men Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive Order 10501. Certainly, whatever the significance that may be attached to debating points in construing a statute,[7] these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.

Executive Order 10501 was promulgated more than a decade before the Freedom of Information Act was debated in Congress. Yet no reference to the Order can be found in either the language of the Act or the Senate Report. Under these circumstances, it would seem odd, to say the least, to attribute to Congress an intent to incorporate "without reference" Executive Order 10501 into Exemption 1. Indeed, petitioners' concession that "physically connected documents," classified under § 3 (b) of the Order, are not immune from judicial inspection serves only to reinforce the conclusion that the mere fact of classification under § 3 (c) cannot immunize the identical documents from judicial scrutiny.

The Court's rejection of the Court of Appeals' construction of Exemption 1 is particularly insupportable in light of the cogent confirmation of its soundness supplied by the Executive itself. In direct response to the Act, Order 10501 has been revoked and replaced by Order 11652 which expressly requires classification of documents in the manner the Court of Appeals required the District Court to attempt *in camera*. The Order, which was issued on March 8, 1972, and became effective on June 1, 1972, 37 Fed. Reg. 5209 (Mar. 10, 1972), explicitly attributes its form to the Executive's desire to accom-

[7] See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) (Jackson, J., concurring) (Frankfurter, J., dissenting).

modate its procedures to the objectives of the Freedom of Information Act:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current information policies of the executive branch."

Moreover, in his statement accompanying the promulgation of the new Order, the President stated: "The Executive order I have signed today is based upon . . . a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972).

The new Order recites that "*some* official information and material . . . bears directly on the effectiveness of our national defense and the conduct of our foreign relations" and that "[*t*]*his* official information or material, referred to as classified information or material, is expressly exempted from public disclosure by Section 552 (b)(1) of [the Freedom of Information Act]." (Emphasis added.) Thus, the Executive clearly recognized that Exemption 1 applies only to matter *specifically* classified "in the interest of the national defense or foreign policy." And in an effort to comply with the Act's mandate that genuinely secret matters be carefully separated from the nonsecret components, § 4 (a) of the new Order provides:

> "*Documents in General* . . . . Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

The President emphasized this requirement in his statement:

> "A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*" 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis added).

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Executive, not the Judiciary . . . ." *Ante,* p. 11, n. 10. But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection made explicit in § 552 (a)(3) is the keystone of the congressional plan, expressly deemed "essential 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, at 8; H. Rep. No. 1497, at 9. It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency discretion was discarded under this Act. The Executive was not to be allowed "to file an affidavit stating [the] conclusion [that documents are exempt] and by so doing foreclose any other determination of the fact." *Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726, 727 (ND Cal. 1971). Accord, *Frankel* v. *SEC,* 336 F. Supp. 675, 677, n. 4 (SDNY 1971), rev'd on other grounds, 460 F. 2d 813 (CA2 1972); *Philadelphia News-*

papers, Inc. v. *HUD*, 343 F. Supp. 1176, 1180 (ED Pa. 1972).[8]

The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. The judicial role becomes "meaningless judicial sanctioning of agency discretion," S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9, the very result Congress sought to prevent by incorporating the *de novo* requirement.

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[8] In support of their claim that Executive Order 10501 automatically and without judicial review activates the exemption of § 552 (b)(1), petitioners rely upon *Epstein* v. *Resor*, 421 F. 2d 930 (1970). Rather, *Epstein* confirms the Court of Appeals' interpretation of the Act. The *Epstein* court refused a request to review *in camera* documents classified pursuant to Executive Order 10501, but only because the Government, at the plaintiff's request, had begun a current review of the documents on "a paper-by-paper basis." Moreover, in response to the argument that petitioners advance here—namely, that the mere classification of a document precludes judicial review—*Epstein* states:

"[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that [the Act] was intended to foreclose an (a)(3) judicial review of the circumstances of the exemption. Rather it would seem that [subsection] (b) was intended to specify the basis for withholding under (a)(3) and that judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of the exemption in truth exist." 421 F. 2d, at 932–933.

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 DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U. S. C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

> "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the 'unauthorized' bombing of the North last fall and winter] are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that "The interests of the United States and its citizens are best

served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executives branch."

While "classified information or material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4 (A). And it goes on to say "Material containing references to classified materials, which references do not reveal classified information, shall not be classified." *Ibid.*

The Freedom of Information Act does not clash with the Executive Order. Indeed the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552 (a)(3) of the Act gives the District Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Section 552 (a)(3) goes on to prescribe the procedure to be employed by the District Court. It says "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action."

