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American Law Institute has recommended legislation adopting, in essence, the objective, police conduct approach. Finally, there is little chance that a constitutional foundation for entrapment will be accepted. The Supreme Court refused to consider a due process challenge in the most extreme of contraband cases, and even Justices Powell and Blackmun were not especially encouraging in other areas. Essentially, the Court has once again sanctioned an all-out war by police against hypothetically "predisposed" individuals.

DOUGLAS KRAMER


The United States Court of Appeals for the District of Columbia Circuit has interpreted the 1974 amended time provisions of The Freedom of Information Act to mean that under exceptional circumstances, where an agency diligently processes requests for information but physically cannot comply with the restricted time limits, a court may grant the agency additional time. The author suggests that the court's holding avoids a political question that a less narrow holding would embrace. If the amendments are to retain their force, Congress may need to clarify the emphasis it intends for agencies to place on the screening of requests as opposed to the performance of their normal regulatory duties.

Open America, a corporation, was organized to undertake projects in the public interest. One of these projects involved testing

94. MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962). The Code provides in pertinent part as follows:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except . . . [when causing or threatening bodily injury is an element of the offense charged] . . . a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.
the 1974 Freedom of Information Act (FOIA) amendments allowing an agency ten days (twenty days on appeal) to decide to release requested documents and to notify the requesting party.\textsuperscript{1}

On October 10, 1975, Open America requested that the Federal Bureau of Investigation produce all documents and files on the role of L. Patrick Gray (former Acting Director of the FBI) in the Watergate Affair. On November 5, 1975, twenty-six days later, a reply from the Director of the FBI acknowledged the request and noted that 5,137 FOIA requests had been received previously and 1,084 were being processed. On November 12, 1975, thirty-three days after the initial request, Open America appealed to the Appeals Officer of the Freedom of Information Unit of the FBI. This letter was redirected to the proper appeals office within the Office of the Deputy Attorney General. The appeals office acknowledged the letter by notifying Open America of its priority number. On January 22, 1976, Open America filed an action in the United States District Court for the District of Columbia to compel compliance with or denial of the request, pursuant to subsections (a)(4)(B)\textsuperscript{2} and (a)(6)(C)\textsuperscript{3} of the FOIA. The court found for the plaintiff and ordered the agency to release to the plaintiffs within thirty days an itemization and indexing of documents and justification for documents claimed to be exempted from disclosure under the FOIA.\textsuperscript{4}

\textsuperscript{1} Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 608 n.4, 609 n.9 (D.C. Cir. 1976).

\textsuperscript{2} 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975) states:

\textit{On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . . [T]he court shall determine the matter de novo, . . . and the burden is on the agency to sustain its action.}

\textsuperscript{3} 5 U.S.C. § 552(a)(6)(C) (Supp. V 1975) provides:

\textit{Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.}

\textsuperscript{4} 547 F.2d at 609.
pealed, asserting exception to the limited time requirements by authority of FOIA subsection (a)(6)(C) regarding exceptional circumstances. On appeal, the United States Court of Appeals for the District of Columbia Circuit held, vacated and remanded: Where an agency is inundated with requests not anticipated by Congress, so that existing resources are inadequate to meet the statutory time limits, and where the agency can show due diligence in processing those requests, then the court may retain jurisdiction and allow the agency additional time to complete its review of the records. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

The author contends that this holding is based on a very narrow, and perhaps forced, construction of the FOIA amendment; however, this construction may have been the only way for the court to skirt a political question. The political question would have involved choosing which of two conflicting duties should be given priority by the FBI: the screening of FOIA requests or the investigation and detection of federal crimes. Each of these alternatives, if chosen, would then present a second constitutional problem.

