O'REILLY). Access to any person for any reason has created a policy problem in the area of civil discovery which has troubled courts. *Id.* Litigants in actions against government agencies have attempted to avoid roadblocks to discovery by requesting non-discoverable documents under the FOIA. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *NLRB v. Sears*

information do not apply to nine specific categories of information.⁹ These nine exemptions represent Congress' recognition of the need to protect certain sensitive information.¹⁰ The exemptions function, therefore, as a counterbalance to the Act's broad disclosure provisions.

The successful operation of the FOIA depends upon the maintenance of the balance between public and governmental interests.¹¹ In order to effectuate the successful operation of the Act, Congress carefully created a system of checks and balances governing the disclosure of federal government information under the FOIA. This system involves all three branches of the federal government.

The role of the Congress is primarily one of definition.¹² The legislature defines the types of information which are subject to the FOIA,¹³ the manner in which the FOIA is to be administered,¹⁴ and the roles of the executive and judicial branches in this system.¹⁵ Congress may also amend the Act if it detects problems in its operation.¹⁶ The executive branch, through each of its departments, offices, and agencies, is responsible for the daily administration of the Act.¹⁷ Each agency is required to determine whether a particular piece of information must be disclosed pursuant to the FOIA's broad disclosure provisions¹⁸ or whether that information may be withheld from public disclosure pursuant to one of the nine exemptions.¹⁹ Finally, the judiciary is responsible for the enforcement of the FOIA.²⁰ The Act grants the federal courts substantial power to review executive agency decisions and enjoin those that are improper.²¹ If an executive agency decides to withhold information and a citizen challenges the propriety of the agency's decision, the federal courts are empowered to make a *de novo* determination of whether the agency

Roebuck & Co., 421 U.S. 132, 159-160 (1975); Title Guarantee Co. v. NLRB, 534 F.2d 484, 491-492 (2d Cir. 1976); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145, 146-147 (1st Cir. 1976).

Further problems are expressed by government agencies in regard to national security information. Foreign individuals, including ambassadors, have rights equal to those of citizens under the FOIA. 120 CONG. REC. H6806 (daily ed. Mar. 14, 1974) (remarks of Rep. Moorhead). These rights could be used regardless of the status of the requesting party. See Weinstein, *Open Season on 'Open Government'*, N.Y. Times, June 10, 1979, § 6 (Magazine), at 78.

⁹ The FOIA provides for nine categories of information which are exempt from disclosure. See *infra* note 75 and accompanying text.

¹⁰ 112 CONG. REC. H13641 (daily ed. June 20, 1966) (remarks of Rep. Moss).

¹¹ *Id.* at H13641-H13642.

¹² 1 O'REILLY, *supra* note 8, at 3-16.1.

¹³ 5 U.S.C. § 552(a)(1)-(2), (b)(1)-(9).

¹⁴ 5 U.S.C. § 552(a)(1)-(6).

¹⁵ *Id.*

¹⁶ Amendment of the national security exemption which intrudes too far into the Executive's domain, however, may create a separation of powers problem. See *infra* note 34.

¹⁷ See generally 1 O'REILLY, *supra* note 8, at 7-1 through 7-20.

¹⁸ 5 U.S.C. § 552(a)(1),(2),(3),(5),(6).

¹⁹ 5 U.S.C. § 552(b)(1)-(9).

²⁰ 5 U.S.C. § 552(a)(4)(B).

²¹ 5 U.S.C. § 552(a)(4)(B) empowers the Judiciary to conduct a *de novo* review of the propriety of an agency's decision to withhold information. *Id.* This review of the documents which have been claimed by the agency to be exempt from disclosure may include a complete examination of the documents themselves and of the legal issues, without any judicial deference to the agency's prior determination of exempt status. 1 O'REILLY, *supra* note 8, at 8-13. Commentators have praised judicial *de novo* review because it removes questions of disclosure from the absolute discretion of bureaucrats. Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 905 (1974) (hereinafter cited as *Seven-Year Assessment*).

properly withheld the information and to order the disclosure of information that is improperly withheld.²²

Performance by each branch of its assigned role maintains the balance between the public interest in disclosure and the governmental interest in the protection of information. In cases involving the first of the Act's nine exemptions, the national security exemption,²³ however, the judiciary has expressed its reluctance to perform its assigned role.²⁴ The courts are rarely willing to review the executive agencies' decisions to withhold information and enjoin those that are improper.²⁵ As a result, in those national security cases in which an agency's decision is improper, the judiciary's reluctance leaves the public's right of access to government information inadequately protected.²⁶

Agencies may make improper decisions to withhold information in national security cases for several reasons. First, the criteria which define "national security information" are difficult to apply.²⁷ Second, in a world of fluid political situations, the amount of damage to national security which may result from the disclosure of a particular document is sometimes impossible to predict.²⁸ Finally, the consequences of an erroneous decision to disclose may be disastrous: an ill-advised disclosure of sensitive information could seriously threaten national security. Because of the uncertainties and risks attendant upon the determination of whether to disclose certain information, agencies are inclined to be exceedingly protective of any information, the disclosure of which may even remotely threaten national security.²⁹ In some cases, the protection of this information may be improper under the FOIA.³⁰

The national security exemption possesses the potential for creating a further problem for the FOIA's system of maintaining a balance between public and governmental interests. The FOIA provides that the criteria for the national security exemption be established by the President in his Executive Order on National Security Information.³¹

²² 5 U.S.C. § 552(a)(4)(B) provides statutory authority for judicial review of FOIA claims. The U.S. District Court in the district in which the complainant resides or has his principal place of business, or in which the agency records are situated, or in the District of Columbia has jurisdiction. *Id.* The court is empowered to make a *de novo* determination of the propriety of the agency's decision to withhold records and order the production of any improperly withheld records. *Id.*

²³ 5 U.S.C. § 552(b)(1). See *infra* notes 215-290 and accompanying text.

²⁴ See *Stein v. Department of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981) ("The court is in no position to second-guess . . . the agency's determination of the need for classification. . . . [The court] must defer to the agency's evaluation of the need to maintain the secrecy of the [information]."); *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions. . . . Judges, moreover, lack the expertise necessary to second-guess such agency opinions. . . .").

²⁵ See *infra* notes 215-290 and accompanying text.

²⁶ See *id.*

²⁷ National security is concerned with potential dangers — with probabilities rather than concrete threats which are readily foreseeable and easily grasped. *Executive Order on Security Classification, Hearings before a Subcommittee of the House Committee on Government Operations*, 97th Cong., 2d Sess. 11-12 (1982) (hereinafter cited as *Classification Hearings*). The "national security" criterion is thus so intrinsically vague and elastic that courts may have difficulty applying it to executive classification decisions. See *id.* at 43-48; Note, *National Security and the Amended FOIA*, 75 YALE L.J. 401, 411 (1976) (hereinafter cited as *Yale Note*).

²⁸ See *Yale Note*, *supra* note 27, at 411-412.

²⁹ 1 O'REILLY, *supra* note 8, at 3-9 through 3-11.

³⁰ *Alfred Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975). See also 1 O'REILLY, *supra* note 8, at 3-9 through 3-11.

³¹ 5 U.S.C. § 552(b)(1). For a discussion of Executive Orders, see *infra* notes 136-147 and accompanying text.

By empowering the executive branch to define the types of information which may be protected under the FOIA's national security exemption and to amend the criteria at will,³² Congress has eliminated a possible check against the executive's power to withhold information. In the FOIA's eight other exemptions, Congress establishes the criteria for exemption and thus defines the scope of the executive's power to protect information.³³ In the national security exemption, however, Congress vests total control in the executive to define the scope of its power to protect information. The allocation of control over national security matters to the executive conforms to the separation of powers doctrine.³⁴ Nevertheless, the elimination of this check creates the potential for abuse by the executive.³⁵ For example, the President could establish criteria for exemption from the FOIA which are so broad as to permit agencies to withhold any information they want, regardless of the public interest in the disclosure of that information.³⁶

As a result of the broad grant of power to the executive branch and the agencies' tendency to overprotect some information under the national security exemption, the judiciary's role is especially important in national security cases.³⁷ In order for the FOIA to operate effectively in regard to national security information, the judiciary should exercise its authority to make a *de novo* determination of the propriety of the agencies' decisions to protect information and to enjoin those that are improper.³⁸

Unfortunately, the courts have been reluctant to conduct a thorough *de novo* review of the agencies' decisions to withhold information.³⁹ The courts' reluctance reveals their willingness to defer to the executive agencies.⁴⁰ Such deference is a product of several

³² The President is empowered to make and issue such orders and instructions from time to time as he may think necessary. 11 Stat. 60 (1856). It should be noted, however, that there is no explicit congressional delegation of legislative power by Congress for the promulgation of Executive Orders on national security information except to the extent that the 1974 Amendments of the FOIA expressly incorporate the criteria of the Orders. In addition, it has long been contended that the President requires no specific delegation because the power, specifically executive privileges, is inherent in the President under the separation of powers doctrine, and because it is a necessary concomitant of his power to make rules and regulations for the proper operation of the executive branch of the federal government. MEZINES, STEIN, & GRUFF, *ADMINISTRATIVE LAW* § 10.02, at 10-30 through 10-31.

³³ 5 U.S.C. § 552(b)(2)-(9).

³⁴ The separation of powers doctrine gives the Executive authority over national security. See *infra* note 341; Note, *National Security and the Public Right to Know: A New Role for the Courts Under the FOIA*, 123 U. PA. L. REV. 1438, 1466-67 (1975) (hereinafter cited as Note, *Right to Know*). Congress has been cautious in its considerations of amending the national security exemption. See *Classification Hearings*, *supra* note 27, at 20-21. Congress is unsure of the boundaries created by the separation of powers doctrine, and it seeks to avoid a constitutional conflict. *Id.* The problems raised by Separation of Powers concerns, however, are beyond the scope of this Note.

³⁵ See *infra* text accompanying notes 156-204.

³⁶ *Id.*

³⁷ See *infra* notes 205-297 and accompanying text.

³⁸ *Id.*

³⁹ See H.R. REP. NO. 793, 95th Cong., 1st Sess. 10 (1977) ("[I]n most instances the courts have been reluctant to second guess the classifications imposed by the government.") See also *infra* notes 205-297 and accompanying text.

⁴⁰ See *Afshar v. Department of State*, 702 F.2d 1125, 1137 (D.C. Cir. 1983) ("This court will not . . . question the President's determination that the national security requires increased secrecy."); *Weissman v. C.I.A.*, 565 F.2d 692, 697 (D.C. Cir. 1977) ("Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. . . . [The court] need not . . . test the expertise of the agency or . . . test its veracity when nothing appears to raise the issue of good faith."); Comment, *Developments Under the Freedom of Information Act — 1982*, 1983 DUKE L. J. 390, 395 ("courts generally defer to agency document classification under exemption (b)(1)").

factors: the difficulty of deciding whether the disclosure of a document will endanger national security;⁴¹ the judiciary's perceived lack of competence in matters of national security;⁴² and the executive's historical exercise of authority over matters of national security and foreign policy.⁴³

Congress was aware of these problems⁴⁴ and nevertheless determined that the judiciary should be empowered to make the difficult determinations which are necessary to the effective enforcement of the FOIA.⁴⁵ As a result, the FOIA depends heavily upon the courts' performance of their assigned role. The judiciary's failure to perform fully its function creates serious problems for the successful operation of the FOIA.

This Note will explore the problems presented by the judiciary's failure to play its proper role in the operation of the FOIA. It will focus on the special necessity of judicial review of decisions by executive agencies to protect a particular document pursuant to the FOIA's national security exemption. Finally, it will discuss recent developments affecting the effectiveness of the FOIA in regard to national security information.

Section I⁴⁶ presents an overview of the Freedom of Information Act and introduces the two provisions which are most relevant to the aforementioned problems, the national security exemption⁴⁷ and the provision for judicial review.⁴⁸ These provisions are then fully examined in the two sections which follow. Section II⁴⁹ analyzes the national security exemption's broad grant of power to the executive branch⁵⁰ and sets forth the problems which the exercise of that power creates for the FOIA.⁵¹ Section III⁵² defines the scope and purposes of the FOIA's provision for judicial review⁵³ and examines the courts'

⁴¹ See *New York Times Co. v. U.S.*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The word 'security' is a broad, vague generality."); *Zweibon v. Mitchell*, 516 F.2d 594, 623 (D.C. Cir. 1975) (quoting *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)) (Decisions as to national security "are delicate, complex, and involve large elements of prophesy."); *Yale Note*, *supra* note 27, at 411.

⁴² *Salisbury v. U.S.*, 690 F.2d 966, 970 (D.C. Cir. 1982) ("Judges lack the expertise necessary to second-guess such agency opinions."); *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions."); *Bell v. U.S.*, 563 F.2d 484, 487 (1st Cir. 1977) (standard of review does not allow court to substitute its judgment for that of the agency); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1976) ("[T]he question of what is desirable in the interest of national defense . . . is not the sort of question that courts are designed to deal with.")

⁴³ See Comment, *FOIA: A Survey of Litigation Under the Exemptions*, 48 Miss. L.J. 784, 787 (1977) ("Since these secrets were already protected from disclosure by the quasi-constitutional concept of executive privilege, judicial interpretation has resulted in a diminution of Exemption One's effectiveness."); Note, *Right to Know*, *supra* note 34 at 1466-1468.

⁴⁴ *Hearings on S.1142 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess., pt.2 at 108 (1974).

⁴⁵ See S. REP. NO. 854, 93d Cong., 2d Sess., reprinted in *Staffs of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974* (Pub. L. 93-502), *Source Book: Legislative History, Texts, and Other Documents* 183 (1974) (hereinafter cited as *Source Book*); Note, *Right to Know*, *supra* note 34, at 1449-1450.

⁴⁶ See *infra* notes 58-130 and accompanying text.

⁴⁷ See *infra* notes 81-96 and accompanying text.

⁴⁸ See *infra* notes 97-130 and accompanying text.

⁴⁹ See *infra* notes 131-203 and accompanying text.

⁵⁰ See *infra* notes 131-177 and accompanying text.

