chief purpose of the new Act was to increase public access to governmental records by substituting limited categories of privileged material for these discretionary standards, and providing an effective judicial remedy.[37] The Act rejects the usual principle of deference to administrative determinations by requiring a trial "de novo" in the district court. By directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief. Most significantly, the Act expressly limits the grounds for nondisclosure to those specified in the exemptions.[38] Through the general disclosure requirement and specific exemptions, the Act thus strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, *i.e.*, the public interest in freedom of information and countervailing public and private interests in secrecy. Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.[39] There may be

---

[37] 5 U.S.C. § 552 (Supp. V, 1970); *see* Bristol-Myers Co. v. FTC, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938 (1970); American Mail Line, Ltd. v. Gulick, 133 U.S. App. D.C. 382, 385, 411 F.2d 696, 699 (1969); H.R. REP. No. 1497, 89th Cong., 2d Sess. 1-2, 5-6, 8-9, 11 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 3-6, 8, 10 (1965).

[38] This section does not authorize withholding information or limit the availability of records to the public, except as specifically stated in this section.

5 U.S.C. § 552(c) (Supp. V, 1970); *see* Epstein v. Resor, 421 F.2d 930, 932 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970).

[39] One statement in the report of the Senate Committee on the Judiciary specifically supports the conclusion that Congress intended to eliminate equitable discretion. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965) ("It is essential that

exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

Thus, unless the Government on remand makes a valid claim of constitutional privilege, it will be able to prevent disclosure only by showing that the Garwin Report falls within one or more of the statutory exemptions.

On the basis of the present record, the exemption which seems most likely to be relevant is the fifth, protecting "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[40] That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions,

---

agency personnel, *and the courts as well,* be given definitive guidelines in setting information policies.") (emphasis added). The report of the House Committee on Government Operations contains language indicating that district courts do have discretion. H.R. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966) ("The Court will have 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.") (emphasis added). However, the House report was published after the Senate had passed its bill. Since only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict. *See* Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969); Benson v. General Services Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds,* 415 F.2d 878 (9th Cir. 1969); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.2 (Supp. 1970).

[40] 5 U.S.C. § 552(b)(5) (Supp. V, 1970).

and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.[41] Factual information may be protected only if it is inextricably intertwined with policy-making processes.[42] Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of "the inevitable temptation of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records at issue." [43]

The OST is specifically authorized by Congress to evaluate federal scientific programs in order to provide Congress and the President with better information. Its evaluations may be useful to the President, the Congress, and other agencies with the power to make science policy. Nevertheless, the evaluations themselves may not reflect the internal policy deliberations that the "internal communications" privilege is designed to protect. The Garwin

---

[41] *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S. App. D.C. 147, 151, 425 F.2d 578, 582 (1970); Bristol Myers Co. v. FTC, 138 U.S. App. D.C. 22, 26, 424 F.2d 935, 939 (1970); *see* H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. REP. No. 813, 89th Cong., 2d Sess. 9 (1965). *See also* Freeman v. Seligson, 132 U.S. App. D.C. 56, 68-69, 405 F.2d 1326, 1338-39 (1968); Machin v. Zuckert, 114 U.S. App. D.C. 335, 338-40, 316 F.2d 336, 339-41 (1962), *cert. denied*, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 112, 280 F.2d 654, 660 (1960); note 42 *infra*.

[42] *Cf.* United States v. Morgan, 313 U.S. 409, 422 (1941); Morgan v. United States, 304 U.S. 1, 18 (1938); Carl Zeiss Stifting v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd per curiam*, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967).

[43] Ackerly v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

Report may contain some policy advice and recommendations which are protected by the statutory exemption.[44] In the present record, however, there is no evidence to indicate that releasing the factual information in the Garwin Report will expose the decisional processes of the President or other executive officers with policy-making functions. Unless the Government introduces such evidence on remand, the factual information in the Report will not be protected by the exemption for internal communications.

