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JUDICIAL DEFERENCE AND DE NOVO REVIEW IN LITIGATION OVER NATIONAL SECURITY INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

ROBERT P. DEYLING*

I. INTRODUCTION

THERE is inherent tension between broad public access to government information and secrecy in the name of “national security.” Congress tried to address that problem through the 1966 Freedom of Information Act (FOIA), a law that established procedures the public could use to obtain access to a wide range of government information. Among other things, the FOIA granted the federal courts the power to review executive agency decisions to withhold classified information from the public. In 1974 Congress amended the FOIA to require courts to conduct de novo review of agency classification claims and to authorize courts to inspect classified documents in camera if necessary.2

Since the enactment of the 1974 amendments, courts have ruled on hundreds of cases involving classified information,3 affirming the government’s decision to withhold the requested information in nearly every case.4 The one-sided nature of these results might appear strange in light of the congressional mandate to scrutinize agency decisions. It is this author’s belief that the apparently prevailing view among scholars of the FOIA, that the courts must “defer” to agency declarations regarding national security information,5 is a misreading of the history of the FOIA.


2. Id. § 552(a)(4)(B) (“[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . .”).

3. Research reveals over 200 United States District Court opinions on FOIA cases involving the (b)(1) national security exemption. Many of these cases are described in the OFFICE OF INFO. AND PRIVACY, U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (Sept. 1991 ed.) [hereinafter FREEDOM OF INFORMATION CASE LIST].

4. For a discussion of the few cases in which courts have rejected government withholding claims, see infra notes 125-38 and accompanying text.

5. For further discussion of the role of agency declarations, also known as
Judicial deference is not an accurate description of the role assigned to the courts in reviewing FOIA national security cases.

This article contends that one reason plaintiffs seldom persuade courts to order the government to release "secret" information is that judicial treatment of these cases fails to fully implement the reforms Congress intended when it passed the 1974 amendments. Rather than expanding the scope of judicial inquiry into the procedural and substantive legality of withholding information, opinions issued both before and after the 1974 amendments have established a lenient standard of review in FOIA national security cases. That standard, in essence, will validate any "reasonable" executive agency decision to withhold such information.

At present, Congress is considering amendments to the FOIA that would clarify the courts' role in FOIA national security cases.\(^6\) This article, however, focuses on judicial review under the current law as an essential check on executive secrecy. This author contends that the courts could be doing a more thorough job at this difficult task by actively using the de novo review power already granted by Congress.

The courts are the first and only forum in which unsuccessful FOIA requesters have the opportunity to present the case in favor of disclosure.\(^7\) FOIA requesters are entitled to a written appeal to the agency that denied the request, but have no legal right to force the agency to consider legal or factual arguments in favor of disclosure.\(^8\) In court, however, an individual whose request for

\(^{Vaughn}\) affidavits," in FOIA national security litigation, see infra notes 26-30 and accompanying text.

6. One such proposed amendment would require the courts to engage in a "balancing test" when reviewing FOIA cases involving classified documents. A draft Senate bill would change the language of FOIA exemption 1 to make documents exempt from disclosure only if they are:

(1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are—

(A) in fact properly classified pursuant to such Executive order;

(B) matters the disclosure of which could reasonably be expected to cause identifiable damage to national defense or foreign policy; and

(C) matters in which the need to protect the information outweighs the public interest in disclosure.


8. See id. § 552(a)(6)(A)(i) (requiring agency that denies request for infor-
information has been denied lacks precise knowledge of the subject matter of the litigation, making a test of the government's claim in an adversarial setting nearly impossible. Arrayed against the FOIA plaintiff and, in a sense, against the court, is the considerable executive branch apparatus set up to classify information in the interest of national security. Courts therefore face a dual challenge when reviewing executive branch decisions to withhold classified information. Courts must protect the confidentiality of "properly classified" information while simultaneously requiring the government to justify keeping secrets from the public.

A quick review of some recent FOIA requests denied by the government for reasons of national security gives a sense of both the type of information that is the subject of litigation, as well as the sometimes inscrutable nature of government opposition to the disclosure of information:

—The FBI refused to release documents relating to its "Library Awareness Program," a nationwide campaign to recruit librarians to monitor the reading habits of foreigners in public and university libraries.9

—The government refused to release documents that the FBI gathered twenty years ago while investigating singer John Lennon. The United States Court of Appeals for the Ninth Circuit recently ruled that the government had not justified its claim that releasing the information would endanger national security.10

—The government refused to release thousands of pages of material relating to the Cuban Missile Crisis, despite the passage of thirty years and dramatic changes in world politics. The documents are believed to include details of United States plans to topple the Castro government in the early 1960s through economic pressure and military action.11
This article first will review the background of the "national security" exemption\textsuperscript{12} to the FOIA and the legislative history of the 1974 FOIA amendments that affected that exemption. Next, the article briefly traces the development of the case law, both before and after the 1974 amendments, relating to the national security exemption. The article analyzes the judicial treatment of FOIA national security exemption cases and considers the standard of review appropriate in such cases. Finally, the article examines litigation strategies and judicial procedures that, if widely adopted, could make the adjudication of these cases approximate more closely what Congress intended in passing the FOIA.\textsuperscript{13}

II. History of the National Security Exemption (1966-1973)

Congress designed the FOIA to establish a judicially enforceable right of access by any person to federal agency records. As summarized in the \textit{Justice Department Guide to the Freedom of Information Act}: "[U]nder the thrust and structure of the FOIA, virtually every record possessed by a federal agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or specially excluded from the Act's coverage in the first place."\textsuperscript{14} Information that executive branch officials determine must be "kept secret in the interest of national defense or foreign policy," also known as "classified" information, is exempt from disclosure under the FOIA.\textsuperscript{15}

Executive officials classify particular documents by following the terms of an executive order defining the standards for classifying information.\textsuperscript{16} Likewise, the FOIA adopts the executive order on Cuban Missile Crisis, Department of State Dispatch, Jan. 13, 1992, available in LEXIS, Exec. Library, DSTATE File.

12. See 5 U.S.C. § 552(b)(1) (1988). The national security exemption is commonly known as the ``(b)(1) exemption,'' a reference to the section of the FOIA that exempts properly classified information from disclosure.

13. The adjudication process could also be affected by congressional action more clearly defining the courts' role in deciding national security cases, coupled with improved congressional oversight of the classification process itself. This article, however, does not focus on congressional action, but instead on the courts and their role in deciding FOIA national security cases. For further analysis of the potential for congressional influence in the declassification process, see Note, \textit{Keeping Secrets: Congress, The Courts, and National Security Information}, 103 Harv. L. Rev. 906 (1990).


der as the standard for withholding material from the public under the (b)(1) exemption. Under the FOIA as amended, a document need not be disclosed if it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order."17 In response to a FOIA request, the government reviews all relevant information in light of the executive order and decides which information should remain classified, be declassified, or be newly classified.18

While ostensibly promoting the public's "right to know," in drafting the FOIA Congress left unchanged the Executive's broad discretion to classify large amounts of information on the ground

U.S.C. § 401 note (1988). This is the executive order currently in effect. It was issued by President Reagan and became effective on August 1, 1982. Executive Order No. 12,356 provides that information shall be classified if it falls into one of ten categories and if "its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Exec. Order No. 12,356, § 1.3(b), 3 C.F.R. at 169. The 10 classification categories are:

1. military plans, weapons, or operations;
2. the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;
3. foreign government information;
4. intelligence activities (including special activities), or intelligence sources or methods;
5. foreign relations or foreign activities of the United States;
6. scientific, technological or economic matters relating to the national security;
7. United States Government programs for safeguarding nuclear materials or facilities;
8. cryptology;
9. a confidential source; or
10. other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President.

Id. § 1.3(a), 3 C.F.R. at 168-69.