⁵¹ See *infra* notes 178-203 and accompanying text.

⁵² See *infra* notes 205-297 and accompanying text.

⁵³ See *infra* notes 205-214 and accompanying text.

reluctance to assume the responsibilities which Congress had given them.⁵⁴ Finally, Section IV⁵⁵ examines the effects which the courts' deference has upon the FOIA in light of recent developments⁵⁶ and considers solutions to the resulting problems. It then concludes that any solution requires the active enforcement of the FOIA by the courts.⁵⁷

1. THE FOIA: PROTECTION OF THE PUBLIC'S RIGHT

The FOIA was originally enacted in 1966⁵⁸ and was substantially strengthened by amendment in 1974.⁵⁹ The Act embodies Congress' recognition of the need to establish a statutory right of public access to government information.⁶⁰ The Act is based on the assumption that any person⁶¹ should have access to identifiable, existing records⁶² of a federal government agency⁶³ without having to demonstrate a need for the requested information.⁶⁴ The thrust of the FOIA is to mandate responsible disclosure of government information.⁶⁵

The broad disclosure requirements of the FOIA are not unqualified. Rather, as noted above, the Act attempts to achieve a balance between the public's right of access to information and the legitimate needs of governmental secrecy⁶⁶ by enumerating nine categories of information which may be withheld in the interests of national security, the privacy of individuals, or the effective operation of government.⁶⁷ Although the Act specifies nine categories of information which may be protected from disclosure,⁶⁸ these exemptions do not *require* agencies to withhold records, but merely *permit* the protection of information.⁶⁹

⁵⁴ See *infra* notes 215-297 and accompanying text.

⁵⁵ See *infra* notes 300-351 and accompanying text.

⁵⁶ See *infra* notes 300-332 and accompanying text.

⁵⁷ See *infra* notes 333-351 and accompanying text.

⁵⁸ Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383.

⁵⁹ Pub. L. No. 93-502, 88 Stat. 1561 (1974). Two amendments in particular substantially strengthened the Act. First, courts were empowered to conduct a discretionary *in camera* inspection of disputed documents. See *infra* notes 241-264 and accompanying text. Second, in national security cases, courts were granted the power to review the substantive propriety of the classification decision as well as the procedural propriety. See *infra* notes 92-96 and accompanying text.

⁶⁰ 111 CONG. REC. 2797 (daily ed. Feb. 17, 1965) (remarks of Senator Long) ("[O]ur purpose in introducing the [FOIA] is that a necessary corollary to the right of a democratic people to participate in governmental affairs is the right to acquire information."); 112 CONG. REC. H13641 (daily ed. June 20, 1966) (remarks of Rep. Moss).

⁶¹ 5 U.S.C. § 552(a)(3)(B).

⁶² 5 U.S.C. § 552(a)(3).

⁶³ 5 U.S.C. § 552(e).

⁶⁴ See *supra* note 8 and accompanying text.

⁶⁵ 1 R. DAVIS, *supra* note 4, at 329; 112 CONG. REC. H13645 (daily ed. June 20, 1966) (remarks of Rep. Moss) ("[FOIA] seeks to open to all citizens, so far as consistent with other national goals of equal importance, the broadest possible range of information."); S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

⁶⁶ See *supra* note 4.

⁶⁷ See *infra* note 75 and accompanying text.

⁶⁸ 5 U.S.C. § 552(b)(1)-(9).

⁶⁹ Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. S. REP. NO. 854, 93d Cong., 2d Sess. 6 (1974), reprinted in *Source Book*, *supra* note 45, at 158. Rather, they are only permissive. *Id.* They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances dictate that the information should be withheld. *Id.*

The FOIA is divided into five subsections. Subsection (a) is the heart of the Act. It sets forth the types of information which shall be made available to the public,⁷⁰ the manner in which such information shall be made available,⁷¹ and the means by which requests for information must be made.⁷² It also outlines the scope and procedure of judicial review of a decision to deny disclosure of requested information,⁷³ and delineates the provisions for disciplinary action against a government official who fails to comply with the Act.⁷⁴ Subsection (b) enumerates the nine categories of information which are exempt from the disclosure provisions of the FOIA: national security information; government personnel rules; information specifically exempted from disclosure by another statute; trade secrets; inter-agency memoranda; personnel files; investigatory records; reports related to the regulation of financial institutions; and geological data concerning wells.⁷⁵ Subsection (c) re-emphasizes the Act's overriding policy of responsible disclosure by specifically limiting the scope of exemptions from disclosure to those categories enumerated in subsection (b).⁷⁶ Subsection (d) requires agencies to make annual reports to Congress regarding their administration of the Act.⁷⁷ Subsection (e) describes the various governmental entities and agencies that are subject to the provisions of the FOIA.⁷⁸

One of the more controversial provisions of the FOIA is the national security exemption.⁷⁹ This exemption is the oldest and most well-established ground for withholding information.⁸⁰ It has also been the one exemption most frequently criticized by advocates of greater public access to government information.⁸¹ The national security exemption presents two potential problems for the FOIA. First, because of the high degree of uncertainty and risk attendant upon questions dealing with sensitive information,⁸² the amount of government information which is protected may be excessive.⁸³ Second, by empowering the executive to establish the criteria for determining which information shall be protected,⁸⁴ the exemption alters the distribution of power among the three branches found elsewhere in the FOIA and creates the possibility of abuse by the executive.⁸⁵

The national security exemption provides that mandatory disclosure under the FOIA does not apply to matters that are both: (a) specifically authorized under criteria

⁷⁰ 5 U.S.C. § 552(a)(1)-(3).

⁷¹ *Id.*

⁷² 5 U.S.C. § 552(a)(3).

⁷³ 5 U.S.C. § 552(a)(4)(B). *See infra* notes 205-297 and accompanying text.

⁷⁴ 5 U.S.C. § 552(a)(4)(F).

⁷⁵ 5 U.S.C. § 552(b)(1)-(9).

⁷⁶ 5 U.S.C. § 552(c).

⁷⁷ 5 U.S.C. § 552(d).

⁷⁸ 5 U.S.C. § 552(e).

⁷⁹ *See* *Environmental Protection Agency v. Mink*, 410 U.S. 73, 81-84 (1973); *See generally* *Hearings "Executive Privilege, etc." Before a Subcommittee of the Senate Judiciary Committee and a Subcommittee of the House Committee on Government Operations*, 93d Cong. 1st Sess. (1973) Vol. 1 (extensive hearings on the national security exemption); *Yale Note, supra* note 27, at 403 n.20 (discussing compromise draft on House and Senate versions).

⁸⁰ *See* 1 O'REILLY, *supra* note 8, at 11-1.

⁸¹ *Id.* at 11-2.

⁸² *See* *Yale Note, supra* note 27, at 411-412.

⁸³ *Classification Hearings, supra* note 27, at 50-51 (testimony of Alan Adler and Morton Halperin); *id.* at 16 (remarks of Rep. English).

⁸⁴ *See infra* notes 156-203 and accompanying text for a discussion of the Executive's exercise of this power.

⁸⁵ *Id.*

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.⁸⁶ The exemption expressly vests in the executive the power to establish the criteria for determining which information may be protected. As a result, the relevant Executive Order on national security information is an integral part of the national security exemption.⁸⁷ Discussion of Executive Orders is reserved, however, for Section II.⁸⁸

The present national security exemption is the result of a much-debated congressional action⁸⁹ which, in 1974, amended the prior exemption. Overriding a Presidential veto,⁹⁰ Congress voted to restrict the scope of executive privilege claims under the

⁸⁶ 5 U.S.C. § 552(b)(1). Prior to 1974, subsection (b)(1) exempted matters "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1), Pub. L. 90-23 (1967).

⁸⁷ See 1 O'REILLY, *supra* note 8, at 11-8.

⁸⁸ See *infra* notes 131-203 and accompanying text.

⁸⁹ An excellent compilation of the debate of the 1974 Amendments to the FOIA is found in *Source Book*, *supra* note 45.

⁹⁰ See 120 CONG. REC. H36243-H36244 (1974) (veto message of President Ford). In vetoing the amendment, President Ford contended that it seriously intruded upon the Executive's authority to classify information in order to protect national security. *Id.* He felt that the decision to classify a document and refuse disclosure may be exercised properly only by the executive branch because the Constitution vests in the Executive the authority to conduct foreign relations and maintain the national defense. See *id.* See also remarks of Senator Hruska, who supported the President's view during debate over whether to override the veto. 120 CONG. REC. S3682-S36873 (daily ed., Nov. 21, 1974).

Under the amended language of the exemption, however, the criteria used by an agency in a decision to exempt materials remain those set forth in the prevailing Executive Order on National Security Information. Compare 5 U.S.C. § 552(b)(1) (1967) with U.S.C. § 552(b)(1) (1982). Executive Orders on National Security Information prescribe a uniform system for classifying, declassifying, and safeguarding national security information. See Exec. Order No. 12,356, 3 C.F.R. 166, 166 (1983). They are very explicit about what information shall be classified, how it shall be classified, and who is authorized to make the decision. See *infra* notes 136-155 and accompanying text for a discussion of Executive Orders in general, and see *infra* notes 180-203 and accompanying text for a discussion of the present Executive Order, President Reagan's Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

The Judiciary is not empowered to review the propriety of the standards set forth in the Executive Order. See 120 CONG. REC. H6808 (daily ed., Mar. 14, 1974) (remarks of Rep. Erlenborn). It only reviews the agencies' application of those standards. See *id.*; Clark, *supra* note 3, at 758-59 (The Judiciary is only empowered to require the executive agencies to comply with the standards.). The Conference Committee said that this judicial check should prevent agencies from extending the scope of the national security exemption beyond the limits established by the Executive Order. H.R. REP. NO. 1380, 93d Cong., 2d Sess. (1974). According to the District of Columbia Circuit, the rationale for a cautious judicial review, which a *de novo* review can produce, was the congressional intention that judicial review should be a safeguard against the potential that agencies could partially undo the statutory boundaries on exempt status. *Allen v. C.I.A.*, 636 F.2d 1287, 1297 (D.C. Cir. 1980). If an agency could expand the class of exempt materials, and not have to fear careful review in doing so, the court surmised that the exemptions could be quietly narrowed. *Id.*

The FOIA thus continues to vest broad power in the Executive to prescribe the standards and procedures for the classification of national security information. Congress may limit the Executive's power by amending the FOIA. See *Classification Hearings*, *supra* note 27, at 20-21. The FOIA, as it presently exists, however, does not provide for any statutory check on Executive power. For a discussion of the Constitutional constraints on Congress' ability to limit Executive power in regard to national security information, see Note, *Right to Know*, *supra* note 34, at 1466-67.

FOIA⁹¹ by adding the new requirement that the withheld information be "in fact properly classified pursuant to such Executive Order."⁹² Prior to the amendment, a court reviewing a claim under the national security exemption was limited to a review of the procedural propriety of the classification.⁹³ The courts were not empowered to determine whether the classification was substantively proper.⁹⁴ The amended language of the exemption, however, expressly authorizes the courts to review the substantive as well as the procedural propriety of a classification decision.⁹⁵ The 1974 Amendments to the FOIA thus opened the issue of proper classification to an independent review by the judiciary.⁹⁶

Judicial review under the FOIA is an integral part of the Act. Representative John D. Moss, a sponsor of the original FOIA, has described the provision for judicial review of an agency's refusal to disclose requested information⁹⁷ as "by far the most important provision of [the FOIA]. It is this device that expands the rights of citizens and which protects them against arbitrary or capricious denials [of access to government information]."⁹⁸ The Act grants Federal District Courts "jurisdiction to enjoin the agency from the withholding of agency records improperly withheld from the complainant."⁹⁹ In such cases, Congress explicitly provided that "the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action."¹⁰⁰

⁹¹ Prior to the 1974 debates, the (b)(1) exemption had a simpler form. See *supra* note 86. This form, as interpreted in several cases prior to the 1973 Supreme Court opinion in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), allowed more latitude in withholding than the presently defined criteria. See *Wolfe v. Froelke*, 358 F. Supp. 1318, 1320 (D.D.C. 1973) (The court did not look beyond the procedural propriety of the agency's classification decision.); *Epstein v. Resor*, 296 F. Supp. 214, 217 (N.D. Cal. 1969) (The standard applied was whether the classification was "clearly arbitrary and unsupportable.").

⁹² 5 U.S.C. § 552(b)(1).

⁹³ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 84 (1974).

⁹⁴ *Id.*

⁹⁵ See H.R. REP. NO. 1380, 93d Cong., 2d Sess. 11-12 (1974); S. REP. NO. 1200, 93d Cong., 2d Sess. 11-12 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6273, 6273; *Source Book*, *supra* note 45, at 127. A court's review of the procedural propriety of a classification decision consists of merely checking to see that the procedural rules of classification were obeyed and that the proper substantive standards were applied. *Id.* A court's review of the agency's substantive decision, however, consists of reviewing the correctness of the agency's application of these substantive standards. See 1 O'REILLY, *supra* note 8, at 11-6.

⁹⁶ The courts are empowered to review an agency's application of Executive Order criteria even if the review requires the court to weigh foreign affairs and national defense issues against citizen rights. See 1 O'REILLY, *supra* note 8, at 11-6. Cf. *Zweibon v. Mitchell*, 516 F.2d 594, 601-602 (D.C. Cir. 1975) (warrant issuance may depend on national security considerations), *cert. denied*, 425 U.S. 944 (1976). But see *Weissman v. C.I.A.*, 565 F.2d 692, 697 (D.C. Cir. 1977), in which the court accorded great deference to the agency, thus suggesting that although the court was empowered to act it was perhaps not competent to do so. *Weissman v. C.I.A.*, 565 F.2d 692, 697 (D.C. Cir. 1977). *Weissman* has been followed by many other courts. See *Raven v. Panama Canal Co.*, 583 F.2d 169, 171-172 (5th Cir. 1978) (Inquiry beyond the agency's affidavits would "require the court to . . . substitute its judgment of the risk to national security for that of the agency."); *Diviao v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978) (Court applied rule set forth in *Weissman*.); *Maroscia v. Levi*, 569 F.2d 1000, 1003 (7th Cir. 1978) ("Our responsibility is not to 'test the expertise of the agency, or to question its veracity where nothing appears to raise the issue of good faith' " (quoting *Weissman*, 565 F.2d at 697).); *Bell v. U.S.*, 563 F.2d 484, 487 (1st Cir. 1977) (Court agrees with standard applied in *Weissman*.).