Another statutory exemption which may be applicable to the Garwin Report is the fourth, protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[45] This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and

---

[44] The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

[45] 5 U.S.C. § 552(b)(4) (Supp. V, 1970). Other statutory exemptions also protect information that might be communicated to the Government on a confidential basis. The Act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and matters "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." *Id.*, § 552(b)(6) & (8). The Act also exempts "investigatory files compiled for law enforce-

it must be read narrowly in accordance with that purpose.[46] If the Garwin Report contains material protected by this exemption, then that material should be deleted before disclosure of the remainder may be required.[47]

Finally, the trial court on remand may be called upon to consider the first exemption, for matters "specifically

---

ment purposes except to the extent available by law to a party other than an agency." *Id.*, § 552(b)(7). This exemption covers files prepared for both civil and criminal law enforcement. *See* Clement Bros. v. NLRB, 282 F. Supp. 540, 542 (N.D. Ga. 1968).

[46] *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S. App. D.C. 147, 151, 425 F.2d 578, 582 (1970); Bristol-Myers Co. v. FTC, 138 U.S. App. D.C. 22, 25-26, 424 F.2d 935, 938-39 (1970); Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 802-04 (S.D.N.Y. 1969). *See also* Roviaro v. United States, 353 U.S. 53 (1957) (identity of informers); *In re* Quarles & Butler, 158 U.S. 532 (1895); Vogel v. Gruaz, 110 U.S. 311 (1884); Freeman v. Seligson, 132 U.S. App. D.C. 56, 69-70, 405 F.2d 1326, 1339-40 (1968); Westinghouse Elec. Corp. v. City of Burlington, 122 U.S. App. D.C. 65, 70-74, 351 F.2d 762, 767-71 (1965); Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 113, 280 F.2d 654, 661 (1960); Arnstein v. United States, 54 U.S. App. D.C. 199, 203-04, 296 F. 946, 950-51 (1924).

[47] The exemption for confidential information is available only with respect to information received from sources outside the Government. The Garwin panel's Report is therefore eligible for this exemption only to the extent it contains private information given confidentially by panel members or information obtained from nongovernmental parties on a confidential basis. *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S. App. D.C. 147, 151, 425 F.2d 578, 582 (1970); Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 802-04 (S.D.N.Y. 1969).

required by Executive order to be kept secret in the interest of the national defense or foreign policy."[48]

Under the Freedom of Information Act, the District Court is required to expedite the proceedings on remand to determine whether the Garwin Report is protected by any statutory exemption or constitutional privilege.[49] The court can most effectively undertake the statutory de novo evaluation of the Government's claim by examining the Report *in camera.* Since the record indicates that the Report is an evaluation of the federal program for development of the SST, it seems likely that the Report contains factual information on the SST and on the Government's activities with respect to it. If the Government asserts a specific privilege on remand, inspection of the Report will enable the court to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies

---

[48] 5 U.S.C. § 552(b)(1) (Supp. V, 1970). The other exemptions require a de novo determination of whether the record the Government seeks to withhold contains information of the class protected by an exemption. But to qualify for the first exemption, the Government need show only that the record is "specifically required . . . to be kept secret" pursuant to an Executive order; review of the propriety of keeping it secret is then limited to determining that the administrative decision was not arbitrary and capricious. *See* Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970). *See also* United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1875); *cf.* Dayton v. Dulles, 102 U.S. App. D.C. 372, 378, 254 F.2d 71, 77 (1957), *rev'd on other grounds,* 357 U.S. 144 (1958).

[49] Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

5 U.S.C. § 552(a)(3) (Supp. V, 1970).

of the Act.[50] Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.[51]

III

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceed-

---

[50] *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S. App. D.C. 147, 150, 425 F.2d 578, 581 (1970). *See also* Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 114, 280 F.2d 654, 662 (1960):

> In the present case, where no military or state secrets are involved, and where the generally meritorious basis of the subpoena—including necessity—has been established, we think it proper for the District Judge to examine *in camera* the individual papers which are alleged to be privileged, and direct exclusions or excisions in a manner deemed lawful and appropriate, keeping in mind the issues of the case, the nature and importance of the interests supporting the claim of privilege, and the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy. [citations omitted]

[51] *See* United States v. Reynolds, 345 U.S. 1, 8-10 (1953); Epstein v. Resor, 421 F.2d 930, 933 (9th Cir), *cert. denied*, 398 U.S. 965 (1970).

ings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. The OST itself was created to help alleviate this problem; Congress intended that the OST would provide better information and coordination with respect to federal activities in the scientific field. It would defeat the purposes of the OST, as well as the purposes of the Act, to withhold from the public factual information on a federal scientific program whose future is at the center of public debate.