18. See Justice Dep't Guide, supra note 14, at 424 ("[I]t is well settled that information may be 'classified or reclassified' after it has been requested under the FOIA."). In the case of material that is classified only after a FOIA request is made, the request itself apparently creates the need to classify information the government did not previously see a need to protect. Also, entire classes of information may be presumed exempt without regard to classification status, such as information on Central Intelligence Agency sources and methods, which is covered by FOIA exemption 3. See 5 U.S.C. § 552(b)(3)(B). That exemption provides that matters "specifically exempted from disclosure" under other statutes are also exempt under FOIA. See also CIA v. Sims, 471 U.S. 159, 181 (1985) (director of CIA was justified in withholding information exempted from disclosure by National Security Act of 1947).
that public disclosure would affect national security or foreign policy.\(^{19}\) Congress left enforcement of the new disclosure standards to the federal courts, which were granted "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."\(^{20}\) In adjudicating such matters, the court is to "determine the matter de novo," and "the burden is on the agency to sustain its action."\(^{21}\)

FOIA litigation is unusual because the government holds all of the information necessary for impartial judicial review and adversarial testing of the government's reasons for withholding documents from the FOIA requester. Neither the plaintiff nor the court has knowledge of the specific identity or content of the withheld documents. In early FOIA cases, a common government strategy was to file a motion for summary judgment along with an affidavit stating that the documents were properly withheld because they fell within the scope of one of the nine FOIA exemptions.\(^{22}\) At that point the burden would effectively shift to the court to determine, through time-consuming review of individual documents, whether the government's arguments were justified.\(^{23}\)

The courts soon realized that extensive in camera review in every FOIA case would be "very burdensome" and "necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure."\(^{24}\) To solve this problem, the courts developed as an alternative to in camera review a procedure that requires the government to prepare a "relatively detailed analysis [of each withheld document] in manageable segments."\(^{25}\)

In the landmark case of *Vaughn v. Rosen*,\(^{26}\) which has been widely followed, the Court of Appeals for the District of Columbia Circuit ruled that to justify withholding information under the FOIA, the government must describe the withheld documents for

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20. Id. § 552(a)(4)(B).
21. Id.
22. See, e.g., Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) (mere conclusory affidavit by government agency asserting that documents sought were exempted by FOIA held to be insufficient), cert. denied, 415 U.S. 977 (1974).
23. Id.
24. Id. at 825.
25. Id. at 826.
the court and the plaintiff\textsuperscript{27} and establish how each document is exempt from disclosure.\textsuperscript{28} Such descriptions and justifications, known as "Vaughn indexes" or "Vaughn affidavits," have become a near-universal requirement in FOIA cases of all types.\textsuperscript{29} This procedure is so important to FOIA litigation that summary judgment decisions are often made solely on the basis of the "adequacy" of the government pleadings, with in camera review employed only when the court cannot decide on the basis of document descriptions alone.\textsuperscript{30}

Few cases involving classified documents were decided between 1966, when the FOIA was passed, and 1974, when Congress amended the FOIA to strengthen the judicial review procedure in cases involving classified information. These cases reveal that the courts saw their role in FOIA national security cases as extremely limited, reflecting long-standing judicial reluctance to be perceived as second-guessing the executive branch on matters relating to foreign policy and national security. Typical of this attitude was Epstein v. Resor,\textsuperscript{31} a case decided in 1970 that involved an historian's request for information on the forced repatriation of anti-communist Russians following World War II.\textsuperscript{32} The court ruled in favor of the government, holding that the scope of judicial review in (b)(1) cases was not de novo, but instead was limited to deciding whether the agency's classification decision was "clearly arbitrary and unsupportable."\textsuperscript{33} The court of appeals affirmed, noting that "what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with."\textsuperscript{34}

In Soucie v. David,\textsuperscript{35} decided in 1971, the plaintiffs sought a government report evaluating development of the supersonic transport airplane. The government cited the (b)(1) exemption,

\textsuperscript{27} Id. at 826-28.
\textsuperscript{28} Id. at 828.
\textsuperscript{29} See, e.g., Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) (requiring FBI to produce adequate Vaughn index); Osborn v. IRS, 754 F.2d 195, 197 (6th Cir. 1985) (trial court erred by failing to require IRS to produce Vaughn index).
\textsuperscript{30} See Justice Dep't Guide, supra note 14, at 632.
\textsuperscript{32} Id. at 215.
\textsuperscript{33} Id. at 217.
\textsuperscript{34} Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965 (1970).
\textsuperscript{35} 448 F.2d 1067 (D.C. Cir. 1971).
among others, as justification for withholding the report.\textsuperscript{36} Although the court asserted that in camera inspection of withheld information might be appropriate even in a (b)(1) case, the court ruled that inspection was unnecessary "if the Government describes [the document's] relevant features sufficiently to satisfy the court that the claim of privilege is justified."\textsuperscript{37}

In the early 1970s, tension increased between Congress and the President concerning secret information and policies. In the midst of court challenges to the government's attempt to prohibit publication of the Pentagon Papers, which were secret plans concerning the Vietnam War, the House Committee on Government Operations began hearings in 1971 focusing on executive privilege and First Amendment issues.\textsuperscript{38} These hearings soon evolved into a wholesale evaluation of the FOIA.\textsuperscript{39}

A 1972 House report\textsuperscript{40} based on the hearings found that operation of the FOIA had been "hindered by 5 years of foot-dragging by the bureaucracy," and recommended significant legislative reforms.\textsuperscript{41} The report focused mainly on problems with administration of the FOIA by the federal agencies, noting that too few cases had been decided by the courts to discern trends in the case law.\textsuperscript{42} Foreshadowing the 1974 amendments, however, the report said that while "the courts' judgment has usually been against needless government secrecy," the courts had been "generally reluctant" to order disclosure when the government argued that documents were covered by the (b)(1) exemption.\textsuperscript{43}

Meanwhile, skepticism about government secrecy was growing as the revelations of Watergate slowly came to light. By early 1973, bills to amend the FOIA were introduced in both the House

\textsuperscript{36} Id. at 1072.
\textsuperscript{37} Id. at 1080.
\textsuperscript{39} See generally Hearings, supra note 38.
\textsuperscript{41} Id. at 8.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 9, 71.
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and Senate. Pressure mounted from many quarters for reform in information-access laws, but perhaps the greatest impetus for change in the way classified information was reviewed by the courts came from the first Supreme Court decision interpreting the proper role of the courts in FOIA national security cases.

The plaintiffs in Environmental Protection Agency v. Mink were members of Congress who sought access to a secret report on proposals for nuclear weapons testing in Alaska. The Supreme Court ruled that, unlike FOIA litigation involving the eight other categories of exempt documents, Congress had not intended to grant courts the power to review in camera documents that the government claimed were exempt for reasons of national security. The government needed to prove only 1) that the document was in fact classified, and 2) that the document fell within the range of subjects protected from disclosure by an executive order. These assertions could be made in a government affidavit, and the court was not permitted to review the requested documents to test the government's word. Under the Mink analysis, the mere fact of classification was enough to justify withholding the documents from the public.

After the Mink decision, lower courts interpreted the judicial role in FOIA national security cases more restrictively. Wolfe v. Froehlke, one of the few cases decided before the 1974 amendments effectively overruled Mink, held that "absent allegations of fraud or subterfuge the Court is not to look beyond the fact of procedurally proper classification of documents pursuant to Executive Order."

From the plaintiff's perspective, FOIA litigation over the (b)(1) exemption looked ever more hopeless. Justice Stewart, concurring in Mink, had pointed out, however, that it was "Congress, not the Court, that in [the (b)(1) exemption] has ordained

46. Id. at 84.
47. Id.
48. Id.
49. Id.
51. Id. at 1320.
unquestioning deference to the Executive’s use of the ‘secret’ stamp.” 52 In what many interpreted as an invitation to Congress to correct a shortcoming in the law, Justice Stewart wrote that he read the FOIA as giving the courts “no means to question an Executive decision to stamp a document ‘secret,’ however cynical, myopic, or even corrupt that decision might have been.” 53 Congress wasted no time taking up the amendment challenge, prodded, perhaps, by the climate of distrust prevalent in the aftermath of Watergate.

III. The 1974 FOIA Amendments

Congress passed the 1974 FOIA amendments twice by an overwhelming majority, the second time overriding President Ford’s veto. 54 The original vote was close to unanimous—383 to 8 in the House and 64 to 17 in the Senate. 55 Congress overrode the President’s veto by a vote of 371 to 31 in the House, and 65 to 27 in the Senate. 56

The amendments, which also dealt with various issues unrelated to the national security exemption, 57 were designed to affect judicial treatment of national security information in four basic ways. First, the amendments directed the courts to evaluate government exemption claims under (b)(1) by determining de novo whether records were properly withheld. 58 Second, the amendments specifically authorized in camera inspection of withheld documents at the court’s discretion in all FOIA cases, even those involving classified information. 59 Third, the amendments shielded from disclosure only information that was properly classified “pursuant to both procedural and substantive criteria contained in [the] Executive order.” 60 Finally, the amendments

52. Mink, 410 U.S. at 94 (Stewart, J., concurring).
53. Id. at 95 (Stewart, J., concurring).
54. Source Book, supra note 44, at 276-79 (House vote), 366 (Senate vote), 431-34 (House vote to override veto), 480 (Senate vote to override veto).
55. Id. at 276-79 (House vote), 366 (Senate vote).
56. Id. at 431-34 (House vote to override veto), 480 (Senate vote to override veto).
57. Id. at 225-27. The amendments also contained provisions dealing with appeals, responses to complaints, assessments of attorneys’ fees, sanctions and deadlines. Id.
59. Id.
required that "any reasonably segregable portion of a record shall be provided after deletion of the portions which are exempt." 61

In the wake of the 1974 amendments, the courts looked to the legislative history to define the proper scope of judicial review in FOIA cases involving national security information. Therefore, it is useful to review the legislative history in some detail.