Before detailing the two-tiered political question incipient in the *Open America* litigation, it is helpful to examine the legislative, executive and judicial actions which led to the 1974 FOIA amend-

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5. *See* Baker v. Carr, 369 U.S. 186 (1962), for a summary of controversies held non-justiciable under the political question doctrine. The non-justiciability of a political question is only a function of the separation of powers. "We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'" *Id.* at 210, (quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939)).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

However, in the case where "an initial policy determination of a kind clearly for nonjudicial discretion" has been made, and where "judicially discoverable and manageable standards for resolving [a controversy]" exist, then deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of the branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. *Id.* at 211.
ments. These interactions reveal an ongoing policy struggle between
the congressional interest in public disclosure, the executive interest
in maintaining its executive privilege of secrecy and the judicial
interest in resolving these opposing forces without leaving the judi-
cial arena. These competing interests were ultimately at issue in
Open America, but they are temporarily in abeyance due to the
court’s narrow statutory construction.

The FOIA has been acknowledged as an attempt to correct
deficiencies in former section 1002 of The Administrative Procedure
Act. Although section 1002 detailed means of making records avail-
able and publishable for public information, the statute “came to
be looked upon more as a withholding statute than a disclosure
statute.” Some of the problems connected with section 1002 were:
(1) matters of record were to be made available only to “persons
properly and directly concerned;” (2) “any function of the United
States requiring secrecy in the public interest,” a broad and vague
classification, was exempted from disclosure; (3) there was no pro-
vision made regarding sanctions for violations of the statute. The
FOIA, however, makes records open to the public, deleting the
“properly and directly concerned” test of access. Exemptions from
mandatory disclosure are spelled out in nine groups, and district
courts are given the power to review exemption issues de novo. In
these reviews, the agency bears the burden of proving the eligibility
of withheld material for exemption. Finally, violation of disclosure

v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1976).
9. Id.
10. In discussing the problems with section 3 and the reasons for the new Act, the Court
in EPA v. Mink quoted a Senate Report: “The phrase ‘public interest’ . . . has been subject
to conflicting interpretations, often colored by personal prejudices and predilections. It
admits of no clear delineations.” EPA v. Mink, 410 U.S. 73, 81-82 (quoting S. REP.
No. 813, 89th Cong., 1st Sess. 8 (1965)).
Except with respect to the records made available under paragraphs (1) and (2)
of this subsection, each agency, upon any request for records which (A) reasonably
described such records and (B) is made in accordance with published rules stating
the time and place, fees (if any), and procedures to be followed, shall make the
records promptly available to any person.
executive secrets in the interest of national security; 2) internal workings of agencies; 3)
statutory exemptions; 4) privileged or confidential commercial or financial information; 5)
inter or intra-agency memorandums; 6) files which would invade personal privacy rights; 7)
investigatory records for law enforcement purposes; 8) files related to regulation of financial
institutions; and 9) geological data.
requirements is punishable by contempt.\textsuperscript{15}

The new disclosure act was quickly emasculated by \textit{EPA v. Mink}\textsuperscript{16} which tested the extent of the agencies' burden in proving that requested records have been properly classified in one of the exempted groups. In a suit to compel disclosure, members of Congress argued that documents classified as Top Secret or Secret and documents alleged to be inter or intra-agency memoranda involved in executive branch decision making\textsuperscript{17} should be inspected \textit{in camera} to sift out non-secret or purely factual material for disclosure. This argument was based on the judicial authority to examine the exemption de novo. The statutory de novo requirement allegedly expressed the legislative intent to leave the ultimate decision of the propriety of exemption to the courts.\textsuperscript{18} The Supreme Court rejected that argument and accepted the EPA's contention that upon a showing of the fact of classification as Secret or Top Secret by Executive Order, the agency has sustained its burden of proving eligibility for exemption.\textsuperscript{19} To require automatically an \textit{in camera} hearing as a requisite of sustaining the agency's burden of proof would be "to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen."\textsuperscript{20} The Court's conclusion has been summarized by one commentator to mean that a procedurally correct executive classification of a document as Secret will be sufficient to warrant the withholding of a document and that classification will not be questioned by the courts.\textsuperscript{21}