⁹⁷ 5 U.S.C. § 552(a)(4)(B).

⁹⁸ 112 CONG. REC. H13641 (daily ed., June 20, 1966) (remarks of Rep. Moss).

⁹⁹ 5 U.S.C. § 552(a)(4)(B).

¹⁰⁰ *Id.*

The *de novo* review of an agency's decision to deny disclosure of requested information proceeds in essentially three stages: 1) the court determines the legal criteria for the exemptions claimed by the Government; 2) it determines the facts of the case; and 3) it applies the legal criteria to the facts and determines whether the documents were properly withheld under the claimed exemptions.¹⁰¹

As the first stage of review, there are few problems.¹⁰² The prevailing Executive Order clearly sets forth the relevant legal criteria for the national security exemption.¹⁰³ At the second stage, the court determines all the relevant facts.¹⁰⁴ Such facts include the nature of the withheld materials,¹⁰⁵ the purposes for which the documents were created,¹⁰⁶ whether the proper classification procedures were followed,¹⁰⁷ and the possible effects of disclosure upon national security.¹⁰⁸

Determination of the facts in national security cases presents special problems. A significant problem is the difficulty of maintaining an adversarial proceeding.¹⁰⁹ Because of the alleged sensitivity of the disputed material, the "adversariness" of the proceeding is necessarily limited.¹¹⁰ Disclosure of all the information which would be necessary to have a truly adversarial proceeding is impossible.¹¹¹ To do so would be to enable the plaintiff to acquire access to the information and thereby circumvent the requirements of the FOIA by merely instituting a lawsuit.

Special procedures for gathering the facts in these cases, however, have been developed in order to maintain as public and adversarial a proceeding as possible.¹¹² One of these procedures requires the Government to submit public affidavits to assist the trial court in conducting its *de novo* review.¹¹³ These public affidavits describe the withheld material and provide all evidence which may be relevant to each claimed exemption.¹¹⁴ To

¹⁰¹ Ray v. Turner, 587 F.2d 1187, 1214-1215 (D.C. Cir. 1978) (Wright J., concurring).

¹⁰² But see *infra* text accompanying notes 223-236.

¹⁰³ See 5 U.S.C. § 552(b)(1). The present Executive Order is President Reagan's Exec. Order No. 12,356, 3 C.F.R. 166 (1983). See *infra* notes 180-203 and accompanying text for a discussion of this Executive Order.

¹⁰⁴ Ray v. Turner, 587 F.2d 1187, 1215 (Wright J., concurring).

¹⁰⁵ In *Phillipi v. C.I.A.*, 546 F.2d 1009, 1013-1014 (D.C. Cir. 1976), the nature of the requested documents were such that the very acknowledgment of their existence, regardless of their content, was shown to pose a threat to national security.

¹⁰⁶ See, e.g., *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) (The information at issue was communicated to or by an attorney in order to provide the Air Force with legal advice. As such, it was protected by the attorney-client privilege.).

¹⁰⁷ See *Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1332-1333 (D.C. Cir. 1980) (Documents classified after FOIA request was made were not properly classified under the allegedly relevant Executive Order.); *Halperin v. Department of State*, 565 F.2d 699, 704-707 (D.C. Cir. 1977) (Documents classified at the time they were created were not classified properly under the relevant criteria.).

¹⁰⁸ Ray v. Turner, 587 F.2d 1187, 1215 (Wright J., concurring). See *supra* note 41 and accompanying text for a discussion of the difficulty of determining these effects.

¹⁰⁹ Ray v. Turner, 587 F.2d 1187, 1212 (Wright J., concurring).

¹¹⁰ *Id.*

¹¹¹ A true adversary proceeding would require that the requesting party have access to the withheld materials. See S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965). Such access would enable that party to explain why the information must be disclosed. See *id.*

¹¹² Ray v. Turner, 587 F.2d 1187, 1212 (Wright J., concurring).

¹¹³ S. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974); *Allen v. C.I.A.*, 636 F.2d 1287, 1291 (D.C. Cir. 1980); *Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979); *Ray v. Turner*, 587 F.2d 1187, 1210-1211 (D.C. Cir. 1978).

¹¹⁴ Ray v. Turner, 587 F.2d 1187, 1214 (D.C. Cir. 1978) (Wright, J., concurring).

enhance the adversary process, the D.C. Circuit Court of Appeals requires these affidavits to be as detailed as possible without revealing the information which is claimed to be exempt.¹¹⁵

A further procedure available to the court is *in camera* inspection of the documents at issue.¹¹⁶ In cases where the agency affidavits are not sufficiently specific, the court may conduct an *in camera* inspection of the documents themselves.¹¹⁷ The court's power to inspect *in camera*, however, is discretionary, and not limited to cases where the affidavits are clearly insufficient.¹¹⁸ Inspection *in camera* may be ordered as a result of "an uneasiness, or a doubt [the judge] wants satisfied before he takes responsibility for a [*de novo*] determination."¹¹⁹ Courts and commentators have stated that an *in camera* inspection is often necessary in order to make a thorough and responsible determination of the necessary facts.¹²⁰

At the third stage of its *de novo* review, the court applies the legal criteria to the facts and decides whether the agency's claim of exemption is proper.¹²¹ In making this determination, the court is charged with the responsibility of assuring the substantive, as well as the procedural propriety of the classification.¹²² Further, the Government bears the

¹¹⁵ The affidavits must meet well established standards of specificity in order for the court to make a responsible *de novo* determination. They must show, with reasonable specificity, why the information falls within the claimed exemption. *Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). Affidavits will not suffice if they are conclusory, merely recite the statutory standards, or are vague. *Id.* A detailed index and affidavit are necessary even if the court conducts an *in camera* examination. *Id.* These public explanations of the agency's action provide the plaintiff with at least some basis from which he can argue his position in an adversarial proceeding. *Id.* These documents also provide assistance to the court by focusing on the relevant issues and arguments. See *Mead Data Central Inc. v. Department of the Air Force*, 566 F.2d 242, 250-251, 260-262 (D.C. Cir. 1977); *Vaughn v. Rosen*, 484 F.2d 820, 825-828 (D.C. Cir. 1973). The requirement of submitting public affidavits may be modified, but only under extreme circumstances. See *Phillipi v. C.I.A.*, 546 F.2d 1009, 1012 (D.C. Cir. 1976) where affidavits were submitted under seal for *in camera* inspection when the government alleged that official confirmation of the mere existence of certain documents would endanger national security.

¹¹⁶ *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978) (Wright J., concurring). Employment of these procedures is not limited to national security cases. They are applicable to all FOIA cases. *Id.*

¹¹⁷ *In Camera* inspection consists of a private examination of documents by the judge or a quasijudicial special master. See generally R. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 3A.6-2 at 64-65 (1976) (hereinafter cited as R. Davis, Administrative Law); Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 558-561 (1974) (hereinafter cited as *In Camera Inspections*).

¹¹⁸ *Allen v. C.I.A.*, 636 F.2d 1287, 1296-1297 (D.C. Cir. 1980) (courts have broad discretion to employ *in camera* inspection); *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("The ultimate criterion is simply this: whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination.").

¹¹⁹ *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). Judge Skelly Wright of the D.C. Circuit has identified several factors which, while in no way meant to minimize the broad discretion granted to trial courts, should be considered by the court in the exercise of that discretion: judicial economy; bad faith on the part of the agency; the nature of the dispute; the public interest in disclosure. *Allen v. C.I.A.*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980).

¹²⁰ See S. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974) reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6287; *Ray v. Turner*, 587 F.2d 1187, 1211 (D.C. Cir. 1978) (Wright J., concurring); *Allen v. C.I.A.*, 636 F.2d 1287, 1298 (D.C. Cir. 1980).

¹²¹ *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978) (Wright, J., concurring).

¹²² See *supra* notes 92-96 and accompanying text.

burden of proving that the withheld documents are exempt.¹²³ This allocation of the burden of proof favors the party seeking disclosure because the *res* of the suit, the document, is in the exclusive possession of the agency.¹²⁴ As the initial Senate Report stated in 1965, the burden rests with the Government because it is the only party with enough information to explain why the information was withheld.¹²⁵ If the Government fails to meet its burden of proving that the requested material is exempt, the information must be released.¹²⁶

The overriding policy of the FOIA is to disclose whenever possible and to withhold only when necessary.¹²⁷ This policy is a response to what Congress has perceived to be the excessive classification practices of government agencies.¹²⁸ The Act embodies Congress' recognition of the need to protect the public's right of access to government information.¹²⁹ It also recognizes the legitimate government interest in secrecy for reasons of national security but seeks to safeguard this interest without sacrificing the public's interest in open government.¹³⁰

Having introduced the national security exemption and the provisions for judicial review, this Note will now examine each in greater detail. Section II will analyze the national security exemption's broad grant of power to the executive and the executive's exercise of that power through Executive Orders. After a discussion of Executive Orders in general, this section will focus upon the current Executive Order, President Reagan's E.O. 12356, and describe its effect upon the public's rights under the FOIA.

II. THE ROLE OF THE EXECUTIVE BRANCH

The executive branch plays two roles in the operation of the FOIA's national security exemption. First, executive agencies regularly determine whether a particular document must be disclosed or whether it fits into one of the exempt categories and can therefore be protected.¹³¹ Second, the President establishes the criteria to be used by the agencies in classifying national security information.¹³² An understanding of the executive's second role is necessary to a discussion of the particular problems created by the national security exemption.

As noted in Section I,¹³³ the prevailing Executive Order on National Security Infor-

¹²³ The FOIA places the burden of proof upon the agency "to sustain its action" of withholding information. 5 U.S.C. § 552 (a)(4)(B). Some courts will shift the burden to the requester. *See Ray E. Friedman & Co. v. C.F.T.C.*, No. 80-C-6389 (N.D. Ill. 1982). Once the exemption is shown to apply, the plaintiff may be compelled to go forward with contrary affidavits which impeach the declarations of the government's affidants. *Id.*

¹²⁴ 1 O'REILLY, *supra* note 8, at 8-36. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

¹²⁵ S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965).

¹²⁶ 1 O'REILLY, *supra* note 8, at 8-37.

¹²⁷ *See Source Book*, *supra* note 45, at 250; *Davis v. C.I.A.*, 711 F.2d 858, 861 (8th Cir. 1983) (quoting *Kuehnert v. F.B.I.*, 620 F.2d 662, 665 (8th Cir. 1980)).

¹²⁸ *See Source Book*, *supra* note 45, at 257 (remarks of Rep. Moss); *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978).

¹²⁹ *See supra* note 3 and accompanying text.

¹³⁰ *See Note, Right to Know*, *supra* note 34, at 1473.

¹³¹ *See generally* 1 O'REILLY, *supra* note 8, at Ch. 7; *Consumers Union of U.S., Inc. v. V.A.*, 301 F. Supp. 796, 799-800 (S.D.N.Y. 1969).

¹³² 5 U.S.C. § 552 (b)(1) (1982) defines the criteria for the national security exemption as those prescribed by Executive Order.

¹³³ *See supra* notes 58-130 and accompanying text.

mation sets forth the criteria for determining whether a document has been properly withheld under the FOIA's national security exemption.¹³⁴ Consequently, a detailed analysis of Executive Orders in general and the present Executive Order, President Reagan's E.O. 12356,¹³⁵ is vital to a discussion of the national security exemption. The results of this analysis can then be examined in terms of their effect on the FOIA.

An Executive Order is a formal directive issued by the President in which he prescribes such regulations and instructions as he may feel are conducive to the public interest.¹³⁶ This form of presidential communication is used in many different contexts.¹³⁷ Since 1940, Presidents have used Executive Orders to promulgate the procedures and criteria for classifying sensitive information.¹³⁸ Although the specific structure and procedure of Executive Orders on National Security Information vary, they generally prescribe standards for three or four levels of classification,¹³⁹ designate which government officials are authorized to classify information at each level,¹⁴⁰ and enumerate several broad categories of information which shall be considered for classification.¹⁴¹

When a document is created, it is reviewed by an official with classification authority. That official determines whether it must be classified pursuant to the Executive Order.¹⁴² The manner of this review varies from Order to Order, depending upon the procedures prescribed by each. In recent Orders, however, the review has been conducted in two

¹³⁴ See 5 U.S.C. § 552(b)(1). These orders prescribe a uniform system for classifying, declassifying, and safeguarding national security information. Exec. Order No. 12,356, 3 C.F.R. 166 (1983). They are very explicit about what information shall be classified, how it shall be classified, and who is authorized to make the decision. See, e.g., *id.*

¹³⁵ Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (effective Aug. 1, 1982).

¹³⁶ 11 Stat. 60 (1856).

¹³⁷ Ehlke and Relyea, *The Reagan Administration Order on Security Classification: A Critical Assessment*, 30 FED. BAR. N & J 91, 91 (1983) (hereinafter cited as *Assessment*).

¹³⁸ *Id.* at 92. Since President Roosevelt issued Exec. Order No. 8381 in 1940, Presidents Truman (Exec. Order No.'s 10,104 and 10,290), Eisenhower (Exec. Order No. 10,501), Nixon (Exec. Order No. 11,652), Carter (Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978)), and Reagan (Exec. Order No. 12,356, 3 C.F.R. 166 (1983)) have issued Orders on national security information.

¹³⁹ For example: Top Secret (information which "reasonably could be expected to cause exceptionally grave danger to the national security"); Secret ("serious damage"); Confidential ("damage"). Exec. Order No. 12,356 § 1.1(a)(1), (2), and (3), 3 C.F.R. at 167 (1983).

¹⁴⁰ Exec. Order No. 12,356 § 1.2, 3 C.F.R. at 167-168 (1983).