Although the final versions of the House and Senate bills were nearly identical with respect to the treatment of national security information, an earlier Senate version differed significantly regarding the standard courts should apply when reviewing (b)(1) claims. The version of the bill reported out of the Senate Judiciary Committee would have required a court to rule in favor of the government "unless, following its in camera examination, it finds the withholding is without a reasonable basis" under the criteria of an executive order. 62

When the bill reached the Senate floor, however, Senator Muskie introduced a substitute version deleting the "reasonableness" standard. 63 He successfully argued that such a lenient standard would render judicial review meaningless, as judges would apply a near-presumption that executive agency decisions were reasonable. 64 The Senate passed the Muskie version of the bill, leaving the "criteria established by an Executive order" as the only standard against which the courts could judge (b)(1) cases.

Opponents of the bill, including President Nixon and President Ford (who took office before the bill was passed), objected to the de novo review provisions as unwarranted congressional restrictions on executive branch discretion to protect information in the interest of national security. They viewed a "reasonableness" standard as more palatable, however, because a presumption that the government acted reasonably in classifying information was unlikely to result in many rulings against the government in (b)(1) cases.

Once the House and Senate each passed the bill, they appointed a Conference Committee to resolve technical differences between the two versions of the FOIA amendments. While the Conference Committee was meeting, President Ford sent it a let-

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61. 5 U.S.C. § 552(b).
63. Id. at 302-05 (Amendment No. 1356).
64. Id. at 328 (amendment passed by vote of 56 to 29).
ter questioning the constitutionality of the judicial review provisions for cases involving national security information. He requested that Congress add to the bill an “express presumption that the classification was proper” and make clear that a court could only order the government to disclose information “if it finds the classification to have been arbitrary, capricious, or without a reasonable basis.”

The Conference Committee responded with a letter to the President stating that the Committee believed his fears regarding in camera review were “unfounded,” but that the Committee had “nonetheless agreed to include additional explanatory language in the [Conference Report] making clear [the Committee’s] intentions on this issue.” In sum, the Conference Committee rejected the President’s arguments while attempting to strike a compromise with him to avoid a veto of the bill.

The Conference Report has been cited often by the courts since 1974 as definitive evidence that Congress meant the courts to show deference toward executive agency claims that information is properly classified. For that reason it merits reprinting here at length:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.

The President vetoed the bill despite that admonition to the courts, claiming that the judicial review provisions would “violate constitutional principles” because “a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be
overturned by a district judge who thought the plaintiff’s position just as reasonable.”69

Although the language relating to the (b)(1) exemption in the Conference Report certainly suggests that Congress intended for the courts to take notice of agency expertise in cases involving classified documents, the language also must be read in the context of other relevant legislative history. That history includes the remainder of the Conference Report70 and a separate committee report on the House and Senate versions of the amendments,71 in addition to transcripts of House and Senate floor debates on the bill itself,72 debates on adoption of the conference report and debates on the vote to override President Ford’s veto.73

Despite the Conference Committee’s expectation that courts would give government evidence “substantial weight,” the legislative history as a whole reveals that Congress did not intend the courts simply to rubber-stamp agency decisions based solely on a reading of a government affidavit attesting to the proper classification of a particular document. Such highly deferential judicial review was, after all, the Supreme Court’s interpretation of the FOIA in the Mink case that Congress sought to overrule.

The Conference Report reiterates that judicial review in (b)(1) cases shall be “de novo,” that “[t]he burden remains on the government” to prove that information is properly classified, and that “[w]hile in camera examination need not be automatic, in many situations it will plainly be necessary and appropriate.”74

The House and Senate committee reports, although dealing with slightly different bills than what ultimately became law, illuminate the judicial review issue as it was presented to the full House and Senate for debate. The Senate Report explains that the courts should “inquire during de novo review not only into the superficial evidence—a ‘Secret’ stamp on a document or set of records—but also into the inherent justification for the use of such a stamp.”75 As a result, “a government affidavit certifying the classification of material pursuant to executive order will no

69. Id. at 483-85 (reprinting Message from the President of the United States Vetoing H.R. 12471 dated Oct. 17, 1974).
70. Id. at 217-32.
71. Id. at 119-216.
72. Id. at 235-80 (House debate), 281-366 (Senate debate).
73. Id. at 431-34 (House vote), 480 (Senate vote).
74. Id. at 226 (reprinting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974)).
75. Id. at 182 (reprinting S. Rep. No. 854, 93d Cong., 2d Sess. (1974)).
longer ring the curtain down on an applicant's effort to bring such material to public light."\(^{76}\)

The Senate Report recognized that de novo review "may impose an additional burden on judges," and suggested that courts give "appropriate consideration" to the results of any classification review already conducted within the executive branch.\(^{77}\) The Senate, however, strongly emphasized the importance of impartial review by the courts:

> It is essential . . . to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations—are the only forums now available in which such review can properly be conducted.\(^{78}\)

The House Report stated that the amendment "means that the court, if it chooses to undertake review of a classification determination, including examination of the records in camera, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order."\(^{79}\)

The House and Senate floor debates on the amendments show a Congress nearly unanimous in its desire to direct the courts to review FOIA national security cases in a manner similar to any other type of FOIA case.\(^{80}\)

Congressman Moorhead, one of the primary drafters of the amendments,\(^{81}\) noted that the amendments were intended to change the way FOIA (b)(1) cases were treated in the courts in two basic ways. First, the amendments would establish that a court may review withheld documents in camera if the government affidavit did not satisfy the court that the information at is-

\(^{76}\) Id.

\(^{77}\) Id. at 183.

\(^{78}\) Id.

\(^{79}\) Id. at 127 (reprinting H.R. Rep. No. 876, 93d Cong., 2d Sess. (1974)).

\(^{80}\) See id. at 235-80 (House debate), 281-366 (Senate debate).

\(^{81}\) Id. at 110. Congressman William S. Moorhead was one of the members of the Conference Committee on the FOIA amendments. Other conferees were Congressmen Chet Holmes, John E. Moss, Bill Alexander, Frank Horton, John N. Erlenborn, and Paul McCloskey, and Senators Edward Kennedy, Philip A. Hart, Birch Bayh, Quentin Burdick, John Tunney, and Charles McC. Mathias. Id. at 117, 223.
sue remained properly classified. Second, the amendments would "authorize[] a court to look behind a security classification label to see if a record deserved classification under the 'criteria' of an Executive order."\(^{83}\)

On the Senate side, Senator Muskie successfully argued for the deletion of the presumption of reasonableness that he believed the original version of the Senate bill contained. He argued that to "constrict the manner in which courts may perform this vital review function" would make the agency officials who classify documents "privileged officials, almost immune from . . . accountability."\(^{84}\)

The floor debates also demonstrate that most members of Congress believed that federal judges were qualified to review executive secrecy claims.\(^{85}\) Congressman Moss, a member of the House committee that crafted the amendments, told his colleagues that he "[d[id] not think we have to make dummies out of [judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret."\(^{86}\) Congressman Moss further stated that "it is the intent of the committee that the Federal Courts be free to employ whatever means they find necessary to discharge their responsibilities. This was also the intent in 1966 when Congress acted, but these two amendments contained in the bill before you today make it crystal clear."\(^{87}\)

The amendments, then, left the courts with a mandate to scrutinize carefully executive agency claims that information is exempt from the FOIA on national security grounds. At the same time, however, Congress gave the courts no new standard to apply in making the factual determination that a particular document deserves protection from disclosure. Instead, the courts were directed to verify that a document was properly classified under the "criteria established by an Executive order."\(^{88}\) Congress further complicated the matter by reminding the courts, in the Conference Report, that agency officials were likely to be in the best position to judge the "adverse effects" that might result

82. Id. at 239 (statement of Congressman Moorhead).
83. Id.
84. Id. at 305 (statement of Senator Muskie).
85. See, e.g., id. at 257 (statement of Congressman Moss).
86. Id.
87. Id. at 258.
IV. AFTERMATH OF THE AMENDMENTS

Soon after the amendments took effect, the courts had the opportunity to interpret the new congressional directives. Those who expected a dramatic change in the way courts treated FOIA cases involving classified documents were to be disappointed. Although many litigants have requested in camera inspection and tried to challenge the sufficiency of government affidavits in (b)(1) cases, courts have continued to routinely grant summary judgment for the government in such cases.

In Ray v. Turner, the Court of Appeals for the District of Columbia Circuit, which has established many precedents in the interpretation of the FOIA, prescribed in camera review as a way of assuring complete de novo review even where there was no showing of government bad faith. The case involved a plaintiff’s FOIA request to the CIA for “any file you may have on me.”

The Ray decision seemed to offer other FOIA plaintiffs a glimmer of hope that (b)(1) litigation would become less one-sided. According to the Ray court, judicial review of the FOIA national security exemption meant putting the burden on the government to justify withholding. The Ray court also stated, however, that courts ought to give “substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.” The court concluded that whether and how to conduct an in camera inspection of the documents should rest in the sound discretion of the court, provided that the court is “satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.”