This interpretation of the scope of judicial review of exemption claims and the shift toward a substantially lightened burden of proof on the withholding agency prompted a flurry of congressional activity aimed at revitalizing section 552. As one commentator remarked, "[T]he Court apparently misconstrued Congressional in-

\begin{itemize}
  \item \textsuperscript{15} 5 U.S.C. § 552(a)(4)(G) (Supp. V 1975). "In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member."
  \item \textsuperscript{16} 410 U.S. 73 (1973).
  \item \textsuperscript{18} Mr. Justice Brennan, in his separate opinion, said: "We have the word of both Houses of Congress that the de novo proceeding requirement was enacted expressly 'in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.'" \textit{EPA v. Mink}, 410 U.S. 73, 100 (1973) (Brennan, J., concurring in part, dissenting in part), (citing S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965) and H.R. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966)).
  \item \textsuperscript{19} \textit{Id.} at 84.
  \item \textsuperscript{20} \textit{Id.}
\end{itemize}
tent, for almost immediately after the *Mink* decision a flood of proposed legislation to amend the Act began to appear.” In February of 1973, House Resolution 4960, a forerunner of the amendments, was introduced.

While the proposed amendments were clearing both houses, President Ford expressed dissatisfaction with them. His concern was that the amendments’ limited time provisions would unduly restrict the agencies in considering certain requests before making the decision on whether or not to withhold. In deference to the President’s concern, Congress immediately included two clauses, (a)(6)(B) and (a)(6)(C) which had been in the Senate version. The first allows a ten day extension for compliance when files are geographically separated or there are some other concrete obstacles to complete indexing within the thirty days allowed. The second was intended as an escape valve of indefinite duration when an agency faces such exceptional circumstances that processing could not be completed within the time limits despite the agency’s due diligence in processing the request. This escape valve would allow the court to retain jurisdiction while allowing the agency additional time. Despite these clauses, President Ford vetoed the bill partially because of concern that the agencies would be so overburdened that they could not perform their duties properly. Congress overrode the veto. This conflict between the executive and legislative branches laid the basis for the extremely delicate political question which ultimately was avoided by the court.

One of the most significant problems in any of the disclosure acts is the ultimate constitutional problem of separation of power. The central question is whether Congress can legislate disclosure so as to defeat the executive power to keep secrets in the interest of national security.” Another question is whether judicial power extends to direct review of executive classification decisions. Courts


23. See 547 F.2d at 610 n.11.

24. It should be noted that only the first escape valve is available to the agency before suit is filed. The second is available only when granted by a court.

25. See 547 F.2d at 610 n.11.

26. “The freedom of information act was not designed to open all government files indiscriminately to public inspection . . . . Obviously, documents involving such matters as military plans and foreign negotiations are particularly the type of documents entitled to confidentiality.” Welch, supra n.21, (quoting Moss v. Laird, No. 1245-71 (D.D.C. Dec. 7, 1971)); see United States v. Reynolds, 345 U.S. 1, 6 and n.9 (1953).

27. “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.” United States v. Reynolds, 345 U.S. 1, 8 (1953) (footnotes omitted).
are consistently reluctant to pass on such issues. 28 As to the conflict between Congress and the executive, the Court has gone so far as to suggest that Congress, with stated justification, may set up classification procedures. 29

As to judicial review of executive classifications, the provision in the FOIA specifically authorizing in camera review of executive classification has not yet been tested as to the ultimate judicial power to reclassify according to the court’s determination of the needs of national security. Thus, judicial power has encroached on executive power little more than has congressional power. One small check on the executive secrecy prerogative occurs in exemption cases where the preliminary showing fails to satisfy the courts that some parts of withheld documents may not be severable and thus subject to disclosure. In this context, in camera review has been merely a sifting process, 30 and not an exercise of the reclassification power.