¹⁴¹ Exec. Order No. 12,356 § 1.3 states:

(a) Information shall be considered for classification if it concerns:

- (1) military plans, weapons, or operations;
- (2) the vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security;
- (3) foreign government information;
- (4) intelligence activities . . . , or intelligence sources or methods;
- (5) foreign relations or foreign activities of the United States;
- (6) scientific, technological, or economic matters relating to the national security;
- (7) United States Government programs for safeguarding nuclear materials or facilities;
- (8) cryptology;
- (9) a confidential source; or
- (10) other categories of information that are related to the national security . . . as determined by the [executive branch].

3 C.F.R. at 168-169 (1983).

¹⁴² See *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975).

steps.¹⁴³ First, the official must determine whether the information concerns one of the enumerated categories.¹⁴⁴ If the information does fit into one of those broad categories, it shall be considered for classification.¹⁴⁵ The official must then, at the second step, determine whether the information meets the minimum standard of classification.¹⁴⁶ If the document meets the standard, it must be classified.¹⁴⁷ All that remains to be determined is the appropriate level of classification.

The structure, scope, and procedure of Executive Orders have varied over the years.¹⁴⁸ At first, they only concerned the security of military information.¹⁴⁹ Gradually, however, they came to classify information "in the interest of national security."¹⁵⁰ It has been noted that this imprecise term, "national security," allows considerable latitude for the creation of secrets.¹⁵¹ Classified information is no longer limited to traditional military or national defense matters.¹⁵² Until recently, however, successive orders had gradually restricted the criteria and procedures for classifying government agency records.¹⁵³ Each successive Executive Order had become more cognizant of the Government's tendency to over-classify government information,¹⁵⁴ and a trend of providing for more disclosure developed.¹⁵⁵

In the midst of this growing trend of increased disclosure of government information, the FOIA was enacted.¹⁵⁶ In light of this trend, Congress possibly did not expect that

¹⁴³ See Exec. Order No. 12,065, 43 Fed. Reg. 28,949, 28,950-28,951 (1978) (President Carter's Order); Exec. Order No. 12,356, 3 C.F.R. 166, 166-169 (1983) (President Reagan's Order).

¹⁴⁴ Exec. Order No. 12,356, 3 C.F.R. 166, 168-169 (1983).

¹⁴⁵ *Id.*

¹⁴⁶ An example of such a standard would be whether disclosure of the information reasonably could be expected to cause damage to the national security. Exec. Order No. 12,356 Preamble, § 1.1 (a)(3), 3 C.F.R. 166, 166-167 (1983).

¹⁴⁷ Exec. Order No. 12,356, 3 C.F.R. 166 (1983). Under the previous Executive Order, classification was permissive, not mandatory. See Exec. Order No. 12,065 § 1-301, 43 Fed. Reg. 28,949, 28,951 (1978).

¹⁴⁸ See *Assessment*, *supra* note 137, at 92-94.

¹⁴⁹ *Id.* at 92.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; *Classification Hearings*, *supra* note 27, at 11-12, 43-48 (testimony of Prof. Cheh).

¹⁵² *Assessment*, *supra* note 137, at 92.

¹⁵³ *Id.* at 94.

¹⁵⁴ There is almost unanimous agreement on the existence of classification abuse. President Nixon stated that:

the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. . . . classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

8 WEEKLY COMP. PRES. DOC. 543 (1972). See also *Classification Hearings*, *supra* note 27, at 16 (remarks of Rep. English); *Renegotiation Board v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 34 (1974) (Douglas, J., Dissenting) ("It has been shown innumerable times that information is often withheld to cover up embarrassing mistakes. . . ."); *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978); 120 CONG. REC. S9316 (daily ed. May 30, 1974) (remarks of Sen. Kennedy); *Classification Hearings*, *supra* note 27, at 51 (In his testimony, Mr. Halperin states: "we have in the library of the Center for National Security Studies, file cabinet after file cabinet of documents where the classification stamps have been crossed out and the Government has released the material."); *Assessment*, *supra* note 137, at 94.

¹⁵⁵ See *Assessment*, *supra* note 137, at 94; *Classification Hearings*, *supra* note 27, at 3 (testimony of Professor Cheh).

¹⁵⁶ See *supra* note 59.

the unchecked power which the national security exemption vested in the executive branch would be used to restrict the public's access to government information.¹⁵⁷ Although the executive agencies still tended to over-classify,¹⁵⁸ the criteria of the Executive Orders during this period favored increased disclosure.¹⁵⁹ In fact, in 1978, President Carter promulgated the most disclosure-oriented Executive Order ever.¹⁶⁰

President Carter's E.O. 12065 contained several provisions which favored the disclosure of as much information as possible. The most significant provision was its general statement of policy, which stated that any substantial doubt should be resolved in favor of disclosure.¹⁶¹ This policy of limiting the amount of classified information to only that which clearly threatened national security was carried out by two important provisions. First, E.O. 12065 tightened the standards for classification by allowing classification only if disclosure could reasonably be expected to cause "at least identifiable damage to national security."¹⁶² The inclusion of the "identifiable" qualifier limited the agencies' discretion to classify information by requiring them to present specific justification for their decisions to classify.¹⁶³ Prior to E.O. 12065, information was classified in the interest of national security.¹⁶⁴ Use of the nebulous term, "national security," allowed considerable latitude in the creation of secrets.¹⁶⁵ Any withholding of information under this standard was fairly easy to justify.¹⁶⁶ E.O. 12065 limited the agencies' discretion in using the term, "national security," by requiring the agency to identify the specific nature of the harm that the disclosure of the information would cause.¹⁶⁷

The second provision of E.O. 12065 which favored the disclosure of as much information as possible was the so-called "balancing test."¹⁶⁸ This test was part of E.O. 12065's declassification procedure.¹⁶⁹ Pursuant to this procedure, information which had previously been classified was subject to mandatory review to determine whether it should continue to be protected.¹⁷⁰ Information which no longer satisfied the criteria of the Order was declassified, but more significantly, the "balancing test" required the declassification of some information that still satisfied the standards for classification.¹⁷¹ When information was reviewed and found to satisfy the criteria for classification, the reviewing official was required to further determine whether the public interest in disclosure outweighed the Government's interest in prohibiting disclosure of the docu-

¹⁵⁷ See 120 CONG. REC. H6809 (daily ed., Mar. 14, 1974) (remarks of Sen. Young), *reprinted in Source Book*, *supra* note 45, at 250 (noting that President Nixon had taken steps to correct the problem of over-classification); 120 CONG. REC. S9310 (daily ed., May 30, 1974) (remarks of Sen. Javits), *reprinted in Source Book*, *supra* note 45, at 311 (noting the overall movement of government towards declassification).

¹⁵⁸ See *supra* note 154.

¹⁵⁹ See *Assessment*, *supra* note 137, at 93.

¹⁶⁰ Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978).

¹⁶¹ Exec. Order No. 12,065 § 1-101, 43 Fed. Reg. 28,949, 28,950 (1978).

¹⁶² Exec. Order No. 12,065 § 1-302, 43 Fed. Reg. 28,949, 28,951 (1978).

¹⁶³ *Assessment*, *supra* note 137, at 93. No court, however, has focused on the presence of the qualifier as adding significantly to the burden on an agency to demonstrate classifiability of materials. See *id.* at 96; *Classification Hearings*, *supra* note 27, at 75. But see *infra* note 340 and accompanying text.

¹⁶⁴ *Assessment*, *supra* note 137, at 93.

¹⁶⁵ See *supra* note 151 and accompanying text.

¹⁶⁶ *Id.*

¹⁶⁷ See *Assessment*, *supra* note 137, at 93.

¹⁶⁸ Exec. Order No. 12,065 § 3-303, 43 Fed. Reg. 28,949, 28,955 (1978).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

ment.¹⁷² If the public's interest outweighed the Government's, the document was declassified.¹⁷³ This provision resulted in the disclosure of many documents which would have otherwise remained classified,¹⁷⁴ and through this provision, E.O. 12065 actively promoted the disclosure-oriented policies of the FOIA.¹⁷⁵ President Carter used his extensive power to establish the criteria of the national security exemption to further the purposes of the FOIA.¹⁷⁶ Although the executive agencies still tended to over-classify information,¹⁷⁷ the balance sought to be maintained by the FOIA did not appear to be seriously threatened.

The presently effective Executive Order, President Reagan's E.O. 12356,¹⁷⁸ however, does threaten the balance sought to be maintained by the FOIA.¹⁷⁹ According to several authorities, E.O. 12356 clearly reverses the trend toward providing for more disclosure.¹⁸⁰ Comparison to its predecessors reveals that E.O. 12356 is the most classification-oriented Order since the FOIA was enacted.¹⁸¹ It places heavy emphasis on the need for the protection of information over the public's need for access to government records.¹⁸²

Although E.O. 12356's preamble professes that "it is essential that the public be informed concerning the activities of its Government,"¹⁸³ its overwhelming message is to classify whenever possible.¹⁸⁴ This overriding policy of increased classification is best illustrated by the present Order's provision for cases where there is doubt about whether a document should be classified. E.O. 12356 provides that when there is a "reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified."¹⁸⁵ This language marks a radical departure from the language of the preceding Executive Order, E.O. 12065, which provided that any "substantial" doubt should be resolved in favor of disclosure.¹⁸⁶ The basic policy of E.O. 12356 as evidenced by the language of this section is thus in direct contradiction with that of its predecessor, E.O. 12065.

Other features of President Reagan's Order reveal this same dramatic reversal in policy concerning public access to government information. First, E.O. 12356 revokes various restraints on classification criteria and discretion which had evolved from previ-

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Classification Hearings*, *supra* note 27, at 51.

¹⁷⁵ Exec. Order No. 12,065 Preamble, 43 Fed. Reg. 28,949, 28,949 (1978).

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* note 154.

¹⁷⁸ Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

¹⁷⁹ *See* 128 CONG. REC. S4211 (daily ed. Apr. 28, 1982) (remarks of Sen. Durenberger) (The Order "will increase secrecy far beyond what experience has taught us is needed to protect the security of our country."); *Id.* at S4213 (remarks of Sen. Huddleston) (commenting on the serious danger of overclassification and excessive secrecy created by Executive Order 12356); *Boston Globe*, Jan. 24, 1984, at 16, col. 1 (quoting a veteran information act officer at a major federal agency who declined to be identified: "The Administration came in to emasculate the Freedom of Information Act.").

¹⁸⁰ *Assessment*, *supra* note 137, at 94; *Classification Hearings*, *supra* note 27, at 66.

¹⁸¹ For an in-depth comparison of Executive Orders 12356 and 12065, *see* 128 CONG. REC. S4211-16 (daily ed. Apr. 28, 1982) (proposal of S.2452 "Freedom of Information Protection Act"); *Assessment*, *supra* note 137, at 94; *Classification Hearings*, *supra* note 27, at 66.

¹⁸² *See Classification Hearings*, *supra* note 27, at 3-4.

¹⁸³ Exec. Order No. 12,356, 3 C.F.R. 166, 166 (1983).

¹⁸⁴ *Classification Hearings*, *supra* note 27, at 50.

¹⁸⁵ Exec. Order No. 12,356 § 1.1(c), 3 C.F.R. 166, 137 (1983).

¹⁸⁶ Exec. Order No. 12,065 § 1-101, 43 Fed. Reg. 28,949, 28,950 (1978).

ous executive orders.¹⁸⁷ Most significant is its elimination of the "identifiable" qualifier from the basic standard for classifying information found in E.O. 12065.¹⁸⁸ In order for a document to be classified under the Reagan Order, there need only be a showing that its disclosure "[could] reasonably . . . be expected to cause damage to national security."¹⁸⁹ The Carter Order required that disclosure of a document be reasonably expected to cause "at least *identifiable* damage to national security."¹⁹⁰ (emphasis added). The result of this change in language is to offer almost unlimited discretion to the classifier.¹⁹¹ Virtually any document that falls within one of the enumerated categories¹⁹² could conceivably be expected to cause damage, however abstract or theoretical.¹⁹³ Under the Reagan Order, therefore, authorized personnel may effectively classify a document without really making a thoughtful determination of specific damage.¹⁹⁴

E.O. 12356 also creates three new categories of information which shall be considered for classification.¹⁹⁵ This new provision, like the others noted above, promotes the classification of more information. Prior to E.O. 12356, the Government, according to one authority, had never complained that it was unable to classify sensitive information because any or all of the enumerated categories were drawn too narrowly to encompass that particular information.¹⁹⁶ Further, no FOIA case has turned on the question of whether or not particular information was properly determined to fit into one of the categories.¹⁹⁷ The new categories, therefore, represent an invitation to the agencies to classify types of information which they perhaps had not considered classifying previously.¹⁹⁸

¹⁸⁷ Compare Exec. Order No. 12,356, 3 C.F.R. 166 (1983) with Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978) and Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 5513 (1972).

¹⁸⁸ Exec. Order No. 12,065 § 1-302 provided that information "may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least *identifiable* damage to the national security." Exec. Order No. 12,065, 43 Fed. Reg. 28,949, 28,951 (1978) (emphasis added).

¹⁸⁹ Exec. Order No. 12,356 § 1.3(b), 3 C.F.R. 166, 169 (1983).

¹⁹⁰ Exec. Order No. 12,065 § 1-302, 43 Fed. Reg. 28,949, 28,951 (1978).

¹⁹¹ See *supra* note 151.

¹⁹² Exec. Order No. 12,356 § 1.3(a)(1)-(10), 3 C.F.R. 166, 168-169. See *supra* note 141.

¹⁹³ *Classification Hearings*, *supra* note 27, at 4 (testimony of Prof. Cheh).

¹⁹⁴ *Id.*

¹⁹⁵ The three new categories include information concerning "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security," "cryptology," and "a confidential source." Exec. Order No. 12,356 § 1.3(a), 3 C.F.R. 166, 168-169 (1983).