Later cases, however, refined the standard for judicial review

90. 587 F.2d 1187 (D.C. Cir. 1978).
91. Id. at 1195 (under FOIA exemptions granting of an in camera inspection is within discretion of trial court; agency may not rely on “exemption by document” approach in national security cases, but must “reasonably segregate” exempt portions).
92. Id. at 1189.
93. Id. at 1194.
95. Id. at 1195.
and narrowed a plaintiff’s chances of persuading a court either to review documents in camera or to order disclosure. These cases turned on the notion that a “reasonably detailed” government affidavit would justify judicial deference to the “expert” opinion of the agency, and hence summary judgment in favor of the government. Some cases went so far as to hold that, because the court must defer to the judgment of the agency as set forth in government affidavits regarding the classified status of the contested documents, in camera review would seldom be appropriate at all.

For example, in Hayden v. National Security Agency/Central Security Service, the court held that “[w]hen the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate.” As expressed in Gardels v. Central Intelligence Agency, a case involving intelligence information, the court’s role is to determine “whether . . . the Agency’s judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility,” taking into consideration the expertise of the agency.

In Military Audit Project v. Casey, which involved a request for information on a secret CIA operation to salvage a sunken Soviet submarine, plaintiffs contended that they could only attack the adequacy of the government’s arguments through discovery. The court ruled that discovery was inappropriate, leaving plaintiffs no way to uncover evidence they could use to argue for

96. See, e.g., Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980).
97. See, e.g., id. at 148 (summary judgment granted to government where its affidavits showed “plausibility of the alleged potential harm” from disclosure “in a manner that is reasonably detailed rather than conclusory”); see also Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (information concerning alleged covert operations by CIA in Albania after World War II was exempt because disclosure would reveal how CIA deployed resources and would deter future cooperation with agency); Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (CIA’s judgment that confirmation or acknowledgement of covert contacts with University of California would be damaging had to be accepted); Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981) (documents that disclosed names, initials, synonyms, and official titles of CIA personnel as well as amount of money spent on project were exempt as matters within national security exemption).
98. See, e.g., Gardels, 689 F.2d at 1106 & n.5.
100. Id. at 1387.
101. 689 F.2d 1100 (D.C. Cir. 1982).
102. Id. at 1105.
104. Id. at 750.
The court stated that "[i]n national security cases some sacrifice to the ideals of the full adversary process are inevitable" because giving the plaintiffs more detailed information about the withheld documents may itself reveal classified information.

The government has thrown powerful roadblocks in the way of FOIA plaintiffs. One of the most serious challenges to effective judicial scrutiny of executive claims that the release of information will cause damage to the national security is known as the "mosaic approach." This argument against disclosure is amorphous yet effective. Basically, it rests on "the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture." The government draws authority for this argument from the executive order, which defines "classified" information as that which, if disclosed, would cause damage "either by itself or in the context of other information."

Another argument that the courts have accepted is known as the "Glomar denial." This term originated with FOIA cases involving documents related to government sponsorship of the Glomar Explorer, an ocean salvage platform financed by the CIA to raise a sunken Soviet submarine. Documents connected with the project were leaked to the press, which in turn published many details about the operation, including the fact that it cost over $500 million and involved secret CIA deals with reclusive billionaire Howard Hughes. In response to FOIA requests, however, the CIA refused to confirm or deny the existence of documents related to the operation. The purpose of the "Glomar denial" is to allow the agency to refuse to confirm or deny the existence of requested information if the existence or nonexistence of the information is itself classifiable.

In summary, the concept of de novo review has been narrowly interpreted in cases since the 1974 amendments. A court recently held, for example, that the government may justify with-
holding information under the (b)(1) exemption by providing “little more than a showing that the agency’s rationale is logical.”\(^\text{113}\)

The courts’ focus on agency “expertise” in national security matters makes it nearly impossible for plaintiffs to counter the government’s affidavits with evidence that casts doubt on the government’s arguments against disclosure. Plaintiffs who have tried to submit opinions from their own “experts” regarding the merits of classifying information have been stymied, because the courts have ruled that only the government classifier can truly comprehend the need to keep a particular document classified.

For example, in *Leichty v. Central Intelligence Agency*,\(^\text{114}\) the plaintiff was a former CIA employee seeking information relating to himself and his family in CIA files. He told the court that he knew the contents of some of the withheld documents as a result of his former employment, and he argued that their release would cause no harm.\(^\text{115}\) The court rejected the plaintiff’s arguments of agency bad faith and refused to accept “the invitation to substitute plaintiff’s view for that of the agency.”\(^\text{116}\) In similar cases courts have rejected the opinions of Senators,\(^\text{117}\) former ambassadors,\(^\text{118}\) retired government officials,\(^\text{119}\) and others\(^\text{120}\) as a basis for attacking the government’s decision to withhold information on national security grounds.

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115. Id., slip op. at 6.
116. Id.
119. Hudson River Sloop Clearwater, Inc. v. United States Dep’t of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (Rear Admiral’s opinions rejected as basis for attacking government’s decision to withhold information on national security grounds).
120. Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (opinion of former CIA agent rejected); Van Atta v. Defense Intelligence Agency, Civil Action No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (court rejected plaintiff’s contention that willingness of foreign diplomat to discuss documents at issue showed confidentiality was unnecessary); see also Goldberg v. United States Dep’t of State, 818 F.2d 71 (D.C. Cir. 1987) (ambassador’s action in returning State Department survey forms marked “unclassified” not sufficient contrary evidence to defeat government summary judgment motion), cert. denied, 485 U.S. 904 (1988).
Washington Post v. United States Department of Defense\textsuperscript{121} may have best expressed the bottom line on this issue. In that case the plaintiff sought the release of a report on El Salvador's military needs prepared at the direction of the Joint Chiefs of Staff.\textsuperscript{122} Senator Zorinsky, who reviewed the report as a member of the Senate Foreign Relations Committee, filed an affidavit on behalf of the plaintiff stating that release of the report would not pose a threat to either the security of the United States or El Salvador, and that Salvadoran officials likely anticipated its release.\textsuperscript{123} The court, noting that Zorinsky was a legislative branch official without classification authority, ruled that "an affidavit that gives a view of national security harm differing from that presented by the government is alone not sufficient to undermine an agency's affidavit, even when submitted by an individual knowledgeable in the agency's area of expertise."\textsuperscript{124}

As indicated in the preceeding discussion, courts usually accept the government's justifications and refuse to require the agency to turn over the requested documents. Courts have, on occasion, rejected government affidavits and ordered disclosure of documents to the plaintiffs. In Donovan v. Federal Bureau of Investigation,\textsuperscript{125} which involved a FOIA request for documents relating to the murder of four American church women in El Salvador in 1980, the district court found that the government affidavits did not adequately describe the withheld documents and did not establish that any harm would result from disclosure.\textsuperscript{126} The court held that "in a number of instances the explanation [for withholding was] of such generality as to constitute in effect merely a repetition of the exemption rather than an explanation."\textsuperscript{127} After conducting an in camera inspection, the court still saw no reason to withhold some of the documents, and ordered the government to disclose them.\textsuperscript{128} The court of appeals upheld this decision, stating that "it would be inappropriate . . . to give more deference to the FBI's characterization of the information than did the trial court."\textsuperscript{129} The case was later settled, however,

\textsuperscript{121} Civil Action No. 84-2429 (D.D.C. Feb. 25, 1987).
\textsuperscript{122} Id., slip op.
\textsuperscript{123} Id., slip op. at 14.
\textsuperscript{124} Id.
\textsuperscript{125} 625 F. Supp. 808 (S.D.N.Y.), aff'd in part, rev'd in part, 806 F.2d 55 (2d Cir. 1986).
\textsuperscript{126} Id. at 811.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 814-15.
\textsuperscript{129} Donovan v. FBI, 806 F.2d 55, 60 (2d Cir. 1986).
with the plaintiff agreeing to withdraw his request for the documents that the trial court had ordered disclosed.\textsuperscript{130}

The district court in \textit{Holy Spirit Association v. Central Intelligence Agency}\textsuperscript{131} found the agency's affidavits made such "broad, often conclusory claims in the area of national security" that it was impossible to undertake meaningful review.\textsuperscript{132} The Supreme Court later vacated that decision.\textsuperscript{133} Similarly, in \textit{Fitzgibbon v. Central Intelligence Agency}\textsuperscript{134} the court ordered certain documents disclosed because the CIA's affidavits were inadequate.\textsuperscript{135} The court justified its decision by pointing out that the CIA had failed to offer an "explanation why palpable harm to the national defense or foreign policy of the United States is likely to occur if information . . . were released" and had failed to "expla[in] how the deleted words—either alone or in context—actually communicate the allegedly sensitive information."\textsuperscript{136} The CIA never disclosed the documents, however, because the court of appeals later ruled that the Supreme Court's decision in \textit{Central Intelligence Agency v. Sims},\textsuperscript{137} relating to information on intelligence sources and methods, had superseded the lower court's ruling.\textsuperscript{138}

With few exceptions, nearly every court has found that the government met its burden of persuading the court that the requested documents were properly classified. Even some judges have acknowledged the seemingly one-sided nature of these cases. Judge Patricia Wald of the Court of Appeals for the District of Columbia Circuit, for example, wrote that de novo review in (b)(1) cases "often seems to be done in a perfunctory way."\textsuperscript{139} She expressed concern that "the courts may be approaching too timidly what is, in my view, their clear responsibility to inquire