Reversed and remanded for further proceedings in accordance with this opinion.

WILKEY, *Circuit Judge,* concurring: I concur in the result reached and in the court's opinion, except on the point of equitable discretion discussed below.

I.

It is necessary to remand this matter to the trial court, because the trial court did err in not holding the Garwin Report a record of an agency subject to the Freedom of Information Act, and therefore quite logically did not proceed to consider the exemptions under that Act.

II.

Conceivably on remand the trial court may also reach a question of constitutional privilege.[1] To put this question in perspective, it must be understood that the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and the other constitutional.

Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

> No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their

---

[1] Although the trial court cited this as a second ground of its ruling, this issue has not been raised by the Government.

> executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility.[2]

Insofar as the executive branch is concerned, most, if not all, of the information protected by this common law privilege is now covered by the fifth exemption to the Freedom of Information Act which exempts from disclosure "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." [3]

The constitutional part of the privilege arises from the principle of the separation of powers among the legislative, executive and judicial branches of our Government. This at first glance may not seem relevant here, where the appellants are private citizens relying on the Freedom of Information Act, but it puts the matter in a different focus to know that originally Congressman Henry S. Reuss had sought to obtain this Report over a period of months. Whatever justification lies behind the refusal of his request has a bearing on appellants' rights here. Only after both Dr. DuBridge and Mr. Ehrlichman, Assistant to the President, had declined to accede to the Congressman's request —on the ground that "the report was in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President"—did the appellants make their request.

Appellants invoked the Freedom of Information Act in support of their request, but as the court's opinion points

---

[2] Rogers, *The Right to Know Government Business From the Viewpoint of the Government Official,* 40 MARQ. L. REV. 83, 89 (1956). *See generally,* Kramer and Marcuse, *Executive Privilege—A Study of the Period 1953-1960,* 29 GEO. WASH. L. REV. 623 (1961).

[3] 5 U.S.C. § 552(b)(5) (Supp. V, 1970).

out—without deciding whether the refusal of the Assistant to the President was justified or not—". . . while his [Mr. Reuss'] right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater" (footnote 6). Obviously Congress could not surmount constitutional barriers—if such exist in this or any other given case—by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source.

Recognition of the necessity, on both grounds cited above, of preserving the confidentiality of certain papers and deliberations has come from all three branches of our Government. A few examples demonstrate the universality and antiquity of the principles involved here.

While the constitutional privilege has been asserted most frequently in our history by the executive against the demands of the legislature, yet the Congress itself has always recognized a privilege for its own private papers and deliberations. Not only is there no provision or procedure for a demand by a private citizen for access to any papers deemed confidential, but no court subpoena is complied with by the Congress or its committees without a vote of the house concerned to turn over the documents willingly in response to the request of the court, thus properly preserving the co-equal separate status of that branch of the Government. For example,

> [N]o evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission.[4]

---

[4] H.R. Res. 427, 81st Cong., 2d Sess., 96 CONG. REC. 565-66 (1950); *see* H.R. Res. 460, 81st Cong., 2d Sess., 96 CONG. REC. 1400 (1950); H.R. Res. 465, 81st Cong., 2d Sess., 96 CONG.

