> scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9.

See also H. Rep. No. 1497, at 10. But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." *Kaiser* v. *Aluminum & Chemical Corp., supra.*, at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States* v. *Reynolds*, 345 U. S. 1 (1953), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.[14] Morevover, in applying the priv-

[14] See, *e. g.*, *Machin* v. *Zuckert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896 (1963) (Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall*, 108 U. S. App. D. C. 106, 280 F. 2d 654, 660–661 (1960) (Renegotiation Board documents); *Olson Rug Co.* v. *NLRB*, 291 F. 2d 655, 662 (CA7 1961) (no claim that NLRB documents are "exclusively policy recommendations"); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 327 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert. denied, 389 U. S. 952 (1967) (discovery denied because documents "wholly of opinions, recommendations and deliberations"); *McFadden* v. *Avco Corp.*, 278 F. Supp. 57, 59–60 (MD Ala. 1967), and cases cited therein.

In *United States* v. *Cotton Valley Operators Comm.*, 9 F. R. D.

ilege, courts often were required to examine the disputed documents *in camera,* in order to determine which should be turned over or withheld.[15] We must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended "to delimit the exception [5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9. See H. Rep. No. 1497, at 10. Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.[16]

719, 720 (WD La. 1949), aff'd by equally divided court, 339 U. S. 940 (1950), the United States offered to file "an abstract of factual information" contained in the contested documents (FBI reports).

[15] See, *e. g., Machin* v. *Zuckert,* 114 U. S. App. D. C. 335, 316 F. 2d 336, 341, cert. denied, 375 U. S. 896 (1963) (private tort action; discovery of Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall,* 108 U. S. App. D. C. 106, 280 F. 2d 654, 662 (1960) (excess profits tax redetermination); *Olson Rug Co.* v. *NLRB,* 291 F. 2d 655, 660, 662 (CA7 1961) (discovery for use in defense to contempt proceedings); *O'Keefe* v. *Boeing Co.,* 38 F. R. D. 329, 336 (SDNY 1965) (private tort action; Air Force Investigation Reports); *Rosee* v. *Board of Trade,* 36 F. R. D. 684, 687–688 (ND Ill. 1965); *United States* v. *Cotton Valley Operators Comm.,* 9 F. R. D. 719 (WD La. 1949), aff'd by equally divided court, 339 U. S. 940 (1950) (civil antitrust suit). Cf. *United States* v. *Procter & Gamble Co.,* 25 F. R. D. 485, 492 (NJ 1960) (criminal antitrust prosecution). See Wigmore § 2379, at 812.

In *Kaiser Aluminum & Chemical Corp., supra,* where *in camera* inspection of the documents was refused because of plaintiff's failure to make a definite showing of necessity, 157 F. Supp., at 947, the "objective facts" contained in the disputed document were "otherwise available." *Id.,* at 946.

[16] See, *e. g., Soucie* v. *David,* 145 U. S. App. D. C. 144, 448 F. 2d 1067 (1971); *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.,* 138 U. S. App. D. C. 147, 425 F. 2d 578, 582 (1970); *Bristol-Myers*

Nothing in the legislative history of Exemption 5 is contrary to such a construction. When the bill that ultimately became the Freedom of Information Act, S. 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

> "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." [17]

Co. v. *FTC*, 138 U. S. App. D. C. 22, 424 F. 2d 935 (1970); *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1358–1359 (CA2), cert. denied, 404 U. S. 827 (1971); *General Services Admin.* v. *Benson*, 415 F. 2d 878 (CA9 1969) aff'g, 289 F. Supp. 590 (WD Wash. 1969); *Long Island R. Co.* v. *United States*, 318 F. Supp. 490, 499 n. 9 (EDNY 1970); *Consumers Union* v. *Veterans Admin.*, 301 F. Supp. 796 (SDNY 1969), appeal dismissed as moot, 436 F. 2d 1363 (CA2 1971); *Olson* v. *Camp.*, 328 F. Supp. 728, 731 (ED Mich. 1970); *Reliable Transfer Co.* v. *United States*, 53 F. R. D. 24 (EDNY 1971).