\textsuperscript{130} See, \textit{Justice Dep't Guide}, supra note 14, at 412.
\textsuperscript{132} Id. at 845 (quoting from unreported district court opinion).
\textsuperscript{133} CIA v. Holy Spirit Ass'n for the Unification of World Christianity, 455 U.S. 997 (1982) (vacating court of appeals' decision as moot); see also \textit{Justice Dep't Guide}, supra note 14, at 412 (noting that plaintiff in another case agreed to withdraw his request for information in exchange for government agreeing not to seek to vacate appeals court decision, making that decision of questionable value).
\textsuperscript{135} Id. at 710.
\textsuperscript{136} Id.
\textsuperscript{137} 471 U.S. 159 (1985).
\textsuperscript{138} See Fitzgibbon v. CIA, 911 F.2d 755, 768 (D.C. Cir. 1990).
into whether national security claims override traditional constitutional rights or liberties.\textsuperscript{140} While Judge Wald did not argue that specific cases had been improperly decided, she pointed out that honoring the "statutory command" of the FOIA required "insisting on affidavits setting out the security concerns, looking at the documentary material \textit{in camera} if necessary, [and] transmitting to the security agencies, most of whom do not like the FOIA one whit, the message that they are being held to account."\textsuperscript{141}

\section{Balancing Deference to Agency Expertise and "De Novo" Review}

Review "de novo" literally means "anew."\textsuperscript{142} In the context of administrative law, it connotes a complete review of the facts and law without any deference to the supposed expertise of the initial decisionmaker, the administrative agency.\textsuperscript{143} Congress rarely directs the courts to conduct such a thorough review of agency actions; that it did so in the FOIA indicates the depth of Congress' motivation to provide open access to the workings of government.

The federal courts are the first and only forum in which a FOIA requester is entitled to make an affirmative case in favor of the disclosure of requested information.\textsuperscript{144} A citizen requesting information under the FOIA is not entitled to present evidence to the agency, or to have arguments in favor of disclosure officially considered at either the initial agency review or appeal stage.\textsuperscript{145} The requester has no right to a hearing at the agency level.\textsuperscript{146} Of course, the requester's arguments may persuade agency officials, but the absence of the right to an adversarial proceeding at the agency level underscores the importance of judicial review in the FOIA process.

\textsuperscript{140} Id. at 764.

\textsuperscript{141} Id.


\textsuperscript{143} Id.


\textsuperscript{145} See id. § 552(a)(6)(C).

\textsuperscript{146} See id. During the House debate on President Ford's veto of the 1974 amendments, Congressman Erlenborn pointed out that (b)(1) cases should be decided based on a "preponderance of the evidence" standard as is the "normal rule in civil cases." FOIA cases should not be treated like regular administrative appeals since a FOIA denial is not the product of "adversary proceedings, public proceedings, and the making of a record," but instead is "usually made on an arbitrary basis of some employee of the executive branch, deciding whether or not the document falls within the system of classification as outlined in the Executive order." Source Book, supra note 44, at 415-16.
At the least, then, judicial officials involved in FOIA national security cases should perform the functions of 1) verifying that all nonclassified material has been released; 2) confirming that all withheld material is justifiably classified; and 3) providing a meaningful opportunity for the requester to advance arguments and present evidence in favor of disclosure. Because the requester has had no opportunity to argue the case at the agency level, it seems axiomatic that the courts should give as much credit and weight to the requester’s legal and factual arguments as possible.

Courts do not have authority to decide whether documents should be classified or not. As a practical matter, however, the FOIA empowers, indeed it directs, the courts to overrule an executive branch decision to classify information if the government cannot persuade the court that releasing the information would cause identifiable “damage” to national security.147

Courts should temper judicial deference to agency judgments by looking to the only standard by which they can measure secrecy decisions—the executive order governing classification. The current order allows the classification of information only if its unauthorized disclosure “reasonably could be expected to cause damage to the national security.”148 This “harm standard” means that the government’s submissions to the court must explain how disclosure would cause damage to national security and, by extension, requires reviewing courts to convince themselves that such damage would or reasonably could result from disclosure. Evaluating whether disclosure “reasonably could be expected to cause damage” might be seen as the true “substantive” aspect of judicial review.

Courts reviewing FOIA national security cases face serious problems in deciding the weight to give various types of evidence and in developing procedures that will closely model the adversarial setting. Courts appear to have resolved the question of evidentiary weight by interpreting broadly the Conference Committee’s reminder that courts should give “substantial weight” to executive agency claims regarding “the details of the classified status” of disputed information.149 Meanwhile, evi-

149. For the text of the Conference Committee’s remark, see supra text accompanying note 68.
evidence offered by plaintiffs to question the completeness or veracity of government affidavits appears to be given little or no weight. If weighed at all, plaintiff’s evidence is never strong enough to overcome what has become a de facto presumption of government victory once reasonably specific government affidavits are filed.

Judges dealing with these cases face a dilemma. Despite judicial deference to agency judgments, judges must continue to review (b)(1) cases and try to make that review thorough and meaningful. Some commentators argue that the inherently ambiguous meaning of “national security”—coupled with classification standards that are sweeping in the scope of information they might be construed to protect—makes meaningful judicial review in such cases impossible. 150 Congress recognized this dilemma, but decided that the courts were the best place to subject executive agency decisions to impartial review. In Senator Muskie’s words, “[i]f courts cannot have full latitude to conduct that review, no one can.” 151

Deferring to agency expertise, courts often accept as true all government evidence and dispose of cases through summary judgment, perhaps after encouraging negotiation between the parties. This is probably the most common course for a (b)(1) case today. 152 Such a deferential review process is likely to yield fair results only if the agency withholding the information sees the threat of court-ordered disclosure as more than a remote possibility. Resolution of FOIA cases by summary judgment may seem efficient, but such resolution only serves the public interest if it produces a fair outcome for plaintiff—i.e., to the extent that the agency releases the maximum amount of nonclassified material possible.

Where an agency cooperates fully with the plaintiff, conducts a thorough review of all requested material and releases as much information as possible, one might argue that the mere threat of judicial review has greased the bureaucratic wheels sufficiently to yield a fair outcome. This analysis places extreme faith in the wisdom of the classifiers. As Congress and the courts have recognized, however, an extremely deferential review standard gives

150. See Note, National Security and the Amended Freedom of Information Act, 85 Yale L.J. 401 (1976) (arguing that the dependence of national security on policy determinations would complicate judicial review under the amended FOIA).
152. See Justice Dep’t Guide, supra note 14, at 634 (“Summary judgment is the vehicle by which virtually all FOIA cases are resolved.”)
the executive branch—the classifiers—too much credit. This is true not only because of the inherent tendency of executive officials to withhold more information than is necessary to protect national security, but also because the same officials and agencies have repeatedly exhibited a penchant for "secret" activities which, in retrospect, did not merit such status. Furthermore, the reality of FOIA litigation does not counsel faith that judges can maintain a "hands off" approach and fulfill the purpose of de novo review. Many (b)(1) exemption cases involve large volumes of information, recalcitrant agencies, and contested litigation. The plaintiff must make repeated requests for administrative review before initiating litigation. In that process, the plaintiff must negotiate with the agency over documents she has never seen, and once an impasse is reached must hope the court will help balance the scales by putting the government to a meaningful test of its assertions regarding the classification of the information at issue.

The agency in such cases has little incentive to disclose information because both parties know that the court is unlikely to order disclosure. In any event, plaintiffs are likely to abandon their request unless they are among the few who have the time, money, and lawyers necessary to pursue litigation. What little incentive the agency may have to disclose documents may result from the threat that, if the case proceeds to litigation, the agency will likely be required to take the time to prepare a detailed index of the withheld material and an affidavit attesting to the information's classified status. This prospect, however, is probably not great enough to prompt additional disclosure or negotiation with the plaintiff, especially as the process of drafting affidavits becomes routine and the agency is able to tailor its affidavits and indexes to meet minimum standards announced by the courts in other FOIA cases.

Another method courts could employ to resolve FOIA national security cases would involve the time-consuming and tedious process of routinely looking behind government affidavits and attempting to verify that the information at issue is properly classified. Putting aside the question of the burden this would place on both courts and agencies, it is impossible to predict

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158. Some cases take many years to resolve. See, e.g., Washington Post v. United States Dep't of Defense, Civil Action No. 84-3400-LFO, slip op. at 39 (D.C. Cir. May 30, 1991) (court expressed hope that "this decade-old FOIA request will be resolved").
whether such exacting scrutiny would result either in additional voluntary disclosures by the agencies or disclosure orders by the courts. Still, if judicial review in (b)(1) cases is to mean anything more than summary affirmation of the truth of government affidavits, courts must devise procedures which assure that FOIA national security cases take into account the public interest in information disclosure that Congress designed the FOIA to protect.

De novo judicial review in FOIA national security cases should not mean that courts will overrule legitimate decisions to classify information. The document classification system as a whole, of course, reflects the myriad policy decisions that collectively form the nation’s perception of its “security” interests. These policy choices are not what the courts are empowered to decide in (b)(1) cases.