The separation of powers conflicts have been avoided by the use of statutory construction as a basis of decision by the courts, and although the courts have gradually worked out an approximation of the proper weight for each interest, 31 the struggle between policies is nonetheless vigorous. One might suggest that the resolutions used by the Court have intensified the struggle by frustrating both branches. Congress anticipated greater weight on the side of disclosure; the executive branch desired less weight on disclosure. The balance struck by the Supreme Court, though wavering from a

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28. See id. at 6; “That there may be matter, the production of which the court would not require, is certain . . . . What ought to be done, under such circumstances, presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country.” Aaron Burr Trial, 1 ROBERSON’S REPORTS 186 (Marshall, C.J.) cited in United States v. Reynolds, 345 U.S. 1, 7 n.18 (1953).

29. For example, in EPA v. Mink, the Court said: “Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.” 410 U.S. at 83.

30. It appears to us that Exemption 5 [inter or intra-agency memorandums] contemplates that the public’s access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties’ discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Id. at 91.

31. “In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.” GSA v. Benson, 415 F.2d 878, 880 (9th Cir. 1969).
heavier emphasis for exemption of executive-classified secrets with almost no in camera hearings, to a lighter emphasis on ordinary executive privilege exemptions with occasional “necessary and appropriate” in camera hearings, does not settle the ultimate conflict.\textsuperscript{33}

This conflict was bound to surface in connection with the FOIA amended time limits. History indicates that time may be of the essence to the public’s right to know.\textsuperscript{34} Yet, we have already seen that the presidential concern was over the strict time requirements’ threat to the customary business of an agency.

The facts offered by the FBI in \textit{Open America} show that the time limits are considered unworkable if the agency is to screen material satisfactorily before releasing it. Information requested from the Justice Department goes through two readings: an initial reading to determine the applicability of exemptions, then a review of exemption claims to see whether “matter which is legally exempt can still be disclosed without harm to, \textit{inter alia}, confidential sources, privacy of individuals, classified data, etc.”\textsuperscript{35} Logically, this higher review may also reveal that matters apparently subject to disclosure may on review be determined legally exempt. Manpower is a problem; already there are 191 employees at the FBI Headquarters who are assigned to the processing of FOIA requests. When \textit{Open America} made its request, there was a total backlog of 5,137 requests.\textsuperscript{36}

Given the money and manpower shortage claimed by the FBI, the expedition of \textit{Open America}’s request within the statutorily prescribed time limit could come in one of only three ways: (1) a reallocation of screening personnel according to the priority of judicial enforcement decrees; (2) a reallocation of investigatory staff


\textsuperscript{33} See the concurring and dissenting opinions of \textit{EPA v. Mink}, 410 U.S. 73 (1973).

\textsuperscript{34} “It is not sufficient to assume that if information is important it will get out. When it gets out is crucial . . . .” \textit{Nader, New Opportunities for Open Government}, 25 AM. U.L. REV. 1, 3 (1975).

\textsuperscript{35} 547 F.2d at 612.

\textsuperscript{36} Id. at 613.

\textit{[R]equests are separated into difficult and simple requests, identified respectively as “project requests” or “non-project requests” . . . .}

A project request is assigned to a project team, headed by a supervisory special agent, including five research analysts, and at least two research clerks.

The particular team to which \textit{Open America}’s request has been assigned is in various stages of processing 33 other projects, all of which were received prior to \textit{Open America}’s request . . . .

\textit{Id. at 612.}
generally to the screening process; or (3) a substantial curtailment of pre-disclosure screening. The majority opinion deals well with its refusal to reallocate by the first method, in that there was no question of urgency which would justify according a judicially-imposed preference over the 5,137 other requests.\(^{37}\) The second and third choices are not analyzed.

When these latter alternatives are examined, the reasons compelling settlement by statutory construction of the exceptional circumstances provision\(^ {38}\) become clear. The court could be construing that provision to mean that when refusal to grant relief to an agency would entangle the court in problems of a political nature, the existence of those problems constitutes exceptional circumstances.