The proposed Federal Rules of Evidence appear to recognize this construction of Exemption 5. Proposed Rule 509 (a)(2)(A) defines "official information" to include "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions." Rule 509 (c) further provides that "[i]n the case of privilege claimed for official information the court may require examination *in camera* of the information itself."

[17] Hearings before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1376, S.1758, and S. 1879, 89th Cong., 1st Sess., at 7 (May 1965) (hereinafter 1965 Senate Hearings). This exemption had itself been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda "relating to the consideration and disposition of adjudicating and rulemaking matters." Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters, not directly related to adjudication or rulemaking. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., at 202–203, 247 (Oct. 1963).

This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law and policy would inevitably, under the proposed exemption, become available to the public.[18] As a result of this criticism, Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of

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[18] See 1965 Senate Hearings, at 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 382–383, 402–403, 406–407, 417, 437, 445–446, 450, 490. See 1965 House Hearings, at 27–28, 49, 208, 220, 223–224, 229–230, 245–246, 255–257. Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings, at 446):

"Few records would be entirely devoid of factual date, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions."

Department of Commerce (1965 Senate Hearings, at 406):

"Under this provision, internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information." (Emphasis in original.)

law, policy or opinion. It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense 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.

Petitioners further argue that although *in camera* inspection and disclosure of "low-level, routine, factual reports" [19] may be contemplated by Exemption 5, that type of document is not involved in this case. Rather, it is argued, the documents here were submitted directly to the President by top-level government officials, involve matters of major significance, and contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily "inextricably intertwined with policymaking processes." 464 F. 2d, at 746. For these reasons, the petitioners object both to disclosure of any portions of the documents and to *in camera* inspection by the District Court.

To some extent this argument was answered by the Court of Appeals, for its remand expressly directed the District Judge to disclose only such factual material that is not "intertwined with policymaking processes" and that may safely be disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We have no reason to believe that, if petitioners' characterization of the documents is accurate, the District Judge would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.

[19] Tr. of Oral Arg., at 23.

We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in *Kaiser Aluminum & Chemical Corp., supra,* at 947: "It seems . . . obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy, is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U. S. C. § 552 (a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter. In short,

in camera inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States* v. *Reynolds, supra.* In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 71–909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U. S. C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552 (b)(1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense.

Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother DOUGLAS discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The dissenting opinion of my Brother BRENNAN makes an admirably valiant effort to deflect the impact of this rigid exemption. His dissent focuses on the statutory requirement that "the Court shall determine the matter *de novo* . . . ." But the only "matter" to be determined *de novo* under § 552 (b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry*

As the Court points out, "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." But in enacting § 552 (b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat.

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*Similarly rigid is § 552 (b)(3), which forbids disclosure of materials that are "specifically exempted from disclosure by statute." Here, too, the only "matter" to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U. S. C. § 552 (1970), authorizes the District Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history which distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552 (a)(3)—"the court shall determine the matter *de novo* and the burden is on the agency to sustain its action"—is the procedure that Congress prescribed for both Exemptions.

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to

Executive Order 10501, 3 CFR § 292 (Jan. 1, 1971).[1] In reaching this result, however, the Court adopts a construction of Exemption 1 which is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself.[2] In plain words, Exemption 1 exempts from disclosure only material "*specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy.*" (Emphasis added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any *specific* documents be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3 (b) and 3 (c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy:

> "3 (b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that

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[1] Executive Order 10501 was revoked on March 8, 1972, and replaced with Executive Order 11652, 37 Fed. Reg. 5209, which became effective June 1, 1972. See pp. 7–9, *infra.*

[2] "The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie* v. *David,* — U. S. App. D. C. —, —, 448 F. 2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin,* 444 F. 2d 21, 25 (CA4 1971).

of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

"3 (c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications."