Judicial deference in (b)(1) cases, however, should be tempered by the FOIA presumption in favor of maximum disclosure. This presumption requires the agency to prove to the court that the decision to classify is valid and correct. 154 This process will function smoothly only where the court strikes a balance between requiring persuasive evidence that classification is necessary, on the one hand, and deferring to agency judgment regarding the types of information that must remain secret, on the other. There is evidence that Congress was thinking along these lines in passing the 1974 amendments. Commenting on the amendment’s reference to “criteria established by an executive order,” Congresswoman Mink said that “[t]his will give courts leeway to probe into the justification of the classification itself . . . . In effect, courts will be able to rule on whether disclosure actually would bring about damage to the national security or on whatever other test is set forth in the Executive order as justification for the classification.” 155

The harm standard is one key to determine what judicial procedures would promote fair, efficient outcomes in FOIA (b)(1) cases. Judicial deference to agency claims that disclosure of information will cause damage to national security serves the public interest only if the results in actual cases inspire confidence that

154. For a general discussion of this concept, see CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 98-105 (1990).

155. SOURCE BOOK, supra note 44, at 260 (statement of Congresswoman Mink).
such deference is, in fact, justified. If the information that is ultimately revealed (either through litigation or negotiation) turns out to be obviously inconsequential, the public confidence in executive arguments for secrecy will be eroded. Similarly, the case against judicial deference is stronger if the government clings to unreasonable positions revealed through the course of litigation.

There is no doubt that the government has used the classified label to hide apparently innocuous material from plaintiffs. Washington Post v. United States Department of Defense\(^\text{156}\) is an ongoing case involving a FOIA request for information on the failed mission to rescue American hostages in Iran in 1980. Seven years into the litigation, the government agreed to review a sample of documents designated by a special master as representing the legal issues presented in the case.\(^\text{157}\) After this review, the government released additional portions of many of the documents.\(^\text{158}\) Among the newly released documents were:

—a two-page document that turned out to be the text of an Associated Press news report. In its Vaughn affidavit, the government had not mentioned that the document was a press report.\(^\text{159}\)

—a fifty-page transcript of a press conference given on a “background basis” but “inadvertently” released to news organizations. Even when confronted with an identical copy of the document produced by plaintiff in the course of the litigation, the government maintained that the document remained properly classified because it had not been “officially” disclosed.\(^\text{160}\)

The government only released these documents after the


\(^{157}\) Id. at 4.

\(^{158}\) For further discussion of the proceedings in this case, one of the first to employ a special master to assist the judge in framing the issues for ultimate resolution by the court, see infra notes 236-67 and accompanying text.

\(^{159}\) Plaintiff-Intervenor’s Reply to Defendant’s Response to Plaintiff-Intervenor’s Second Statement of the Issues at 5, Washington Post (Civil Action No. 84-3400-LFO) (filed January 18, 1991) [hereinafter Plaintiff’s Reply].

\(^{160}\) See Plaintiff’s Reply, supra note 159, at Exhibit B; Special Master’s Description of Sample Documents at 2, Washington Post (Civil Action No. 84-3400-LFO) (filed Dec. 21, 1989). The courts have generally rejected arguments that the existence of similar information in the “public domain” suggests that the government has waived the right to claim FOIA exemptions. See Ashfar v. United States Dep’t of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (holding that plaintiff bears burden of “pointing to specific information in the public domain that appears to duplicate that being withheld”).
special master produced a report for the court summarizing the arguments both sides could make regarding the sample documents.\textsuperscript{161} The government’s willingness to litigate over such matters reinforces arguments for more aggressive judicial review in FOIA national security cases.

Courts have taken notice of similar government actions and have suggested that they underscore the importance of the threat of in camera review as an incentive for greater disclosure. In Ray v. Turner,\textsuperscript{162} the concurring opinion noted that the CIA “found” portions of documents that it could release after the lawsuit over the documents began, despite the fact that during two other reviews the CIA found no segregable portions of the documents and the agency had “flatly stat[ed] that no such portions existed.”\textsuperscript{163} Similarly, in Goland v. Central Intelligence Agency,\textsuperscript{164} the agency disclosed to the plaintiff 321 documents one week after the court of appeals had affirmed a lower court summary judgment ruling for the government.\textsuperscript{165} The agency admitted it had determined that the documents were relevant to the plaintiff’s FOIA request six months earlier.\textsuperscript{166} As Chief Judge J. Skelly Wright wrote in Ray, such cases “emphasiz[e] the difficulties that inhere in permitting an agency to be the final judge of its own cause.”\textsuperscript{167}

\section*{VI. IMPROVING THE LITIGATION PROCESS IN FOIA NATIONAL SECURITY CASES}

Chief Judge Wright’s concurring opinion in Ray offers a thoughtful examination of the appropriate role of the courts in FOIA national security cases, and provides a useful starting point for examining judicial procedures that may assist the courts in carrying out the intent of Congress through the de novo review process. His opinion urges the courts to conduct the de novo review required by Congress in the 1974 amendments without placing undue emphasis on the Conference Committee’s admonition regarding the “substantial weight” courts should give agency expertise.\textsuperscript{168} Overemphasizing the Conference Committee language would risk creating a “broad presumption favoring all

\begin{thebibliography}{9}
\bibitem{161} Washington Post, 766 F. Supp. at 4.
\bibitem{162} 587 F.2d 1187 (D.C. Cir. 1978).
\bibitem{163} Id. at 1212 n.51 (Wright, C.J., concurring in the remand).
\bibitem{164} 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).
\bibitem{165} Id. at 375.
\bibitem{166} Id.
\bibitem{167} Ray, 587 F.2d at 1213 n.51 (Wright, C.J., concurring in the remand).
\bibitem{168} Id. at 1214 (Wright, C.J., concurring in the remand).
\end{thebibliography}
agency affidavits in national security cases.”

Chief Judge Wright also gave his colleagues advice on the fair treatment of (b)(1) cases and recommended procedures—all of which had already been tried with varying degrees of success by other judges—to resolve difficult issues. For instance, he suggested that the plaintiff or plaintiff’s counsel should have limited access to the disputed documents, whenever possible, “a step that seems essential if the plaintiff is to challenge the accuracy of the government’s characterization of the documents in true ‘adversary’ fashion.”

Chief Judge Wright viewed greater use of in camera inspection as a way to “increase[] the ‘adversariness’ of the proceeding . . . by allowing the court to test the accuracy of the agency’s representations.” He noted that obstacles to in camera review could be minimized by either limiting access to classified documents to court personnel with security clearances or by appointing properly cleared special masters. Chief Judge Wright pointed out that courts had dealt with large volumes of information in other FOIA cases by reviewing only samples of the withheld material. He urged judges to conduct in camera review if government affidavits do not clear up a “dispute of fact concerning the nature or contents of the documents sought to be pro-

169. Id. at 1213 (Wright, C.J., concurring in the remand).
170. Id. (Wright, C.J., concurring in the remand).
171. Id. at 1205 n.24 (Wright, C.J., concurring in the remand). Judge Wright noted that FOIA plaintiffs had asked to be granted access to classified documents under terms of a protective order in Hayden v. CIA, Civil Action No. 76-284 (D.D.C. Oct. 8, 1976). Id. at 1212 (Wright, C.J., concurring in the remand). The Senate Report also recognized the disadvantage to plaintiffs of conducting in camera review without the plaintiffs’ participation and encouraged plaintiff access to the documents “whenever possible.” See Source Book, supra note 44, at 166-67 (reprinting S. Rep. No. 854, 93d Cong., 2d Sess. (1974)).
172. Ray, 587 F.2d at 1212 (Wright, C.J., concurring in the remand).
173. Id. at 1211 (Wright, C.J., concurring in the remand).
174. Id. (Wright, C.J., concurring in the remand) (citing Mead Data Cent., Inc. v. United States Dep’t of the Air Force, 566 F.2d 242, 262 n.59 (D.C. Cir. 1977) (“court could selectively employ in camera inspection to verify the agency’s descriptions and provide assurances . . . to FOIA plaintiffs that the descriptions are accurate”); see also Ash Grove Cement Co. v. Federal Trade Comm’n, 511 F.2d 815 (D.C. Cir. 1975) (district judge inspected two of four categories of information involved); Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1977) (sampling of withheld items was justified when agency ran serious risk of compromising national security secrets by disclosure).
duced,” if the government “affidavits or testimony” do not demonstrate that the information is “clearly exempt and that no segregable portions remain,” or if the court suspects “bad faith” by the government.175

Along lines similar to those outlined by Judge Wright in Ray, some courts have followed procedures in national security cases designed to allow themselves to test more carefully government withholding claims without “second-guessing” the executive classification decision. These procedures fall into three general categories:

1) document description and index requirements that allow the plaintiff to prepare credible and informed legal arguments in favor of disclosure and that allow the court to verify that documents are properly classified (“index requirements”);
2) admission into the record of evidence contrary to the government affidavits, including plaintiff’s evidence about the nature of the disputed documents and evidence of government bad faith (“contrary evidence”);
3) use of special masters to help the court evaluate government affidavits, weigh contrary evidence, and facilitate in camera review if necessary (“special masters”).