In order to visualize the functioning of the FOIA section 552, let us first consider what the effect would be on a hypothetical regulatory agency if that section were applied to it. Let us assume that Congress by statute creates a quasi-legislative agency to regulate an interstate marketing of a particular class of consumer products. Assume further that Congress is prompted to do so by public clamor over inconsistencies in quality which endanger consumers' health, so that the statute creates the regulatory agency for the express purpose of making rules and hearing complaints so as to insure adherence to a given range of qualities in the goods. That Congress has the power to delegate such functions has not been seriously questioned since the "hot oil" and "sick chicken" cases.\(^ {39}\) All Congress need do is define its policy in creating the agency and establish standards for achieving such a statutory purpose.\(^ {40}\) The agency then is free to pursue that goal, usually subject to judicial review should any affected corporation or dissatisfied consumer allege an abuse of discretion or action contrary to the statute or the agency's own regulations. In its investigation of national variations in quality, the agency may be empowered to keep records itself or to require companies to keep records subject to administrative subpoena.\(^ {41}\)

As to this fictional agency, should Congress pass the section 552 amendments without the inclusion of the exceptional circumstances

\(^ {37}\) Id. at 614.

\(^ {38}\) See note 3 supra for the text of the exceptional circumstances provision.


language, should a fictional plaintiff request such records as have been kept, and should the agency have insufficient manpower to continue amassing records and to screen so as to remove all matters arguably exempt, then there is a question as to whether Congress intended to give the information collecting provision or the disclosure provision priority in the internal resource allocation of the agency, or whether Congress intended to curtail substantially the screening before disclosure. Given the power to create the agency, Congress clearly has the power to modify the agency or to redirect its energies. The only question is whether Congress had indicated its intention clearly.

If the Congress in passing the amendments had mandated a redirection of resources to expedite disclosure requests, either in the statute or in the legislative history, then as one alternative the court could order immediate compliance with the administrative deadline; the agency could be compelled to reallocate as Congress had mandated, diverting manpower from routine supervision or data collection to the screening process. As a second alternative, if Congress had indicated an intention to subordinate the screening to the ordinary business and had indicated in statute or legislative intent that in such situations the agency was directed to waive the detailed sort of screening that is geared to releasing technically exempt material or to withholding arguably exempt material, then again the court could order compliance and compel the agency to dispense with the kind of processing the FBI has described in the instant case. After minimum screening the agency would thus release all materials including those arguably but not clearly exempt, and would withhold only clearly and technically exempt materials.

In this hypothetical case, the court's task would be to ascertain the intention of Congress as to the preferred effects of an order of strict compliance in the face of a manpower shortage. If the court could find that the basic preference had been stated so that the court in its order of compliance and the agency in its compliance could be guided in its responses to the requests, then strict compliance could be ordered by the court. However, if the court could find no preference stated, nor a decision made by Congress as to which policy should be pursued in ordering the priorities of personnel and screening options, then the court could not order compliance. To do so would be to resolve a political question, that is, to make a policy.

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42. This kind of order is limited to a certain extent by some statutes and cases which place penalties on agencies which disclose material improperly. See Welch supra note 21 at 370.
decision beyond the power of the court to make, since the power to
decide such policies has been committed to Congress.\textsuperscript{43}

In \textit{Open America}, the most conspicuous fact is that not only has
Congress not made a basic choice for a situation like the one the FBI
faced, but it never foresaw such potentiality of conflict in terms of
internal resources. In addition, even if the court were to find an
indication of policy choice, there would have to be no other constitu-
tional limitations on that choice before the court could compel the
agency to follow it. In \textit{Open America}'s case, the alternatives them-
selves may be subject to constitutional limitations.