Exec. Order No. 12,356 also extends a presumption of classification to include "intelligence sources or methods," as well as foreign government information. Exec. Order No. 12,356 § 1.3(c). The effect of this new presumption is to provide essentially blanket protection to the CIA. *Classification Hearings*, *supra* note 27, at 77. The Reagan Administration sought to obtain Congressional approval of a proposal to exempt totally the CIA from the provisions of the FOIA (even though the agency won every case in which it sought to withhold information), but Congress refused to adopt this proposal. See Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 28, 1983, § 6 (Magazine), at 23. The new presumption in favor of classifying intelligence sources and methods essentially accomplishes what the proposed amendment sought to accomplish. *Id.*

¹⁹⁶ *Classification Hearings*, *supra* note 27, at 75.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* The House Subcommittee which conducted hearings on the proposed Exec. Order No. 12,356 was puzzled as to why President Reagan sought to expand the categories of classifiable information. See *Classification Hearings*, *supra* note 27, at 16. Unfortunately, the Reagan Administra-

Finally, E.O. 12356 eliminates from the previous Order several significant declassification procedures so that many records may now remain classified indefinitely.¹⁹⁹ Some of the discarded procedures provided for mandatory review of a document's classification after a certain number of years.²⁰⁰ In addition, E.O. 12356 revokes E.O. 12065's balancing test, thus no longer requiring agency officials who review information for declassification to consider the public's interest in disclosure.²⁰¹ These officials merely apply the standards for classification; if the information satisfies the standard, it remains classified. Despite its express recognition of the need for disclosure,²⁰² none of the operative provisions of E.O. 12356 seem to recognize the public's right of access to government records.²⁰³

Because the national security exemption vests full power in the executive to prescribe the criteria for exemption, President Reagan's E.O. 12356 is valid under the provisions of the FOIA. This Order, however, may pose a threat to the successful operation of the FOIA regarding national security information which did not exist under E.O. 12065. E.O. 12356's failure to acknowledge the public's right of access to government information may disrupt the balance between the public interest in disclosure and the governmental interest in the protection of information.

The judiciary's performance of its role under the FOIA, however, should restore the balance or, at least, diminish the adverse effect which E.O. 12356 may have upon the operation of the FOIA. The Act empowers the federal courts to conduct a *de novo* review of agency classification decisions and enjoin those that are improper. The next section²⁰⁴ defines the scope and purposes of the FOIA's provisions for judicial review and examines the judiciary's reluctance to assume the responsibilities which Congress has given it.

III. THE COURTS: INEFFECTIVE ENFORCEMENT OF THE FOIA

The courts, as noted in Section I,²⁰⁵ have been given an especially significant role to play in ensuring the effective operation of the FOIA. In all cases in which an executive agency withholds a document under one of the exemptions, the court has the power to conduct a *de novo* review of the agency's decision.²⁰⁶ In national security cases, the *de novo* review of an agency's decision to withhold a document necessarily becomes a review of the

tion failed to send a representative to the hearings to discuss its intentions. *Id.* at 2-3, 16. Any possible justifications for the expansion would therefore be mere speculation. *See also* 128 CONG. REC. S4213 (daily ed. Apr. 28, 1982) (remarks of Sen. Moynihan) (commenting upon the Administration's inadequate explanation for its decision to drop the balancing test and the "identifiable" qualifier from E.O. 12356).

¹⁹⁹ *Id.* at 50.

²⁰⁰ Exec. Order No. 12,065 §§ 3-4 through 3-6, 43 Fed. Reg. 28,949, 28,956-28,957 (1978).

²⁰¹ Exec. Order No. 12,065 § 3-303 provided that "in some cases . . . the need to protect [classified] information may be outweighed by the public interest in disclosure of the information, and in these cases, the information should be declassified." Exec. Order No. 12,065, 43 Fed. Reg. 28,949, 28,955 (1978). Exec. Order No. 12,356 has no comparable provision.

²⁰² *See supra* note 183 and accompanying text.

²⁰³ *See Classification Hearings, supra* note 27, at 80. Because the Reagan Administration has not accepted Congress' invitation to discuss E.O. 12356, any possible justifications for discarding the balancing test would be mere speculation. *See supra* note 198.

²⁰⁴ *See infra* notes 205-297 and accompanying text.

²⁰⁵ *See supra* notes 58-130 and accompanying text.

²⁰⁶ 5 U.S.C. § 552(a)(4)(B).

agency's decision to classify that document.²⁰⁷ If the court determines that the classification and subsequent withholding are improper, it has the power to enjoin the agency from withholding the document from the party seeking disclosure.²⁰⁸

The court's role under the FOIA has been described as one of expanding the rights of citizens and protecting them against arbitrary or capricious denials of access to government information.²⁰⁹ *De novo* review of a government agency's classification decision provides a meaningful opportunity for a citizen to challenge a classification decision and forces the classifying agency to justify its decision before a neutral arbiter.²¹⁰ The FOIA's provisions for judicial review thus provide a means for maintaining a balance between the public's interest in disclosure and the government's interest in protecting certain sensitive information. Because Congress recognized that executive agencies tended to over-use classification stamps,²¹¹ the FOIA empowers the courts to review classification decisions, substantively as well as procedurally,²¹² and requires the agencies to satisfy the courts that their decisions are proper.²¹³ The judiciary's proper exercise of these powers should reduce agency abuse of classification stamps and reverse improper classification decisions in favor of the party requesting disclosure.²¹⁴

Despite the judiciary's broad powers to review the propriety of classification decisions and enjoin those it finds to be improper, classified records have rarely been disclosed to the public as a result of FOIA litigation.²¹⁵ In the nine years since the 1974 Amendments to the FOIA, the courts have seldom questioned the classification decisions of government officials.²¹⁶ In fact, one authority has noted that he knew of only four very short and

²⁰⁷ The criteria for the exemption are the same as those for classification. Both are set forth in the relevant Executive Order. See, e.g., Exec. Order No. 12,356 §§ 1.1, 1.3, 3 C.F.R. 166, 166-169 (1983).

²⁰⁸ 5 U.S.C. § 552(a)(4)(B).

²⁰⁹ See *Seven-Year Assessment*, *supra* note 21, at 905.

²¹⁰ The statutory requirement that review be *de novo* is intended to "prevent it from becoming meaningless judicial sanctioning of agency discretion." S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965).

²¹¹ See 128 CONG. REC. S4211 (daily ed. Apr. 28, 1982) (remarks of Sen. Huddleston) (commenting upon the "natural desire of all bureaucrats for secrecy"). It is widely acknowledged that the classification stamp is overused. See *supra* note 154. Indeed, even Edwin Meese, White House Counselor of the Reagan Administration, acknowledged in a national press interview that "there is way too much classification." *Assessment*, *supra* note 137, at 94.

²¹² See *supra* notes 92-96 and accompanying text.

²¹³ 5 U.S.C. § 552(a)(4)(B) places the burden on the agency to sustain its action. See *supra* notes 123-126 and accompanying text.

²¹⁴ See S. REP. NO. 854, 93d Cong., 2d Sess. (1974), reprinted in *Source Book*, *supra* note 45, at 182.

²¹⁵ See 128 CONG. REC. S4211 (daily ed. Apr. 28, 1982) (remarks of Sen. Durenberger) ("judges . . . have almost always [allowed] the Government to withhold information that it says should be kept secret"). Two district courts, however, have enjoined improper classification decisions and ordered the release of the documents in dispute. The Court of Appeals in *Holy Spirit Ass'n v. C.I.A.*, 636 F.2d 838, 846 (D.C. Cir. 1980) affirmed a district court decision which ordered the release of assertedly classified information, but that judgment was stayed by the Supreme Court and ultimately vacated as moot when the requesters withdrew their request for the classified documents. *C.I.A. v. Holy Spirit Ass'n*, 102 S. Ct. 1626 (1982). The court in *Jaffe v. C.I.A.* quoted portions of classified documents in the course of its discussion of what it viewed as inconsistent classification decisions by the agency. *Jaffe v. C.I.A.*, 516 F. Supp. 576, 581-583 (D.D.C. 1981). Other district courts have ordered the release of classified information, but these orders have not survived either reconsideration or appellate review. See, e.g., *Weberman v. National Security Agency*, 490 F. Supp. 9 (S.D.N.Y. 1980), reversed, 646 F.2d 563 (2d Cir. 1980), on remand, 507 F. Supp. 117 (S.D.N.Y. 1981), affirmed, 668 F.2d 676 (2d Cir. 1982).

²¹⁶ *Classification Hearings*, *supra* note 27, at 50.

innocuous sentences which the courts have ordered released, after rejecting the government's claim that they were properly classified.²¹⁷ Analysis of the courts' response to the FOIA's broad grant of power reveals that this result is a product of both the judiciary's reluctance to exercise its power and its utmost deference to the executive branch.

The process of a *de novo* review under the FOIA which was explained in Section 1²¹⁸ provides a useful framework for analysis of the court's reluctance to perform its assigned role under the FOIA. The judiciary's *de novo* review proceeds in three stages: 1) determining the proper legal criteria to be applied; 2) finding the relevant facts of the case, and; 3) applying the proper criteria to the facts.²¹⁹ At each of these three stages, courts have been deferential to the executive branch.

The courts' determination at the first stage of *de novo* review²²⁰ offers little room for the exercise of discretion because the legal criteria for the national security exemption are clearly set forth in the relevant Executive Order.²²¹ Only rarely does a reviewing court's determination of the proper legal criteria affect its decision to overrule or sustain the agency's classification decision.²²² Recently, the D.C. Circuit Court of Appeals confronted this issue²²³ and that court's decision illustrates the judiciary's deference to executive classification decisions.

In *Afshar v. Department of State*,²²⁴ the plaintiff submitted requests under the FOIA to several agencies for all documents pertaining to him or his activities in opposition to the Shah of Iran.²²⁵ The agencies withheld a number of the requested documents and failed to respond to the plaintiff's appeals.²²⁶ The plaintiff brought an action to enjoin the withholding of the requested documents, and the district court granted the Government's motion for summary judgment.²²⁷ The appellant raised several issues on appeal, including a question of the lower court's refusal to apply E.O. 12065's balancing test.²²⁸ After

²¹⁷ *Id.*

²¹⁸ See *supra* notes 101-122 and accompanying text.

²¹⁹ *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978) (Wright, J., concurring).

²²⁰ See *supra* notes 102-103 and accompanying text.

²²¹ *Id.*

²²² The only time there is any question of the proper legal criteria is when a new Executive Order supercedes a prior order, especially during the pendency of an FOIA action. See *Afshar v. Department of State*, 702 F.2d 1125, 1135 (D.C. Cir. 1983) (Executive Order 12356 superceded Executive Order 12065 after oral argument on appeal); *Baez v. Department of Justice*, 647 F.2d 1328, 1333 (D.C. Cir. 1980) (Executive Order 12065 superceded Executive Order 11652 while case pending before district court); *Lesar v. Department of Justice*, 636 F.2d 472, 479 (D.C. Cir. 1980) (Executive Order 12065 superceded Executive Order 11652 after district court had decided the case); *Fulbright and Jaworski v. Department of the Treasury*, 545 F. Supp. 615, 619 (D.D.C. 1982) (Document originally classified under Executive Order 11652. Plaintiff brought suit to require agency to review the classification under Executive Order 12065, which had just become effective.); *Laroche v. Kelly*, 522 F. Supp. 425, 432 (S.D.N.Y. 1981) (Executive Order 12065 superceded Executive Order 11652 during pendency of district court trial).

²²³ *Afshar v. Department of State*, 702 F.2d 1125, 1135 (D.C. Cir. 1983).

²²⁴ 702 F.2d 1125 (D.C. Cir. 1983).

²²⁵ *Id.* at 1128.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *supra* notes 168-176 and accompanying text. The appellant, Afshar, raised three other issues: 1) whether the FOIA allows government agencies to withhold information under exemptions 1 and 3 where there have been prior disclosures of similar information; 2) whether information can be withheld under exemption 3 of the FOIA if it is not properly classified under exemption 1; and 3) whether certain memoranda recommending agency action can be withheld under exemption 5 if the recommendations were actually adopted as the basis for agency action. *Afshar v. Department of State*, 702 F.2d at 1127.

oral argument on appeal, E.O. 12356 became effective and superceded E.O. 12065.²²⁹ In order to address the question regarding the balancing test, the appellate court had to determine which of the two competing Executive Orders would be used to assess the propriety of the agency's decision to classify information.²³⁰ The court held that where the executive had determined that national security requires increased secrecy and had issued an Executive Order to that effect, the court, in its review of the classification of documents claimed to be exempt under the national security exemption, shall apply the criteria of the Executive Order in force at the time of the court's decision.²³¹

Three years prior to *Afshar*, the D.C. Circuit ruled, on essentially identical facts, that "a reviewing court should assess classification under the Executive Order in force at the time the responsible official finally acts."²³² The court's holding in *Afshar*, that the relevant order is the one which is currently effective, is in direct conflict with this well-established precedent.²³³ Indeed, the *Afshar* court itself recognized that it was departing from precedent.²³⁴ The court, however, supported its departure by concluding that "the evident national interest in allowing the President to respond quickly to shifts in the need for secrecy must take precedence."²³⁵ The *Afshar* court thus did not hesitate to base its decision upon the deference that it felt due the executive in matters of national security.²³⁶

Evidence of the judiciary's deference to the executive may also be derived from its determinations at the second stage of review.²³⁷ In national security cases, one of the most important issues which the court must resolve at this stage is whether the agency's affidavits are sufficiently detailed and complete to enable the court to make a *de novo* determination.²³⁸ Sometimes the public affidavits are sufficient, but as Judge Skelly Wright has noted, the agencies often fail to satisfy this requirement.²³⁹ If the court is not satisfied with the affidavits, it can order an *in camera* examination of the documents.²⁴⁰

²²⁹ The lower court's review of the plaintiff's FOIA claim was conducted under Executive Order No. 12,065, 43 Fed. Reg. 28,949 (1978). *Afshar v. Department of State*, 702 F.2d at 1135.

²³⁰ *Afshar v. Department of State*, 702 F.2d at 1135.

²³¹ *Id.* at 1137.

²³² *Lesar v. Department of Justice*, 636 F.2d 472, 480 (D.C. Cir. 1980).

²³³ For cases following the precedent established by *Lesar*, see *supra* note 222 and cases cited therein.