The judiciary, as perhaps inherently the weakest of the three branches, has most frequently reiterated the principle of separation of powers, the classic expression being in *Kilbourn* v. *Thompson*:

> It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.[5]

The reason for the separation of powers was well put by Mr. Justice Brandeis:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.[6]

When President Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reason for refusal,

> [I]t is essential to the due administration of the Gov-

REC. 1695 (1950); H.R. Res. 469, 81st Cong., 2d Sess., 96 CONG. REC. 1765 (1950). Only recently, in a situation substantially the inverse of the present case, *i.e.*, a suit to *suppress* publication of congressional documents, the House indicated its displeasure with, and asserted its independence from, what it deemed an intrusion by the judiciary into its prerogatives with respect to its own documents. See *Hentoff* v. *Ichord*, No. 3028-70 (D.D.C. 28 Oct. 1970), and H.R. Res. 1306, 91st Cong., 2d Sess., 116 CONG. REC. H 11606, 11625 (daily ed. 14 Dec. 1970).

[5] 103 U.S. 168, 191 (1880).

[6] *Myers* v. *United States*, 272 U.S. 53, 293 (1926) (dissenting opinion).

> ernment that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.[7]

These examples of recognition by all three branches of a constitutional privilege to withhold certain documents under given circumstances not only show the tripartite nature of the constitutional privilege, but are relevant here, where the appellants are private citizens, because the original request for the Garwin Report stemmed from a Congressman and was denied by the executive on grounds the validity of which is not yet finally determined. But it would be an absurdity to contend that a Congressman —who is both citizen and Member of the House of Representatives—could not have access to a document in the executive branch, and yet another citizen could gain access on the strength of a statute enacted by Congress. Thus, if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the executive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

Part II of the court's opinion also expresses the view that Congress, in providing for *de novo* court review of agency refusals to disclose information, intended to *require* the courts to enjoin withholding of any agency record not exempted by the Act and not protected by a constitutional privilege. Congress, the opinion states, "did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." This quoted statement and related dis-

---

[7] 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 196 (1896).

cussion relate to an issue which is not presented for decision in this case and is not likely to face the trial court on remand. There is no suggestion in the record that the District Court here denied relief on equitable grounds, nor is it likely that such grounds could be presented in the context of this case. It has been suggested that a court may, on equitable grounds, decline to require disclosure of records not covered by a specific exemption in the Act, where to order disclosure would irreparably invade personal privacy or cause the Government to violate an agreement with a private party that non-commercial and non-financial [8] information provided by him will be kept confidential.[9] There do not appear to be such equitable grounds for non-disclosure present in the instant case and I would not therefore reach the difficult question of statutory construction of the District Court's power in such circumstances.

The Act itself merely provides: "On complaint, the district court . . . *has jurisdiction to enjoin* the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." [10] It does not in terms require that such juris-

---

[8] The fourth exemption of the Freedom of Information Act exempts from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (Supp. V, 1970).

[9] Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 767, 787, 791, 802 (1967).

[10] 5 U.S.C. 552(a)(3) (1967). In *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), the statute involved directed that upon complaint of the administrator of the Emergency Price Control Act an injunction *"shall be granted."* Nevertheless the Supreme Court held that the District Court could decline to issue an injunction if equitable considerations indicated that to be the appropriate result. Contrarily, in *United Steelworkers* v. *United States*, 361 U.S. 39 (1959), the Court impliedly held

diction be exercised in all cases. The legislative history pulls in opposite directions on this question; the Senate Report states:

> It is the purpose of this [Act] to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . . It is essential that agency personnel, *and the courts as well, be given definite guidelines* in setting information policies. Standards such as "for good cause" are certainly not sufficient.[11]

The House Report, on the other hand, relates that under the Act:

> The Court will have 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.[12]

And a noted commentator has expressed the view that the denial of relief on equitable grounds is an appropriate course in certain circumstances.[13]

There is, no doubt, force to the majority's opinion that the thrust of the Act is to limit the grounds for agency withholding to the exemptions therein stated, and that the discretion of the court in enforcing the Act should thus be

---

that under a statute which provided that the District Court *"shall have jurisdiction"* to enjoin an industry-wide strike causing a national emergency, the trial judge had no equitable discretion to refuse to issue an injunction. (That conclusion was made explicit in the concurring opinion of Justices Frankfurter and Harlan.) The accommodation of these two precedents and their application to the statutory scheme of the Freedom of Information Act are, in my view, best accomplished in the context of a case where the issue is presented by the facts and argued by the parties.

[11] S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

[12] H.R. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966).