The first alternative in the fictional example was to find a
congressional intention of reallocation from the ordinary agency
purpose to the disclosure process. Such a finding in \textit{Open America}
would effect a frustration of the kind which concerned President
Ford. Though the power of Congress to spend is also the power not
to spend, it is questionable whether such an undercut could be
inferred in the absence of clear designation in actual appropriations
by Congress for that agency. For a court to effect a cutback in the
FBI function by ordering strict compliance would amount to a deci-
sion not within the discretion granted to the judiciary. This problem
was averted in the majority opinion by a finding that the financial
squeeze on the agency came as a result of gross underestimation of
requests rather than as a deliberate refusal of Congress to fund the
agencies' additional manpower needs.\textsuperscript{44}

The second alternative in the hypothetical involved a waiver of
the right to withhold and litigate the question of arguably exempt
materials. Here, the congressional power to give up secrets runs into
the wall of the executive privilege. In the hypothetical case, the
agency was a quasi-legislative body, regulating a consumer market
by delegated powers of Congress. In those imagined facts, it was not

\textsuperscript{43} This would be what one author describes as a jurisdictional problem, a problem of
lack of judicial power rooted in the Constitution. Hughes, \textit{Civil Disobedience and the Political
Question Doctrine}, 43 N.Y.U.L. Rev. 1, 7 (1968). It would not involve an exercise of what A.
Bickel calls a discretion not to decide a case, based on
the Court's sense of lack of capacity, compounded in unequal parts of (a) the
strangeness of the issue and its intractability to principled resolution; (b) the
sheer momentousness of it . . .; (c) the anxiety, not so much that the judicial
judgment will be ignored, as that perhaps it should but will not be; (d) finally
. . . the self-doubt of an institution which is electorally irresponsible and has no
earth to draw strength from.

(1962)). Instead, the majority opinion reveals a court which is reaching through statutory
construction to avoid the application of the political question doctrine.

\textsuperscript{44} 547 F.2d at 612.
assumed that the collection of information might ultimately involve national security and the executive privilege. In the case of Open America, the FBI is an executive agency, not a quasi-legislative body. It is intimately involved in questions relating to national security through its investigation of violations of federal laws. It is an agency charged with an exclusively executive function and derives its claim of privilege from the Presidency itself. It is questionable whether the Congress can, by financial pressure, coerce an executive department into disclosure of sensitive materials by merely establishing a new set of priorities. Thus, to hold that the time limits must be observed, in the face of the manpower shortage in screening, would be to accomplish either what the President feared in regard to a thwarting of the investigatory role of the agency, or to accomplish what the courts have refused to do, that is, to subordinate the secrecy privilege of the President to the policy priorities of Congress or the citizens.

The executive privilege problem was also skirted by the court for lack of a clear statement in the statute or in the legislative history to indicate congressional intent. Instead, the court found no indication as to which alternative result Congress intended to effect. It was thus faced with either making a choice for Congress clearly beyond its judicial power, refusing to hear the case under the political question doctrine, or construing the exceptional circumstances language in the way the FBI contended was proper.

The exceptional circumstances clause was a tailored escape from this judicial quandary. Even though some might feel the Open

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45. Lacher, supra note 22 at 973; Welch, supra note 21 at 359-60.
46. See EPA v. Mink, 410 U.S. 73 (1973); New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Reynolds, 345 U.S. 1 (1953); Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In all these cases, the Court refrained even from reviewing materials claimed to be within the executive privilege to determine whether some portions were disclosable because they were merely factual and separable.
47. The Court has gone only so far as insisting that the secrecy privilege does not protect the material from in camera review for the purposes not of reclassifying, but of designating separable, mere factual portions within the document. This review, furthermore, has been upheld primarily in "matters of general domestic concern." Lacher, supra note 22 at 975. But see United States v. Nixon, 418 U.S. 683, 710-11 (1974) (pending criminal trial possibly incriminating high level government officials).
48. Baker v. Carr, 369 U.S. 186 (1962). Tracking this language in Open America, we see that under the spending power clause, the issue of funding and manning of the investigating agency has been committed to Congress. There is a lack of discoverable and manageable standards for resolving the reallocation problems that could result from strict compliance. There was no indication of Congressional awareness of the problems of compliance, much less a choice as to alternative results, so that the Court could not order compliance without making such a policy determination.
America decision was not the best one, it should be remembered that construction of that clause may have been the only way to keep the action alive, and with the action, the amendments. A holding generous to the agency may be preferable to dismissal due to the nature of the action as involving a political question. This decision does not, by any means, let the agency off the hook since the applicable clause allows the court to retain jurisdiction.