²³⁴ 702 F.2d at 1138 n.18. ("To the extent that the decision in this case gives present effect to that provision of Executive Order No. 12,356 that revoked the balancing provision of Executive Order No. 12,065, it limits the broad statement [of] *Lesar*.").

²³⁵ *Id.* at 1137. The court said that it did not think its holding dramatically undermined *Lesar* because it thought that the situation in the case at hand, where a new Executive Order clearly stripped away a severable portion of the former Order, was a rare one. *Id.* The court found that, because the balancing provision of Executive Order No. 12,065 was set out in a separate section called "Declassification Policy," it was severable from the classification procedures of that Order. *Id.*

²³⁶ *Id.* In fact, the court probably went out of its way to express its belief that such deference ought to be paid to the Executive by the courts. See *id.* The distinctions that it drew from *Lesar* were plausible, but far from convincing. The court could have followed *Lesar*, applied the criteria of Executive Order No. 12,065, and found that the documents were properly classified. It could have achieved the same result without explaining its decision in terms of deference to the Executive.

²³⁷ See *supra* notes 104-119 and accompanying text.

²³⁸ *Allen v. C.I.A.*, 636 F.2d 1287, 1298 (D.C. Cir. 1980); *Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979); *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978) (Wright, J., concurring).

²³⁹ *Allen v. C.I.A.*, 636 F.2d 1287, 1298 (D.C. Cir. 1980). The reason the agency's affidavits often are not sufficiently detailed is that a complete description of the classified material will often reveal the very material sought to be withheld. See *supra* notes 114-115 and accompanying text.

²⁴⁰ See *supra* note 116 and accompanying text.

The power to inspect disputed documents *in camera* is a valuable tool for the promotion of open information.²⁴¹ It balances the inability of the plaintiff to argue fully for disclosure against the need of the government to assure that the statutory exemptions will not be circumvented merely by the filing of a suit by an aggrieved requester.²⁴² The principal benefits achieved by the *in camera* procedure are the avoidance of misapplication of a strictly-read exemption,²⁴³ the deterrent effect of impartial review upon an agency's natural tendency to withhold documents,²⁴⁴ and the enhanced "adversariness" of the proceeding.²⁴⁵

The express grant of power to order *in camera* inspection was designed to empower courts to exercise "effective judicial review of executive branch classification decisions" in order to rectify "the widespread over-use of classification stamps."²⁴⁶ The legislative history of the 1974 Amendments to the FOIA demonstrates that, despite the substantial criticism of the *in camera* procedure,²⁴⁷ Congress sought to facilitate *in camera* inspection of documents.²⁴⁸ Examination of the courts' response to this Congressional mandate, how-

²⁴¹ 1 O'REILLY, *supra* note 8, at 8-44. See generally, R. DAVIS, ADMINISTRATIVE LAW, *supra* note 117, at 64-66; *In Camera Inspections*, *supra* note 117, at 558-560.

²⁴² The Government's legitimate interests in secrecy could be destroyed if access to any document could be obtained by the mere filing of a suit. For a discussion of the legitimacy of the Government's protection of information see *infra* notes 302-303 and accompanying text.

²⁴³

In camera inspection checks the potential abuse of the exemption-claims power by the agencies. If an exemption were read strictly by the courts and the agency described documents in a fashion tailored to adjust that description to the terms of precedents interpreting that exemption, courts would not be able, without *in camera* powers to look behind that agency's choice of descriptive terms.

1 O'REILLY, *supra* note 8, 8-50 n.14.

²⁴⁴ The Government has a bias toward classification. *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (Wright J., concurring). See *supra* notes 29-30. It may even have an improper motive for concealing information such as covering up agency mistake, misconduct, or other embarrassments. See *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 34 (1974) (Douglas, J., dissenting) ("It has been shown innumerable times that information is often withheld only to cover up embarrassing mistakes. . . ."); 8 WEEKLY COMP. PRES. DOC. 543 (1972) ("[C]lassification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations."). See also *Seven Year Assessment*, *supra* note 21, at 935 ("The agencies' track record on disclosure, both past and present, does not lend itself to commendation Confining judicial review to non-substantive determinations [by refusing *in camera* power] . . . forecloses judicial redress for meritorious complaints.").

²⁴⁵ *Ray v. Turner*, 587 F.2d 1187, 1212 (D.C. Cir. 1978) (Wright, J., concurring). *In camera* inspection at least provides a minimal substitute for true adversariness by allowing the court to test the accuracy of the government's statements. *Id.*

²⁴⁶ See *supra* note 154 and accompanying text.

²⁴⁷ The most frequently raised objection to *in camera* inspection has been that judges lack the knowledge and expertise to evaluate the effects of releasing allegedly sensitive material. See *infra* note 282 and accompanying text. Congress responded to this concern by noting that the reviewing court would have the benefit of the Government's affidavits when making its *in camera* inspection, S. REP. NO. 854, 93d Cong., 2d Sess., reprinted in *Source Book*, *supra* note 45, at 167-168, and by expressing its expectation that the reviewing court would accord "substantial weight" to agency affidavits reflecting special knowledge or expertise. S. REP. NO. 1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 6285, 6290. For a further discussion of the "substantial weight" language, see *infra* note 259-263 and accompanying text. Congress considered the fear of judicial incompetence which was expressed by opponents to the *in camera* procedure to be unfounded. Letter from Senator Kennedy and Representative Moorhead, Chairmen of the Conference Committee, to President Gerald R. Ford (Sept. 23, 1974), reprinted in *Source Book*, *supra* note 45, at 381.

²⁴⁸ *Allen v. C.I.A.*, 636 F.2d 1287, 1295 (D.C. Cir. 1980); See also, *Knopf v. Colby*, 509 F.2d 1362,

ever, reveals that the courts often limit their use of the *in camera* procedure out of deference to the agency's affidavits.

In *Weissman v. C.I.A.*,²⁴⁹ the United States Court of Appeals for the District of Columbia upheld the district court's decision to grant the agency's motion for summary judgment,²⁵⁰ rejecting the appellant's contention that the district court failed to follow proper procedures by refusing to conduct an *in camera* inspection of documents before sustaining the agency's claims of exemption.²⁵¹ The appellant, Weissman, asserted that an *in camera* inspection was especially necessary because the agency's affidavits were not sufficiently detailed to permit scrutiny of agency claims.²⁵² The appellate court was probably correct in finding that the trial court did not abuse its discretion by granting summary judgment without inspecting *in camera*²⁵³ because the FOIA grants district courts broad discretion in their use of the *in camera* procedure.²⁵⁴ The rule that the appellate court articulated to guide district courts in their use of *in camera* inspection, however, reveals its reluctance to conduct such an inspection out of deference to executive agencies.

The court held that a district court should conduct an *in camera* examination of disputed documents "only where the record is vague or the agency claims too sweeping or suggestive of bad faith."²⁵⁵ In support of its holding, the court said that, "[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. . . . In deciding whether to conduct an *in camera* inspection [the district court] need not . . . test the expertise of the agency, or . . . question its veracity when nothing appears to raise the issue of good faith."²⁵⁶ The court went on to describe *in camera* inspection as a "last resort."²⁵⁷

In most of the cases following *Weissman* in which the federal courts have not conducted an *in camera* inspection and have based their *de novo* determination upon the Government's affidavits, the courts have relied upon language in the Conference Committee's Report on the 1974 Amendments²⁵⁸ for support.²⁵⁹ This language expressed the

1367 (1975) ("[The judge] now has a right . . . to require production of the document for his inspection *in camera*."). Both the House and the Senate reported bills which would grant reviewing courts liberal authority to employ *in camera* inspection. H.R. 12471, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 6267; S. 2543, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, p. 6267. *See also* 120 Cong. Rec. 17022-17023 (daily ed., May 30, 1974) for an important amendment added by Senator Muskie on the floor (placing the burden on the agency to prove the propriety of its decision to withhold the information).

²⁴⁹ 565 F.2d 692 (D.C. Cir. 1977).

²⁵⁰ *Id.* at 698.

²⁵¹ *Id.* at 696.

²⁵² *Id.*

²⁵³ *Id.* at 698. The accuracy of the court's decision is difficult to ascertain because its opinion does not discuss the affidavits in any detail. If appellant's assertion that the affidavits were inadequate is correct, the district court's decision to grant summary judgment should be reversed.

²⁵⁴ *Allen v. C.I.A.*, 636 F.2d 1287, 1296 (D.C. Cir. 1980).

²⁵⁵ 565 F.2d at 698 (emphasis added).

²⁵⁶ *Id.* at 697.

²⁵⁷ *Id.*

²⁵⁸ S. REP. NO. 1200, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 6285.

²⁵⁹ *See Ingle v. Department of Justice*, 698 F.2d 259, 268 (6th Cir. 1983) ("Courts have long been required to accord substantial weight to an agency's affidavit concurring [sic] national security matters."); *Taylor v. Department of the Army*, 684 F.2d 99, 106-107 (D.C. Cir. 1982) ("The court

Committee's expectation that the reviewing court would accord "substantial weight" to agency affidavits reflecting special knowledge or expertise.²⁶⁰ According to Judge Skelly Wright, this language is a legitimate part of legislative history and "should influence the courts to the extent that [it is] compatible with the fundamental directions on the face of the statute itself."²⁶¹ Judge Wright warned, however, that courts must recognize the limits of the language: "Stretching the Conference Committee's recognition of the 'substantial weight' deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute . . ."²⁶² An affidavit stating only in general or conclusory terms why the agency has determined that the document should be exempt "should not and cannot be accorded 'substantial weight' in a *de novo* proceeding."²⁶³ Those courts that view *in camera* inspection as a last resort, therefore, may not support their deferential treatment of agency affidavits with the Conference Committee's "substantial weight" language without ignoring the fundamental intent of the 1974 amendments to the FOIA.

This is not to say that the vast majority of courts so limit their use of the *in camera* procedure.²⁶⁴ Many courts, however, have not been examining the documents with the frequency which Congress had anticipated²⁶⁵ and which is arguably warranted by the general inadequacy of agency affidavits.²⁶⁶ The reluctance of a significant number of courts to inquire beyond insufficient affidavits, thus, presents evidence of deference to the executive branch when determining the facts in national security cases.²⁶⁷

must give 'substantial weight' to those affidavits."); *Baez v. Department of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980) ("The court must accord 'substantial weight' to these affidavits."); *Lesar v. Department of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980) ("[T]he district court is to afford 'substantial weight' to the agency's affidavits.").

²⁶⁰ S. REP. NO. 1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 6285, 6290. This language was designed to assuage President Ford's "unfounded" fears without compromising the FOIA's provisions calling for *de novo* review with the burden on the Government and permissive *in camera* inspection. See Letter from Senator Edward M. Kennedy and Representative William S. Moorhead, Chairmen of the Conference Committee, to President Gerald R. Ford (Sept. 23, 1974), reprinted in *Source Book*, supra note 45, at 381; *Ray v. Turner*, 587 F.2d 1187, 1213 (D.C. Cir. 1978) (Wright, J., concurring).

²⁶¹ *Ray v. Turner*, 587 F.2d 1187, 1213 (D.C. Cir. 1978) (Wright, J., concurring).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See *Porter v. U.S. Dept. of Justice*, No. 82-1833, slip op. (3d Cir. 1983); *Dames & Moore v. U.S. Department of the Treasury*, 544 F. Supp. 94, 96 (C.D. Cal. 1982); *Larouche v. Kelley*, 522 F. Supp. 425, 434 (S.D.N.Y. 1981); *Dunway v. Webster*, 519 F. Supp. 1059, 1065 (N.D. Cal. 1981); *National Catholic Reporter v. F.B.I.*, 514 F. Supp. 1149, 1151 (D.D.C. 1981).

²⁶⁵ See *Allen v. C.I.A.*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (Judge Skelly Wright noted that agency affidavits often fail to provide sufficient information for the court to make its *de novo* determination.); S. REP. NO. 854, 93d Cong., 2d Sess. (1974), reprinted in *Source Book*, supra note 45, at 182.

²⁶⁶ See *Allen v. C.I.A.*, 636 F.2d 1287, 1298 (D.C. Cir. 1980).

²⁶⁷ One court has said:

Congress did not intend that the courts would make a true *de novo* review of classified documents, that is a fresh determination of the legitimacy of the classification status. . . . Rather, Congress intended that the courts would review the sufficiency of the agency's affidavits and require the agency to come forward with more . . . if the affidavits proved insufficient. . . .

The court is in no position to second-guess either the agency's determination of the need for classification or the agency's prediction of harm should release be permitted. *Stein v. Department of Justice*, 662 F.2d 1245, 1253-54 (7th Cir. 1981). But see *infra* notes 342-347.

Although judicial deference to the executive is perhaps more readily apparent at the first two stages of review, such deference is probably most prevalent at the third stage. As noted above, many courts do fulfill their duties at the first two steps of *de novo* review.²⁶⁸ The fact that no alleged national security information of any significance has been disclosed as a result of FOIA litigation, however, suggests that these courts are not pursuing *de novo* review to its conclusion.

A court's assessment of the requested documents in light of the relevant legal criteria is most likely the step at which the deferential treatment of executive decisions is most prevalent,²⁶⁹ but least detectable.²⁷⁰ Examination of a court's application of law to facts in national security cases is difficult because of the nature of the proceeding. The information in the public record is limited. Much of the important information is presented *in camera*, and the court's reasoning in support of its decision is necessarily lacking in detail. Although the court is required to provide the plaintiff with sufficient information so that he may develop an appeal,²⁷¹ this requirement is still restricted by the fact that much of the information necessary to explain the decision is classified and cannot be disclosed.

The court's task at the final stage of *de novo* review in national security cases is to review agency compliance with the criteria of the relevant Executive Order.²⁷² The court must decide whether the information has been classified in accordance with the procedural requirements of the relevant Order, and whether it actually falls within the substantive classification categories claimed by the agency.²⁷³ Both the procedural and substantive criteria must be satisfied.²⁷⁴

Under the current Executive Order,²⁷⁵ the court's application of the substantive criteria is essentially a two-step process.²⁷⁶ The court must first determine whether the withheld material meets the threshold requirement set forth in E.O. 12356. If the court finds that the material "concerns"²⁷⁷ one or more of the ten enumerated categories, then the material "shall be considered for classification."²⁷⁸ This initial determination is quite straightforward, but if there is any ambiguity regarding whether a document "concerns" one of the categories, the FOIA requires that it be resolved in favor of disclosure.²⁷⁹

²⁶⁸ See *supra* note 264.