The Act and the Executive Order read together mean at the very minimum that the District Court has power to direct the agency in question to go through the suppressed document and make the portion-by-portion classification to facilitate the excerpting as required by the Executive Order. Section 552 (a)(3) means also that the District Court may in its discretion collaborate with the agency to make certain that the congressional policy of disclosure is effectuated.

The Court of Appeals, in an exceedingly responsible opinion, directed the District Court to proceed as follows:

> "(1) where material is separately *unclassified* but nonetheless under the umbrella of a 'secret' file, the District Court should make sure that it is disclosed under the Act. This seems clear from § 552 (b)(1) which states 'This section does not apply to matters that are (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.' Unless the *unclassified* appendage to a 'secret' file falls under some other exception in § 552 (b) it seems clear that it must be disclosed. The only other exception under which refuge is now sought is (b)(5) which reads that the section does not apply to 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'"

This exemption was described in the House Report as covering "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency." H. R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. It is clear from the legislative history that while opinions and staff advice are exempt, factual matters are not. H. Rep., *supra,* at 10; S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. And the courts have uniformly agreed on that construction of the Act. See *Soucie* v. *David,* 448 F. 2d 1067; *Grumman Aircraft Eng. Corp.* v. *Renegotiating Bd.,* 425 F. 2d 578; *Long Island R. Co.* v. *United States,* 318 F. Supp. 490; *Consumers Union* v. *Veterans Adm.,* 301 F. Supp. 796.

Facts and opinions may, as the Court of Appeals noted, be "inextricably intertwined with policy making processes" in some cases. In such an event, secrecy prevails.

Yet where facts and opinions can be separated, the Act allows the full light of publicity to be placed on the facts.

Section 552 (c) seems to seal the case against the government when it says "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Disclosure, rather than secrecy, is the rule, save for the specific exceptions in subsection (b).

The Government seeks to escape from the Act by making the Government stamp of "Top Secret" or "Secret" a barrier to the performance of the District Court's functions under § 552 (a)(3) of the Act. The majority makes the stamp sancrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

I repeat what I said in *Gravel* v. *United States*, 408 U. S. 606, 641–642 (dissenting opinion):

> ". . . as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the official's tool of suppression and it has been used to withhold information which in '99½%' of the cases would present no danger to national security. To refuse to publish 'classified' reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or 'leaks' it would become an arm

> of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government."

The Government looks aghast at a federal judge even looking at the secret files and deals with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

That is to misconceive and distort the judicial function under § 552 (a)(3) of the Act. The Court of Appeals never dreamed that the trial judge would reclassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "secret" or "top secret" file. His second task would be to determine whether under normal discovery procedures contained in Rule 26 of the Rules of Civil Procedure, factual material in these "secret" or "top secret" material is detached from the "secret" and would therefore be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much advertised Freedom of Information Act is on its way to becoming a shambles.[1] Unless federal courts can be

[1] My Brother STEWART, with all deference, helps makes a shambles of the Act by reading § 552 (b)(1) as swallowing all the other eight exceptions. While § 552 (b)(1) exempts matters "specifically required by the Executive order to be kept secret in the interest of the national defense or foreign policy," § 4 of the Executive Order, as I have noted, contemplates that not all portions of a document classified as "secret" are necessarily "secret," for the order contemplates "excerpting" of some material. Refereeing what may properly be excerpted is part of the judicial task. This is made obvious by § 552 (b)(5) which keeps secret "inter-agency or intra-agency memorandums or letters which would not be available by

trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "top secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S. Rep. No. 813, *supra,* at 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b)(1) of the Act. We should remember the words of Madison:

> "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 knowledge gives." [2]

I would affirm the judgment below.

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law to a party other than an agency in litigation with the agency." The bureaucrat who uses the "secret" stamp obviously does not have the final say as to what "memorandums or letters" would be available by law under the Fifth exception, for § 552 (a)(3) gives the District Court authority, where agency records are alleged to be "improperly withheld" to "determine the matter *de novo,*" the "burden" being on the agency "to sustain its action." Hence § 552 (b)(5), behind which the executive agency seeks refuge here, establishes a policy which is served by the fact-opinion distinction long established in federal discovery. The question is whether a private party would routinely be entitled to disclosure through discovery of some or all of the material sought to be excerpted. When the Court answers that no such inquiry can be made under § 552 (b)(1), it makes a shambles of the disclosure mechanism which Congress tried to create. To make obvious the interplay of the nine exceptions listed in § 552 (b), as well as § 552 (c), I have attached them as an Appendix to this dissent.

[2] Letter to W. T. Barry, Aug. 4, 1822, IX The Writings of James Madison (Hunt ed. 1910) 103.

APPENDIX

Sec. 552 (b) and (c) of the Freedom of Information Act reads as follows:

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commerical or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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