Read in light of the alternatives, the court's reasoning is much more understandable. The same facts which support the doubt as to whether Congress had in fact realized the effect of compliance, and which make a holding of strict compliance so difficult for the court, support the FBI's contention that it was operating under exceptional circumstances. That Congress estimated the total additional cost of FOIA amendments to be $50,00049 for 1974 supports the inference that Congress did not intend either a reallocation of personnel or a curtailment of the screening process. If this inference is valid, then equally valid is the court's conclusion that "[i]f Congress' anticipation of the burden thrust upon all agencies by its 1974 FOIA amendments is to be taken as a measuring stick, then surely the demands placed on this one agency by Congress' action may reasonably be viewed as 'exceptional circumstances.'"

The court makes clear that the allowance under the exceptional circumstances clause is to be made only where "the agency will have found it impossible to respond to a request within the time limits specified, even with all due diligence . . . ."51 By reference to the Senate Report on the amendments, the court further clarified that "[s]uch 'exceptional circumstances' will not be found where the agency had not, during the period before administrative remedies had been exhausted, committed all appropriate and available personnel to the review and deliberation process."52

The fact that 191 employees at the FBI headquarters process FOIA requests, complicated by the "need to reapportion personnel to comply with court orders in cases of genuine need,"53 and the fact that both the project and nonproject requests were processed on a first-in and first-out system were held to indicate the FBI's due

49. 547 F.2d at 612.
50. Id.
51. Id. at 610-11.
53. Id. at 613. In Meeropol v. Levi, No. 75-1121 (D.D.C. Aug. 27, 1975), 21 part-time employees, one-third of the total FOIA processors, were needed. In Fellner v. Levi, No. 75-C-430 (W.D. Wis. Dec. 17, 1975), six researchers worked full time to comply with a court order.
diligence. The showing that, despite diligence, the existing resources were inadequate to meet the demand was held to prove exceptional circumstances.

There could be a different result if the resource allocation were directly challenged. Since the commitment of all available and appropriate personnel was not challenged, the court was able to avoid discussing the issues that might have been raised had the plaintiff contended that the agency misappropriated its manpower resources. In the meantime, the court has been able to construe an exception to the operation of the statute as a double safety valve: the exceptional circumstances clause operates to take statutory pressure off the constrained agency, and it presents to the court the opportunity to reduce demand for judicial action in an ongoing debate on disclosure between the legislative and executive branches. The majority opinion has now placed the debate back where it started—in the hands of Congress which controls the funding of agencies which are to expedite disclosure. Congress can legislate the result which it desires from strict compliance so that the next round of cases will present more clearly limited questions regarding the ultimate congressional goal of disclosure.

There remain the objections to the court’s reasoning posed by Judge Leventhal in the concurring opinion. Although he agreed with the interpretation that the FBI’s resource limitations constituted exceptional circumstances, he characterized the majority opinion as effecting a reversal in the burden of proof: “No longer must the Government make out a case of exceptional circumstances; instead the plaintiff will be required to show a ‘genuine need and reason for urgency.”

This objection can be refuted by referring to the complete wording of the majority statement:

We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff’s individual request or was lax overall in meeting its obligations under the Act with all available resources, and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information.

There can be no disagreement about the first quoted instance.