²⁶⁹ Despite the fact that many courts fulfill their duties at the first two stages of review, virtually no information has been disclosed as a result of FOIA litigation. See *supra* note 217 and accompanying text. This suggests that the courts' application of the legal criteria to the facts is the crucial stage where their duties are not being fulfilled.

²⁷⁰ See *Ray v. Turner*, 587 F.2d 1187, 1205, 1215 (D.C. Cir. 1978) (Wright, J., concurring).

²⁷¹ See *id.* at 1192.

²⁷² See *supra* notes 121-126 and accompanying text.

²⁷³ See 5 U.S.C. § 552(b)(1); *Assessment*, *supra* note 137, at 96.

²⁷⁴ See *supra* notes 92-96 and accompanying text.

²⁷⁵ Exec. Order No. 12,356, 3 C.F.R. 166 (1983). See *supra* notes 178-203 and accompanying text for a discussion of Executive Order No. 12,356.

²⁷⁶ *Id.* The Order enumerates ten categories of information which shall be considered for classification.

²⁷⁷ Executive Order No. 12,356's use of the word "concerns" in § 1.3 is yet another example of the use of broad and vague language which enables agencies to classify at will. Exec. Order No. 12,356, 3 C.F.R. 166, 168-69 (1983). Cf. *Classification Hearings*, *supra* note 27, at 7 (discusses the vague and general language of Executive Order No. 12,356).

²⁷⁸ Exec. Order No. 12,356 § 1.3, 3 C.F.R. 166, 168-69 (1983).

²⁷⁹ See *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978) (Wright, J., concurring). The resolution of ambiguity concerning the Government's failure to carry its burden of proving that the material clearly concerns one of the enumerated categories must be distinguished from the resolu-

The second step of the court's application of the substantive criteria to the facts is, in contrast to the first, not at all clear-cut. If the information is found to concern one of the categories in step one, the court must determine whether disclosure of the information "reasonably could be expected to cause damage to the national security."²⁸⁰ Although the standard is indefinite and its application may be difficult, Congress has made clear its intent that the court make these judgments.²⁸¹ The courts must have full power of review so as to provide a check on the exercise of executive classification authority.²⁸² In the words of Senator Muskie, "Government classifiers must be subject to some impartial review. If courts cannot have full latitude to conduct the review, no one can."²⁸³

The judiciary, however, has refrained from making these judgments out of deference to the executive branch.²⁸⁴ They have even excused procedural errors where the Government has satisfactorily shown the substantive propriety of its decision to classify a document.²⁸⁵ The judiciary's reluctance to review *de novo* the agencies' substantive decisions is a product of the courts' recognition of the inherently speculative nature of predicting the degree of harm to the national security which may result from the disclosure of certain information.²⁸⁶ The courts have noted that to demand more than a plausible demonstration that the predicted danger is a reasonable expectation would be "overstepping by large measure the proper role of a court in a national security FOIA case."²⁸⁷ The proper role of the court, however, is to make a thorough *de novo* determination of whether the predicted danger is a reasonable expectation.²⁸⁸ The court's accep-

tion of ambiguity concerning the question of whether the material actually concerns one of the enumerated categories. Where there is reasonable doubt whether the agency has shown that the material should clearly be classified, the FOIA's policy in favor of disclosure must guide the courts' determination. On the other hand, where there is reasonable doubt whether the material should be classified, the Executive policy favoring classification must control. Exec. Order No. 12,356 § 1.1(c), 3 C.F.R. 166, 167 (1983) ("if there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified . . .").

²⁸⁰ Exec. Order No. 12,356 § 1.3(b), 3 C.F.R. 166, 169 (1983).

²⁸¹ See *supra* note 44 and accompanying text.

²⁸² See 120 CONG. REC. H6813 (daily ed., Mar. 14, 1974). It has been suggested that because of the courts' lack of experience in matters of national security, the courts are limited to a determination that the documents fit into one of the enumerated categories, that they have in fact been classified in accordance with the proper procedure, and that there is a logical nexus between the information at issue and the claimed exemption. *Stein v. Department of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981). Proponents of this view say that the courts are in no position to second-guess the agency's prediction of the harm that would result from disclosure. See *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980). "Even in those instances where the court might have its own view of the soundness of the original policy decision, it must defer to the agency's evaluation of the need to maintain the secrecy of the [information at issue]." *Stein v. Department of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981).

²⁸³ 120 CONG. REC. S17023 (daily ed. May 30, 1974) (remarks of Sen. Muskie).

²⁸⁴ See *supra* note 267 and accompanying text.

²⁸⁵ See, e.g., *Baez v. Department of Justice*, 647 F.2d 1328, 1332 (D.C. Cir. 1980) ("[A]lthough procedural and substantive conformity . . . is required by the terms of the statute, the consequences of a particular defect may differ." Because no agency bad faith was found, the validity of agency decision to classify was not affected by the procedural impropriety.); *Lesar v. Department of Justice*, 636 F.2d 472, 483-484 (D.C. Cir. 1980) (belated classification of the documents was an "atypical slip-up" which did not undermine the claimed exemption).

²⁸⁶ *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980) (court deferred to agency affidavits due to its lack of expertise in dealing with matters of national security).

²⁸⁷ *Id.* at 149.

²⁸⁸ See S. REP. NO. 854, 93d Cong., 2d Sess. (1974), reprinted in *Source Book*, *supra* note 45, at 183.

tance of a "plausible" showing by the Government does not comply with Congress' intent that they make a *de novo* determination.²⁸⁹ The FOIA empowers the judiciary to make such a determination, and the courts should exercise this power in order to provide a check on executive classification authority.²⁹⁰ The deference which the courts presently accord the judgment of the executive branch, however, does not allow them to perform their intended role. The courts' unwillingness to question the judgment of the executive agencies prevents them from making a true *de novo* determination.

The high degree of deference accorded the judgment of the executive branch has thus seriously limited the scope of *de novo* review in national security FOIA litigation. Nonetheless, even such a limited review has furthered the purposes of the Act to some extent. Until recently,²⁹¹ the provisions for judicial review have had a curious prophylactic effect. The prospect of having to justify classification decisions before a neutral arbiter seems to have forced agencies to be more thorough in their search for requested documents and more objective in their classification determinations.²⁹² The fact that the Government would have to go into court with affidavits and specify in detail the harm that would result led the Government to release information which, prior to the Amendments of the FOIA, it would not have released.²⁹³ In *Ray v. Turner*,²⁹⁴ for example, only after suit was brought, with the concomitant threat of *in camera* inspection, did the CIA, which had *twice* before found no disclosable portions among the requested materials,²⁹⁵ eventually discover that there were indeed segregable portions.²⁹⁶ Furthermore, it was only under the specific threat of plaintiff's motion for *in camera* inspection that the CIA submitted a supplemental affidavit which, although still insufficient, provided more detailed descriptions of the withheld documents.²⁹⁷ The overriding policy of the FOIA, especially as expressed through its broad provisions for review, had thus created greater voluntary agency compliance with the FOIA, even though it has not resulted in effective judicial enforcement.

This section's examination of the courts' performance of their role under the FOIA has revealed that the courts' deference to executive classification decisions has prevented them from effectively enforcing the FOIA. Section IV²⁹⁸ will examine the problems which the judiciary's failure creates for the FOIA in light of President Reagan's E.O. 12356. It will also discuss the available solutions to these problems, all of which require an active judiciary.

IV. THE NECESSITY OF EFFECTIVE JUDICIAL ENFORCEMENT OF THE FOIA

In order to achieve the goals of the FOIA in national security cases, the classification power of government agencies should not go unchecked. If the executive exercised unchecked classification power, the balance sought to be achieved by the FOIA would be

²⁸⁹ *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (Wright J., concurring).

²⁹⁰ See *supra* note 282 and accompanying text.

²⁹¹ That is, prior to Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

²⁹² *Classification Hearings*, *supra* note 27, at 51; *Stein v. Department of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981).

²⁹³ See *id.*

²⁹⁴ 587 F.2d 1187 (D.C. Cir. 1978).

²⁹⁵ *Id.* at 1212 n.51.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See *infra* notes 300-349 and accompanying text.

disrupted, and the public's right of access to government information would not be effectively protected. Congress provided for a check on the agencies' classification power by empowering the federal courts to review the procedural and substantive propriety of government classification decisions.²⁹⁹ As noted previously, however, the courts, out of deference to the agencies' decisions, have been reluctant to conduct a *de novo* review and enjoin those decisions which it finds to be improper. The courts' reluctance is all the more damaging to the FOIA's efforts to protect the public's rights in light of the current Executive Order on national security information.³⁰⁰

As noted earlier, President Reagan's E.O. 12356 places heavy emphasis on the need for the protection of government information.³⁰¹ The Reagan administration's attempts to protect information are not without merit. Secrecy allows for candor in foreign relations, permits flexibility in negotiations with foreign governments, and allows for the expression of internal opposition without fragmenting governmental policy.³⁰² Maintaining secrecy in government, however, presents serious dangers to a democracy. Withholding information vests unchecked control in the executive, creates a credibility gap between government and the governed, and provides the Government with an opportunity to use "leaks" to disclose only as much information as it deems useful.³⁰³ These are just the sort of dangers which the FOIA seeks to avert by protecting the public's right of access to government information.³⁰⁴ The judiciary's failure to perform its role in the FOIA, however, inhibits the FOIA's ability to achieve this goal.

President Reagan's Executive Order presents two problems for the FOIA in regard to national security information which, when combined with the judiciary's failure to provide a check on executive power, may be fatal to the achievement of the ultimate goals of the Act. That the difficulties posed by E.O. 12356 will prevent the FOIA from achieving its goal is not a foregone conclusion. The solutions to both difficulties, however, require the courts' exercise of their authority to enforce the FOIA.

The first problem presented by E.O. 12356 is that the present Executive Order encourages agencies to err in favor of more classification.³⁰⁵ Such encouragement indirectly results from E.O. 12356's provision that any reasonable doubts about whether a document should be classified shall be resolved in favor of classification.³⁰⁶ The provision articulates an unambiguous policy favoring increased classification.³⁰⁷ This problem could be directly eliminated by the judiciary's assertion of its power to enforce the FOIA.³⁰⁸

²⁹⁹ See *supra* notes 92-96 and accompanying text.

³⁰⁰ See *supra* notes 178-203 and accompanying text for a discussion of the current Executive Order.

³⁰¹ See *supra* note 182 and accompanying text.

³⁰² See Note, *Right to Know*, *supra* note 34, at 1469.

³⁰³ For a general discussion of the costs and benefits of open government, see Franck & Weisband, *Executive Secrecy in Three Democracies: The Parameters of Reform*, in *SECRECY IN FOREIGN POLICY* 3 (T. Franck & Weisband eds. 1974).

³⁰⁴ See *supra* note 3.

³⁰⁵ See 128 CONG. REC. S4213 (daily ed. Apr. 28, 1982) (remarks of Sen. Huddleston) ("The aim [of Executive Order 12356] appears to be to try to make it easier for Government agencies to classify information."); *supra* note 185 and accompanying text.

³⁰⁶ Exec. Order No. 12,356 § 1.1(c), 3 C.F.R. 166, 167 (1983).

³⁰⁷ See 128 CONG. REC. S4213 (daily ed. Apr. 28, 1982) (remarks of Sen. Huddleston) (Executive Order 12356 enables agencies to classify information "without having to think carefully about why disclosure might damage national security"); *supra* notes 186-188 and accompanying text.

³⁰⁸ See *supra* notes 205-297 and accompanying text for a discussion of the Judiciary's role.

It seems fairly evident that when agencies, which are basically inclined to err on the side of protecting their secrets, are *ordered* to err on the side of protecting secrets, they will quickly abandon the somewhat more careful and thoughtful classification practices which developed in response to the 1974 Amendments and President Carter's E.O. 12065.³⁰⁹ Consequently, more information will be classified, and much of this additional classification is likely to be improper.³¹⁰ Under E.O. 12356, agencies are no longer guided by a joint Congressional and Executive mandate to disclose when possible. Instead they have executive orders to follow their basic inclination and classify when possible.

In light of E.O. 12356, the ability of the FOIA to protect the public's right of access to government information depends heavily upon the courts' determination to review agency classification decisions and enjoin those that are improper. The courts' active enforcement of the FOIA would directly address the problem of improper classification created by E.O. 12356. If classifying personnel knew that their decisions would be subjected to a thorough *de novo* review and enjoined if found to be improper, they would be inclined to make their decisions thoughtfully and carefully.³¹¹ As a result, more information would be disclosed by the agencies themselves. The criteria of E.O. 12356 would still apply because the FOIA does not authorize the courts to decide whether the executive's criteria are proper.³¹² The courts, however, may require that all classified documents actually satisfy these criteria, substantively and procedurally, and that the Government bear the burden of proving its compliance with the criteria.

The second problem presented by E.O. 12356 is more difficult to resolve than the first, and it arises directly from the operative provisions of E.O. 12356. The present Order's criteria are so broad³¹³ as to enable agencies to withhold almost any information that they want. Furthermore, the agencies are not required to consider the public's interest in disclosure when making their classification decisions.³¹⁴ As a result, more information will be classified and the public's right of access to government information will be inhibited. E.O. 12356 thus disrupts the balance of public and governmental interests sought to be maintained by the FOIA.³¹⁵

The FOIA's provision for judicial review attempts to balance the competing interests of the public and the government, but E.O. 12356 poses a significant challenge to this attempt. It diminishes the effectiveness of *de novo* review as a means of protecting the

³⁰⁹ *Classification Hearings*, *supra* note 27, at 50-51.

³¹⁰ 128 CONG. REC. S4213 (daily ed. Apr. 28, 1982) (remarks of Sen. Huddleston) (Executive Order 12356 creates "the serious danger of overclassification and excessive secrecy in Government."). See also *supra* note 154.