A. Index Requirements

The most significant judicial invention designed to balance the scales in FOIA litigation was established in 1973 in Vaughn v. Rosen.176 Vaughn established the principle that in most cases the government must provide the court and the plaintiff with a detailed “description” of the withheld material and the justification for withholding.177 This requirement was designed to increase the adversariness of the FOIA litigation process by providing plaintiffs with information on which they could base arguments in favor of disclosure, and to place the burden of justifying withholding squarely on the government.178

The Vaughn system of “specificity, separation, and indexing” is designed to:

175. Ray, 587 F.2d at 1212, 1214 (Wright, C.J., concurring in remand).
177. Id. at 826-27.
178. Id. at 827.
1) assure that a party’s right to information is not submerged beneath governmental obfuscation and mischaracterization, and
2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.\(^{179}\)

In all FOIA cases courts and parties have struggled with the distortion of the adversarial process that inevitably arises from the plaintiff’s lack of precise knowledge concerning the concealed documents. As the *Vaughn* court observed, “the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.”\(^{180}\) Even if the court inspects the documents in camera to test the accuracy of government arguments in favor of withholding, that examination is undertaken “without benefit of criticism and illumination by a party with the actual interest in forcing disclosure.”\(^ {181}\) When the government seeks to withhold based on the (b)(1) exemption, the court’s traditional deference to executive branch judgment relating to national security and foreign affairs magnifies these distortions to the adversarial process.\(^ {182}\)

A court will review documents in camera only if it is not convinced of the propriety of the classification on the basis of the government’s pleadings and *Vaughn* affidavits.\(^ {183}\) Because in camera inspection is viewed as a last resort, government affidavits are the most critical part of the record, and decisions often turn on

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\(^{179}\) *Id.* at 826.

\(^{180}\) *Id.* at 823.

\(^{181}\) *Id.* at 825.

\(^{182}\) As set forth in King v. United States Dep’t of Justice, 830 F.2d 210 (D.C. Cir. 1987), if the government claims the national security exemption, the index must at least:

1) identify the document, by type and location in the body of documents requested;
2) note that Exemption 1 is claimed;
3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption’s purpose;
4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and
5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

*Id.* at 224.

\(^{183}\) See Hayden v. National Sec. Agency/Cent. Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979) (“In camera review is neither necessary nor appropriate” if the agency’s affidavits are acceptable.).
the adequacy of the government’s document descriptions and justifications for continued withholding.184 Thus, the likelihood that the government ultimately will disclose information is a function of judicial decisions outlining minimum standards for the agency affidavit.

Court interpretations of the index requirement suggest the critical nature of the document descriptions in the judicial review process. In King v. Department of Justice,185 a case involving access to FBI surveillance files on a deceased civil rights attorney, the court noted that “categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.”186 Similarly, the court in Powell v. United States Department of Justice,187 held that the Vaughn index must allow the plaintiff and the court to make an “independent assessment of the validity of the claimed exemptions.”188

The index requirement serves many purposes in (b)(1) litigation, the most important of which is to create a detailed public record that allows plaintiffs to put forward their best arguments in favor of disclosure.189 The Vaughn index also forces the government to show the court that the government has released all “reasonably segregable” nonclassified portions of the documents, as required under the 1974 FOIA amendments.190

The courts have adopted a flexible approach in evaluating government document descriptions. Depending on the circumstances, the index may be a narrative, or a system of annotated or cross-referenced excerpts of documents coded to indicate why the exemption applies. In circumstances in which the government cannot possibly describe the information without revealing secrets, courts have accepted and reviewed classified indexes in camera.

In a few national security cases courts have found the government’s index inadequate. The index in Allen v. Central Intelligence

184. See id.
185. 830 F.2d 210 (D.C. Cir. 1987).
186. Id. at 224 (citing Dellums v. Powell, 642 F.2d 1351, 1360 n.29 (D.C. Cir. 1980)).
188. Id. at 1514.
190. See 5 U.S.C. § 552(b) (1988) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").
Agency,\textsuperscript{191} for example, was insufficient because it was based mainly on conclusory descriptions that simply recited the criteria of the executive order and the language of the statute itself.\textsuperscript{192} Courts have rejected other indexes because they claim exemptions for more than one reason but do not state which rationale for withholding applies to which withheld material.\textsuperscript{193}

While a primary function of the index is to allow the plaintiff to formulate meaningful arguments in favor of disclosure, a review of Vaughn index document descriptions in sample (b)(1) cases shows how difficult the plaintiff's task can be. The concept of describing the documents in order to enable the court to conduct further review, or to let the plaintiff mount an adequate argument in favor of disclosure, often seems lost in what is sometimes referred to as the "boilerplate Vaughn."\textsuperscript{194} A boilerplate Vaughn purports to "describe" the withheld material, but actually says very little that would allow the court to determine whether the information is properly withheld. Such affidavits often repeatedly refer the reader to the executive order, or to a generic portion of the government affidavit outlining in vague terms the harm to national security likely to occur if the information is revealed. For good measure, such affidavits generally state that the government has released all "reasonably segregable" nonclassified material (unless that information is subject to another FOIA exemption).

The court and plaintiff are left with an affidavit that states little more than what the government was required to certify in order to win summary judgment under the analysis of Environmental Protection Agency \textit{v.} Mink.\textsuperscript{195} Although the affidavit always includes a general statement explaining why the information sought is protected under one or more of the ambiguous categories of the executive order, true document descriptions that allow meaningful argument of the merit of withholding are exceedingly rare.\textsuperscript{196}

A review of actual Vaughn affidavits shows how the govern-

\textsuperscript{191} 686 F.2d 1287 (D.C. Cir. 1980).
\textsuperscript{192} Id. at 1291.
\textsuperscript{193} \textit{See} Branch \textit{v.} FBI, 658 F. Supp. 204, 208 (D.D.C. 1987) (index rejected because court had to "guess which reason or reasons apply to each deletion").
\textsuperscript{194} \textit{See}, \textit{e.g.}, Wiener \textit{v.} FBI, 943 F.2d 972, 978 (9th Cir. 1991) (quoting text of "boilerplate Vaughn").
\textsuperscript{195} 410 U.S. 75 (1973). For a further discussion of Mink, see supra notes 45-49 and accompanying text.
\textsuperscript{196} Wiener, 943 F.2d at 979.
ment can appear to describe documents while disclosing little that allows the plaintiff to formulate meaningful contrary arguments or assists the court in resolving the case. Bonner v. United States Department of State involved a request for documents on U.S. government dealings with the former Marcos regime in the Philippines. After disclosing some information, the government filed an affidavit claiming the remaining documents were exempt under (b)(1), mainly for reasons relating to diplomatic confidentiality. The affidavit contained a lengthy section on why the release of particular documents would cause harm to U.S. security, but contained little specific information about the material being withheld.

For example, one document was described as "a confidential proposal . . . relating to coordinated action on this foreign relations problem by a number of named countries." The description noted that

it is not clear whether any or all of the other countries concerned had been consulted as to this possible action, and it is likely that at least some of them would regard it as improper on the part of the U.S. government to breach the proposal unilaterally to the Philippine government.

The government concluded that disclosure of this document would "be regarded by foreign officials . . . as evidence of U.S. government unwillingness or inability to preserve diplomatic confidentiality . . . [and would] be exploited by foreign elements opposed to U.S. foreign relations objectives." While such descriptions may seem persuasive at first glance, they do little to allow the plaintiff to formulate counter-arguments or allow a judge to determine that the agency has properly classified the information.

198. Bonner v. United States Dep't of State, 928 F.2d 1148, 1149 & n.3 (State Department submitted declaration of John Eaves, Deputy Director of Office of Mandatory Review and of Classification and Declassification Center of Department of State).
200. Declaration of John Eaves at 55-56. Similar language appears throughout the 143 page index to the withheld documents. The trial court held that the index was adequate. See Bonner, 724 F. Supp. at 1030-32. The plaintiff did not challenge the adequacy of the index on appeal. Bonner, 928 F.2d at 1151 n.8.
201. Declaration of John Eaves at 55-56.
A comparison of Vaughn index descriptions with the documents (or portions of documents) ultimately disclosed may make one doubt the seriousness of the "damage" to national security cited in the typical Vaughn index. In Washington Post v. Department of Defense, for example, a portion of a document declassified during the litigation included the revelation that box lunches for helicopter pilots who fly long missions over a desert should not include milk because it might spoil in the heat. The government description of that document in the Vaughn index stated that release of any portion of the document would cause "exceptionally grave damage to the national security." In the same case, the court found a description inadequate because it described a 250-page document in seven pages. The court faulted the government for failing to describe the information contained in each withheld portion of the document.

In an ongoing case over access to documents relating to the Cuban Missile Crisis, the government filed a twenty-six volume Vaughn index (approximately 1,500 pages) purporting to describe each withheld document. Plaintiffs filed a motion for a supplemental index, citing numerous insufficiencies in the government's submission, including the fact that the government claimed the (b)(1) exemption for some previously released documents.