54. 547 F.2d at 616.
55. See id. at 616.
56. Id. at 617 (Leventhal, J., concurring).
57. Id. at 615.
The fact of not meeting the deadlines can establish the plaintiff’s right to action in the courts. There is no burden on the plaintiff to show the agency is not using due diligence, just as in the instant case there was no need for Open America to prove lack of due diligence on the FBI’s part. All Open America needed to do was show lack of compliance. The second instance is clearly intended to exist when the agency has contended it comes within the exceptional circumstances provision. Indeed, that is the only area of the statute where due diligence is a prerequisite. It is clear from the presentation of evidence by Open America that the burden is, as Congress intended and as Judge Leventhal thinks proper, on the agency to prove the applicability of that exceptional circumstances provision. A showing of urgency by the plaintiff would be necessary only in the event that the special provision applies in order to render that provision waivable by the court.

A further objection is made by Judge Leventhal to the value judgment of the majority regarding the adverse effect of a priority list established by filing of suit. Judge Leventhal points to the provision awarding attorney’s fees and litigation costs to a plaintiff who prevails as a barrier to that discrimination. The majority fears an invidious discrimination as a result of suit priority. However, Judge Leventhal seems to overlook or minimize two possibilities: someone must pay the court costs as the suit progresses and many cannot afford that advance of cash, and a complainant who can ill afford the suit may lose and recover nothing.

Judge Leventhal’s third objection is to the inquiry by the court into the agency’s resources. “[A]bsent a clear statutory mandate or extraordinary circumstances a court does not normally inquire into a defendant’s resources . . . .” A clear answer to this objection seems to be that the case involved both acknowledged exceptions: a statutory mandate to the agency to show due diligence (it is difficult to imagine how this could be accomplished without agency evidence regarding its resources and allocations) and the existence of exceptional circumstances in the difficulty for the agency to comply. In fact, Judge Leventhal based his concurrence on his own acceptance of certain facts regarding those resources.

A final observation by Judge Leventhal is as follows:

The legislature contemplates that the judiciary will seek to define

58. Id. at 620 (Leventhal, J., concurring). “Diligence in seeking court relief is not a fool proof way of assigning priority, but it is material and by no means unprecedented.” Id.
59. Id. at 620 n.10.
60. Id. at 620 (Leventhal, J., concurring).
executive compliance according to the legislative mandate. Softening that mandate by construction serves to provide a gloss that the agency is properly performing the duties assigned by the statute, and operates, in effect, to gloss over and screen out any shortfalls in agency performance from the committees and bodies of the legislature. They might otherwise be compelled—by explicit judicial avowal that its decree enforcing the legislative will cannot be enforced by sanctions—to confront the gulf between their expressed will and the practical realities of agency compliance. 61

In contrast, the author offers the observation that the relief afforded by the exceptional circumstances clause may so dilute the disclosure amendments that Congress, if still in favor of expedition, will be compelled to enunciate its ultimate policies regarding resource allocations and/or increase the funding of the agencies for request screening. For proponents of disclosure, such a result would best serve the public interest.

LOUISE H. McMURRAY

The State College Press and the Public Forum Doctrine

In a recent case the Fifth Circuit decided that a student editor of a state university campus newspaper could not be compelled to print paid advertisements submitted for publication. The author of this note disputes the court's analysis in determining that the campus newspaper was not a public forum. Upon concluding that a public forum was involved, the author argues that the plaintiffs had a constitutionally protected right of access arising from the first and fourteenth amendments.

The Mississippi Gay Alliance submitted a paid advertisement and an announcement1 to The Reflector, a Mississippi State University campus newspaper.2 The advertisement informed the public of

61. Id. at 618 (Leventhal, J., concurring).

1. The Reflector regularly ran a “Briefs” section in which announcements of campus and local organizations were printed gratuitously. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1076 (5th Cir. 1976).

2. There was a dispute as to whether or not The Reflector was the “official” newspaper of Mississippi State University. Plaintiffs claimed that it was (Complaint for Plaintiff at paragraph 9), and that the paper itself bore the designation “Official Newspaper of Mississippi State University” on the front page. The answer of the University stated that there was no “official” university newspaper. Answer for Defendant at paragraph 9. The answer of