Even the petitioners concede,[3] no doubt in response to the "specifically required" standard of § 552 (b)(1) and the "specifically stated" requirement of § 552 (c),[4] that documents classified pursuant to § 3 (b) of Executive

[3] Petitioners' Brief for Certiorari, at 9, n. 4.

[4] Section 552 (c) provides:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The accompanying Senate Report emphasizes that § 552 (c) places a heavy burden on the Government to justify nondisclosure:

"The purpose of [§ 552 (c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless *explicitly* allowed to be kept secret by one of the exemptions in [§ 552 (b)]." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added).

A commenator cogently argues that the "pull of the word 'specifically' [in § 552 (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552 (c), he notes, "is often relevant in determining the proper interpretation of particular exemptions." K. C. Davis, Administrative Law § 3A.15, at 142 (1970 Supp.). See also Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967).

For a detailed study of the Freedom of Information Act and its background, see Note, Comments on Proposed Amendments to § 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417 (1965).

Order 10501 cannot qualify under Exemption 1. Indeed, petitioners apparently accept the conclusion of the Court of Appeals that as to § 3 (b):

> "This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order." 464 F. 2d., at 745.

Nevertheless, petitioners maintain that information classified pursuant to § 3 (c) of the Order is exempt from disclosure under Exemption 1. The Court of Appeals rejected that contention, and in my view, correctly. The Court of Appeals stated:

> "The same reasoning applies to this provision as the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F. 2d., at 746.

Petitioners' argument, adopted by the Court, is that this construction of the Act imputes to Congress an intent to authorize judges independently to review the Executive's decision to classify documents in the interest of the national defense or foreign policy. That argument simply misconceives the holding of the Court of Appeals. Information classified pursuant to § 3 (c), it must be emphasized, may receive the stamp of secrecy not because such secrecy is necessary to promote "the national defense or foreign policy," but simply because it consti-

tutes a part of such other information which genuinely merits secrecy. Thus, to rectify this situation, the Court of Appeals ordered only that the District Court *in camera* determine "[i]f the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning . . . ." The determination whether any components are in fact "non-secret" is left exclusively to the agency head representing the Executive Branch. The District Court is not authorized to declassify or to release information which the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or foreign policy." [5] The District Court's authority stops with the inquiry whether there are components of the documents which would not have been independently classified as secret. If the District Court finds, on *in camera* inspection, that there are such components, and that they can be read separately without distortion of meaning, the District Court may order their release. The District Court's authority to make that determination is unambiguously stated in § 552 (a)(3): "the [district] court shall determine the matter *de novo* and the burden is on the agency to sustain its action." The Court's contrary holding is in flat defiance of that congressional mandate.[6]

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[5] See Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1224–1225 (1972).

[6] "[G]iven the requirement that a file or document is generally classified at the highest level of classification of any information enclosed, it will often be the case that a classified file will contain information that could be released separately. Because it is not 'specifically required by Executive order to be kept secret,' such information is not privileged under the Information Act. To insure that an overall classification is not being used to protect unprivileged papers, a reviewing court should inspect the documents sought by a litigant." Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1223 (1972).

Indeed, only the Court of Appeals' construction is consistent with the congressional plan in enacting the Freedom of Information Act. 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." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (hereinafter cited as S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (hereinafter cited as H. Rep. No. 1497). What was granted, and purposely so, was a broad grant to the District Court of "authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. Rep. No. 1497, at 9. And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by "[p]lacing the burden of proof upon the agency" to justify the withholding. S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

The Court's reliance on isolated references to Executive Order 10501 in the congressional proceedings is erroneous and misleading. The Court points to a single passing reference to the Order in the House Report, which even a superficial reading reveals to be merely suggestive of the kinds of information that the Executive Branch might classify. Nothing whatever in the Report even remotely implies that the Order was to be recognized as immunizing from public disclosure the entire file of documents merely because one or even a single paragraph of one has been stamped secret. The Court also calls to its support some comments out of context of Congress-