[13] Davis, *supra*, note 7.

similarly curtailed. Nevertheless, because of the conflicting legislative history and the difficulty in determining congressional intent on this matter, I believe that pursuant to sound principles of judicial decision making, decision of this issue can and should await the case where it is squarely raised. I therefore express no view as to the correctness of the majority's suggestion that the courts are generally without equitable power to decline to order production of agency records in cases not specifically covered by exemption.

III.

Part III of the court's opinion is a summary of the laudable objectives of the Freedom of Information Act of assuring public access to information necessary to making informed decisions on public issues, but I respectfully suggest it is nevertheless unessential to our decision here. Since it forms part of the court's opinion, however, I think it should be made clear that neither the public nor the Congress is being denied *the facts* here in regard to the supersonic transport, and therefore recourse to legal action under the Freedom of Information Act as a practical matter was simply unnecessary.

Each of the persons who were asked by Dr. DuBridge to form the *ad hoc* panel to prepare the Report for the President could be called before the appropriate congressional committee and asked for his views on any aspect of the SST program. There is no reason why the views of these scientists and engineers cannot be made available to the Congress and to the public. The only matter about which they should not be asked is exactly what advice they gave the President. Furthermore, almost two years have gone by since they expressed their views to the President, and the opinions which they might now give to the Congress or to the public, in the light of additional information obtained, might be somewhat different from their best

advice at the time they helped formulate the Garwin Report. Even without an appearance before a congressional committee any one or several of these scientists or engineers could be interviewed by the press or on TV, invited to write an article for a magazine or newspaper, or participate in public discussion in any form, in order to enlighten the public. There would be nothing improper in a public expression of individual opinion, so long as exactly what the person advised the President was not explicated.

As a matter of recorded fact, Dr. Richard Garwin, who chaired the panel, has done just that. He has appeared before *three* different congressional committees,[14] and has been publicly reported as stating that he had "said everything I have to say" in lengthy critical testimony about the SST before the three committees, although he appears to have carefully refrained from discussing the Garwin Report itself.[15]

---

[14] *Hearings on H.R. 17755 Before the Subcomm. of the Senate Committee on Appropriations,* 91st Cong., 2d Sess., pt. 2, at 1621 (1970); *Hearings on Supersonic Transport Development Before the Subcomm. on Economy in Government of the Joint Economic Comm.,* 91st Cong., 2d Sess., pt. 4, at 904, 908 (1970); *Hearings on Department of Transportation Appropriations Before the Subcomm. on Dept. of Transportation and Related Agencies Appropriations of the House Comm. on Appropriations,* 91st Cong., 2d Sess., pt. 3 (Testimony of Members of Congress and Interested Individuals and Organizations) at 980 (1970).

[15] Dr. Garwin, at least, was interviewed by the *Saturday Review, The Washington Post,* and very likely a number of other media representatives. *See* Sutton, Is the SST Really Necessary, SATURDAY REVIEW, 15 Aug. 1970, at 14; Washington Post, 21 Dec. 1970, § A, at 2. According to the latter report:

> Garwin said he still did not feel free to discuss the study [made by the *ad hoc* panel at the request of the OST] itself, but he emphasized that he "said everything I have

Thus it appears that alternate means of obtaining the facts in regard to the SST, other than a lawsuit to compel production of the Garwin Report, are available both to the public and to Congress.[16] This hints at the possibility that what the appellants are seeking here is really the *advice* given the President of the United States by his subordinates, rather than the *facts* in regard to the SST program on which the public and the Congress can form an intelligent judgment. Viewed in this light, the issues may take on a different aspect from those framed by the appellants.

---

to say" about the SST in the course of critical testimony this year before three congressional committees.

These reports of Dr. Garwin's interviews with the press were quoted and discussed on the Senate Floor. *See* 116 CONG. REC. S 20921, S 20932 (daily ed. 21 Dec. 1970).

[16] Of course these considerations would not apply to personal advisors to the President such as members of the White House staff, who traditionally do not appear before Congress. But, as the court's opinion indicates, Dr. Garwin and his confreres, operating under the direction of the OST, are not thus restricted.