³¹¹ A healthy skepticism about information practices and policies created the *de novo* review requirement in the statute, and skepticism among the courts forces agencies to carefully monitor the invocation of the exemptions. 1 O'REILLY, *supra* note 8, at 3-23.

³¹² The court would only review the [classified] material to see if it conformed with the [Executive Order's classification] criteria. The description 'in the interest of national defense or foreign policy' is descriptive of the area that the criteria have been established in [sic] but does not give the court the power to review the criteria. 120 CONG. REC. H6811 (daily ed., Mar. 14, 1974) (remarks of Rep. Erlenborn). See also 120 CONG. REC. H34167 (daily ed., Oct. 7, 1974) (remarks of Rep. Moorhead) ("A court could only determine whether the information was 'properly classified' pursuant to [the] Executive Order."); 120 CONG. REC. H6813 (daily ed., Mar. 14, 1974) (remarks of Rep. Mink) (courts will be able to rule only on classification within the criteria).

³¹³ See *Classification Hearings*, *supra* note 27, at 75.

³¹⁴ See *supra* note 203.

³¹⁵ See *supra* note 179 and accompanying text.

public's right of access by establishing more categories of classifiable information,³¹⁶ by eliminating the "identifiable damage" requirement from the threshold standard for classification,³¹⁷ and by resolving all doubts in favor of classification.³¹⁸

Under E.O. 12356's predecessor, E.O. 12065, the agency had to prove that disclosure of a classified document would, at a minimum, be reasonably expected to cause "identifiable damage" to national security.³¹⁹ Furthermore, E.O. 12065 required that any reasonable doubts concerning the propriety of classification be decided in favor of disclosure.³²⁰ In contrast, E.O. 12356 requires only proof that disclosure would reasonably be expected to cause damage to national security.³²¹ If no particular damage needs to be identified, the "damage" which the classifying agency predicts will result from the document's disclosure may be only a theoretical damage.³²² As a result, justifying a classification decision is substantially easier under E.O. 12356.³²³

Furthermore, the criteria under which the court must assess the classification decision provide that reasonable doubts be resolved in favor of classification.³²⁴ This provision makes the agency's task of meeting the burden of proof significantly easier. Whereas under E.O. 12065 agencies were required to show that a document was clearly exempt from disclosure,³²⁵ under E.O. 12356 agencies need only show that there is a reasonable doubt about whether the document is exempt.³²⁶ This provision thus forces the party requesting disclosure to show beyond a reasonable doubt that the document is not exempt. Because the plaintiff typically has little or no information pertaining to the reasons why the document is classified, it is virtually impossible for him to meet this burden.³²⁷ Congress recognized this problem when it enacted the FOIA, and as a result, placed the burden on the Government to sustain its action.³²⁸ E.O. 12356 alters the statutory scheme of the FOIA and prevents the Act from effectively protecting the public's right of access to information.³²⁹

These provisions create a serious problem for the FOIA.³³⁰ Even if the federal courts conduct the type of review which Congress had intended, their review may not reveal much, if any, departure from the criteria set forth in E.O. 12356.³³¹ Because the courts are not empowered to review the propriety of the Executive Order, the solution to the

³¹⁶ See *supra* note 313.

³¹⁷ See *supra* note 188.

³¹⁸ Exec. Order No. 12,356 § 1.1(c), 3 C.F.R. 166, 167 (1983).

³¹⁹ Exec. Order No. 12,065 § 1-103, 43 Fed. Reg. 28,949, 28,950 (1978).

³²⁰ Exec. Order No. 12,065 § 1-101, 43 Fed. Reg. 28,949, 28,950 (1978).

³²¹ Exec. Order No. 12,356 § 1.3(b), 3 C.F.R. 166, 169 (1983).

³²² See *Classification Hearings, supra* note 27, at 3-4.

³²³ See 128 CONG. REC. S4213 (daily ed. Apr. 28, 1982) (remarks of Sen. Huddleston).

³²⁴ Exec. Order No. 12,356 § 1.1(c), 3 C.F.R. 166, 167 (1983).

³²⁵ *Ray v. Turner*, 587 F.2d 1187, 1214 (D.C. Cir. 1978) (Wright J., concurring).

³²⁶ See *supra* notes 183-186 and accompanying text.

³²⁷ See S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965).

³²⁸ *Id.*; 5 U.S.C. § 552(a)(4)(B).

³²⁹ 128 CONG. REC. S4212 (daily ed. Apr. 28, 1982) (remarks of Sen. Leahy) ("shifting the burden to the public will have the inevitable effect of upsetting the balance and giving Government its natural advantages in the fight for access.").

³³⁰ See *supra* notes 316-317 and accompanying text.

³³¹ The criteria of Exec. Order No. 12,356 are so classification-oriented that an agency would be able to justify its classification of almost any information. See *Classification Hearings, supra* note 27, at 14.

problem which E.O. 12356 creates is not wholly in the hands of the judiciary. The FOIA itself must be adapted to meet the problems created by E.O. 12356.³³²

Although Congress has not yet enacted any corrective legislation, Senator Durenberger of Minnesota and six other senators have proposed a bill which would address the Reagan Administration's efforts to diminish the effectiveness of the FOIA.³³³ This proposal would amend the national security exemption to require that even properly classified information can be withheld from the public under the FOIA only when the disclosure of the information "could reasonably be expected to cause identifiable harm to national security" and "when the need to protect information outweighs the public interest in disclosure."³³⁴ Through the amendment, the Senators seek to incorporate into the Act the "balancing" and "identifiable damage" provisions of E.O. 12065 which were revoked by E.O. 12356.³³⁵

Such a legislative solution would restore the effectiveness of *de novo* review.³³⁶ By amending the criteria of the national security exemption, the bill imposes a statutory restraint upon the executive's power to establish criteria.³³⁷ The additional criteria would limit agency discretion so that the burden of proof which the agencies must satisfy would be substantial enough to favor the party seeking disclosure, as Congress originally intended.³³⁸

The bill's success in restoring the balance of public and governmental interests which is disrupted by E.O. 12356, however, depends heavily upon the courts. If the courts do not conduct a *de novo* review and require the agencies to show that their decisions comply with these additional criteria, the stricter criteria will not succeed in restoring the balance.³³⁹ Indeed, one authority, in commenting upon the effect that E.O. 12356 would have on the FOIA, has said that the revocation of the "identifiable damage" and "balancing" provisions of E.O. 12356 was unlikely to affect the operation of the FOIA because no court decisions have relied on or even discussed these provisions.³⁴⁰ No decision has considered these provisions, perhaps, because no court has undertaken a *de novo* review and applied them without deferring to the agency's claim that they have been satisfied.

The proposed bill re-emphasizes Congress' belief that judicial review is necessary to

³³² To the extent that the Executive's power to determine the criteria for the national security exemption allows him to manipulate the scope of the exemption, Congress may respond with further amendments. 1 O'REILLY, *supra* note 8, at 11-10 n.3.

³³³ S.2452, introduced on April 28, 1982. 128 CONG. REC. S4210-S4216. (No action was taken on the bill during the 97th Congress.).

³³⁴ *Id.*

³³⁵ Although the Senators did not directly incorporate the provisions of Executive Order No. 12,065, the language of these provisions comes directly from Exec. Order No. 12,065 §§ 3-303, 1-303, 43 Fed. Reg. 28,949, 28,955, 28,952 (1978).

³³⁶ *Contra Assessment*, *supra* note 137, at 96 n.42 ("Given the seemingly relative insignificance of the modifier, 'identifiable,' in terms of burden of proof in F.O.I. Act cases, the bill appears to be more of a signal to agency classifiers than an alteration of the standards of judicial review in F.O.I. Act cases involving exemption one.").

³³⁷ This bill, however, may not go far enough. Executive Order No. 12,356's mandate to resolve all doubts in favor of classification creates a powerful policy which remains untouched by the proposed legislation.

³³⁸ See *supra* notes 123-125 and accompanying text.

³³⁹ Under the bill, the courts are not empowered to review the agency's application of the balancing test. 128 CONG. REC. S4212 (daily ed. Apr. 28, 1982). They may only ask whether the test was made. *Id.*

³⁴⁰ *Classification Hearings*, *supra* note 27, at 75.

the proper operation of the FOIA. Instead of proposing a bill which would seriously intrude into the executive's authority in national security cases and possibly create a separation of powers problem,³⁴¹ the Senators chose to make the criteria for judicial review stricter and thereby return to the courts the power to enjoin improper classifications. The courts, by exercising this power, will thus be able to maintain the balance between the public's interest in disclosure and the Government's interest in the protection of information. The maintenance of this balance is necessary to the success of the FOIA, and the judiciary's acceptance of its responsibility to review executive classification decisions is necessary to the maintenance of this balance.

The proposed bill also emphasizes Congress' belief that the courts are competent to decide issues of national security.³⁴² Probably the reason most often cited for the courts' reluctance to conduct a thorough *de novo* review of an executive agency's classification decision is that the courts are not competent to decide matters of national security.³⁴³ Agencies admittedly have more experience and expertise in matters of national security than the courts. The role of the courts, however, is not to usurp the function of an agency chief, but to weigh the strength of his arguments against those of the litigant requesting disclosure and determine whether the former has properly exercised his authority under the relevant law.³⁴⁴

Congress was aware of the judiciary's lack of expertise in matters of national security when it passed the FOIA Amendments, but it did not find the problem insurmountable.³⁴⁵ The Senate Judiciary Committee specifically concluded that the courts are qualified to make the necessary judgments.³⁴⁶ The committee also suggested that courts

³⁴¹ The separation of powers argument is also advanced in opposition to the courts' *de novo* review and to enjoin classification decisions. See, e.g., 120 CONG. REC. H36243-H36244 (1974) (veto message of President Ford). It is based upon the idea that the Executive can only function effectively in an area committed to him by the Constitution, like national security, if he can operate undisturbed by the other branches. See *id.*; Note, *Right to Know*, *supra* note 34, at 1466-1467. This doctrine, however, does not require that the Executive exercise unchecked power in the area of national security. Note, *Right to Know*, *supra* note 34, at 1467. The purpose of the doctrine is to preserve the integrity of the three branches of government and to ensure each branch's independence. See *Myers v. U.S.*, 272 U.S. 52, 291-95 (1926) (Brandeis, J., dissenting). It does not require absolute deference to the Executive's decisions to withhold documents that do not contain diplomatic or military secrets. See *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1219 (1972). Cf. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793-94 (D.C. Cir. 1971). For a discussion of the separation of powers argument advanced by President Ford in opposition to the Amended FOIA (Veto Message, 120 CONG. REC. 36243-36244 (1974)), see 120 CONG. REC. S39602 (daily ed., Nov. 19, 1974) (letters from Philip B. Kurland to Senator Muskie (Nov. 15, 1974)).

In its provision for judicial review of Executive decisions, Congress did not intrude upon the Executive's power. The FOIA does not empower the courts to review the propriety of the Executive's criteria for classification; it merely authorizes review of agency compliance with those criteria. See *infra* note 349.

³⁴² See *supra* note 281 and accompanying text.

³⁴³ In *Epstein v. Resor*, the court said, "the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with." *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1976). Similarly, in *Salisbury v. U.S.*, the court said that, "[j]udges lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case; they must not . . . conduct a detailed inquiry to decide whether [they] agree [] with the agency's opinions." *Salisbury v. U.S.*, 690 F.2d 966, 970 (D.C. Cir. 1982).

³⁴⁴ See Note, *Right to Know*, *supra* note 34, at 1465.

³⁴⁵ See *id.* at 1449-50.

³⁴⁶ "The judgments involved may often be delicate and difficult ones, but someone other than

employ special masters or expert consultants to aid them in making what may often be sophisticated determinations.³⁴⁷

Courts are frequently called upon to make difficult judgments on complex subjects.³⁴⁸ With no special expertise in business, economics, physics, or engineering, courts resolve intricate factual disputes in corporate, antitrust, environmental, and patent cases. They can perform the same function when national security issues arise in classification cases. In such cases, the court is only required to examine the executive decision in terms of the executive's own criteria.³⁴⁹

CONCLUSION

The courts can provide the best forum for examining the issues raised by national security claims. Judges are insulated from the political arena and can mediate between government claims and public demands.³⁵⁰ *De novo* determinations of the propriety of executive classification decisions would ensure that the national security is protected without sacrificing the public's right of access to government records.³⁵¹

Effective judicial enforcement of the FOIA is thus essential to the successful operation of the Act in regard to national security information. The judiciary's exercise of its powers of review is necessary to the success of the FOIA, which seeks to maintain a balance between the public interest in disclosure and the governmental interest in the protection of information. The maintenance of this balance requires that each branch of the federal government perform its assigned role. The judiciary's role is especially important to maintaining this balance in regard to national security information because the national security exemption vests broad power in the executive branch. This redistribution of power upsets the balance, and in order to restore it, the courts must provide a check on executive power by reviewing the executive agencies' classification decisions.

At present, however, the judiciary does not provide this check on executive power. Courts are deferential to the judgment of the executive agencies, and as a consequence, they do not conduct the *de novo* review that the FOIA's statutory scheme requires of them. The judiciary's failure to perform its assigned role disrupts the balance which is necessary to the success of the FOIA and leaves the public's right of access to government information inadequately protected.

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interested parties — officials with power to classify and conceal information — must be empowered to make them. It is the committee's conclusion that the courts are qualified to make such judgments." S. REP. NO. 854, 93d Cong., 2d Sess. 31 (1974), reprinted in *Source Book* *supra* note 45, at 183.

³⁴⁷ *Id.*

³⁴⁸ See Note, *Right to Know*, *supra* note 34, at 1472.

³⁴⁹ See 120 CONG. REC. H6808 (daily ed., Mar 14, 1974) (remarks of Rep. Erlenborn); Clark, *supra* note 3, at 758-59 (Judiciary is only empowered to require executive agencies to comply with the standards).

³⁵⁰ Note, *Right to Know*, *supra* note 34, at 1473.

³⁵¹ *Id.*