In its motion, the plaintiff argued that the government affidavits were filled with meaningless descriptions, including thirty documents that were described merely as containing records of "conversations or other communications" relating to Cuba and the Missile Crisis. Other documents were referred to as potential "grist for foreign propaganda mills." One twelve-page document was described simply as "this document appears to be a portion of a larger draft analysis and proposal for action." There is no clear formula for a Vaughn affidavit that allows true adversarial testing of the government's withholding claim in

206. Id.
207. Id. at 14.
208. Id. at 16.
209. Id. at 22.
a FOIA national security case. Still, the courts should allow their own past rulings in this area to guide them, and require government submissions that describe the withheld material in sufficient detail to allow the plaintiff to formulate meaningful arguments in favor of disclosure. Unless the Vaughn index truly serves that purpose, the use of the Vaughn procedure as a substitute for in-camera review cannot be justified.

B. Contrary Evidence

Courts have repeatedly held that agency affidavits are only “sufficient” if they are “neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency.”210 It is not clear from the case law, however, what constitutes such “contrary evidence” or “agency bad faith,” and what evidentiary weight the court should give such evidence when it is produced. In one case, Powell v. Department of Justice,211 the court found bad faith in the agency’s “inexcusable delays” and “inadequate responses,” and ordered disclosure of some information. Ultimately, however, the government was permitted to withhold the information under a settlement agreement.212 Powell aside, research reveals no (b)(1) case in which a court has rejected the government’s affidavits or ordered disclosure on the basis of government bad faith.

Judicial opinions have not specifically defined either bad faith or contrary evidence in the context of (b)(1) cases, except to say, as in Goldberg v. Department of State,213 that “contrary evidence must somehow undermine or call into question the correctness of the classification status of the withheld information, or the agency’s explanation for the classification.”214 Plaintiffs have tried—with little success—to introduce what they believe is either “contrary evidence” or evidence of agency “bad faith.”215

210. King v. United States Dep’t of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987). This same view has been expressed in roughly the same words in numerous cases. See, e.g., Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984); McGehee v. CIA, 697 F.2d 1095, 1112 (D.C. Cir.), vacated in part on rehe’r, 711 F.2d 1076 (D.C. Cir. 1983); Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

211. 584 F. Supp. 1508, 1515 (N.D. Cal. 1984).

212. See Justice Dep’t Guide, supra note 14, at 412.


214. Id. at 81.

215. See, e.g., Silets v. United States Dep’t of Justice, 945 F.2d 227, 231 (7th Cir. 1991) (trial court did not abuse its discretion by refusing to conduct an in...
In some cases, courts have dismissed as irrelevant affidavits submitted by plaintiffs to question the basis for keeping information classified, because only the official currently responsible for classification is seen as being in a position to evaluate the reasons for withholding.\textsuperscript{216} Courts have also rejected testimony that withheld information is similar or identical to documents already in the public domain.\textsuperscript{217} Courts have reasoned that only the government, which has possession of the documents, can compare them to public domain information and verify similarity.\textsuperscript{218} Evidence that foreign officials have waived objections to disclosure of information also has been questioned as unofficial and improper for consideration by the court.\textsuperscript{219}

Similarly, plaintiffs can only surmise what might constitute agency bad faith by reviewing arguments that have been rejected. Releasing documents in a piecemeal fashion over the course of protracted litigation (sometimes seemingly in direct proportion to the annoyance the judge exhibits toward the agency), is not evidence of bad faith.\textsuperscript{220} Courts have reasoned that such a holding would discourage future agency cooperation.\textsuperscript{221} An incomplete or inaccurate \textit{Vaughn} index is apparently not evidence of bad faith;\textsuperscript{222} the usual remedy is to require the production of a better index.\textsuperscript{223} A government decision to release documents in the midst of litigation does not constitute a waiver of arguments with respect to other withheld documents, nor does it make agency affidavits "suspect."\textsuperscript{224} Such a ruling would "work mischief in the future by creating a disincentive for an agency to reappraise its

\textsuperscript{216} For a discussion of cases in which courts have rejected plaintiffs' counter-affidavits, see supra notes 114-24 and accompanying text.

\textsuperscript{217} See Ashfar v. United States Dep't of State, 702 F.2d 1125, 1134 (D.C. Cir. 1983) (although similar information might be widely circulated, documents may still be classified to avoid "authoritative official announcements" that might harm national security).

\textsuperscript{218} See id. at 1129-35 (because government is in sole possession of requested documents, only government can compare those documents to released documents and determine similarity).

\textsuperscript{219} See Lawyers Alliance for Nuclear Arms Control v. United States Dep't of Energy, 766 F. Supp. 318, 324 (E.D. Pa. 1991) (fact that Soviet officials waived objections to disclosure of joint nuclear weapons testing documents held to be improper subject of court consideration).

\textsuperscript{220} See Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

\textsuperscript{221} See id. at 953.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} Id. at 954.
position,” and “[i]t would be unwise [for the court] to punish flexibility, lest [the court] provide the motivation for intrusiveness.”

Courts should give plaintiffs in (b)(1) cases the opportunity to present their own evidence that either undermines the agency's exemption arguments or tends to show that the agency has not complied with the request on a good-faith basis. Because courts have not defined the parameters of such evidence and the weight it will be given in the de novo review process, plaintiffs cannot make effective legal arguments in favor of disclosure.

In the meantime, plaintiffs have continued efforts to introduce their own evidence in (b)(1) cases. One recent attempt involved affidavits from government officials who wrote or received specific classified documents relating to the Cuban Missile Crisis. The plaintiff offered such evidence to challenge the sufficiency of the government's document descriptions. In Brenner, the plaintiff argued that “the obvious deficiency of the [Vaughn] Declaration is demonstrated by the affidavits of several high-ranking Kennedy Administration officials who . . . worked closely with these very documents—even they cannot determine from their review of the [Vaughn] Declaration the substance of the documents or the bases for their withholding.” The case remains under consideration, but regardless of the outcome it may provide a model of the type of plaintiffs’ evidence that courts could weigh in the process of de novo review.

It seems logical that former officials—such as the affiants in the Brenner case—may have knowledge that could be used to assist courts in verifying the accuracy of a government Vaughn index. Information obtained through such persons may also shed light on which, if any, contested information the judge might inspect in camera. Such evidence would not necessarily challenge the decision to keep documents classified. Instead, evidence offered by such plaintiffs’ “experts” would comment on the accuracy of the index itself, and provide the court with a useful tool to evaluate

226. Brenner v. United States Dep't of State, Civil Action No. 88-0034 (D.D.C. filed Jan. 7, 1988). Brenner, which involves a request for documents relating to the Cuban Missile Crisis, was pending before Judge Norma Holloway Johnson in the United States District Court for the District of Columbia at the time this article was written.
arguments relating to the classification status of the withheld documents.

C. Use of Special Masters

A judge in a FOIA case involving the national security exemption might be motivated to appoint a special master to help narrow the legal and factual issues and to resolve the case efficiently. Use of special masters in the (b)(1) context is not a new idea.\textsuperscript{228} The \textit{Vaughn} court recommended that if the “raw material” of a FOIA lawsuit is extremely burdensome, the trial court may consider designating a special master to “assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.”\textsuperscript{229} Congress also expected judges to use special masters to assist them in resolving difficult cases.\textsuperscript{230}

Using special masters in FOIA national security cases offers a number of potential advantages. In cases involving many documents, the prospect of time consuming in camera review may influence courts to decide a case on the strength of affidavits alone. Employing a special master may reduce this tendency by easing the burden of reviewing a large number of documents. After meeting with the parties, choosing a sample, and reviewing the documents, the master could prepare a detailed analysis of the issues to assist the judge in making the ultimate decision whether to order disclosure of the documents. Using a master to select a document sample also might reduce arguments over appropriate sampling methods and narrow the issues for the court to resolve. Furthermore, the master could conduct meetings with the parties to facilitate resolution of legal and factual issues, giving both parties a chance to develop their case.\textsuperscript{231}


\textsuperscript{230} See \textit{SOURCE BOOK, supra} note 44, at 167 (reprinting S. Rep. No. 854, 93d Cong., 2d Sess. (1974)). Some in Congress also proposed that judges could be assisted by a Freedom of Information Commission “which could develop expertise in this area and act as a master in chancery or an adviser to the court.” \textit{Id.} at 247 (statement of Congressman Erlenborn).

\textsuperscript{231} Plaintiffs and their counsel are generally excluded from participation in in camera proceedings, especially in (b)(1) cases. In \textit{Salisbury} v. \textit{United States}, 690 F.2d 966 (D.C. Cir. 1982), the court of appeals found “no error” in the district court’s decision to exclude plaintiff’s attorney from the court’s re-
The use of special masters in FOIA cases may also have drawbacks. The cost of using special masters in complicated cases may be prohibitive. The issue of who pays for the master likely will generate additional litigation. The issue of how to select special masters for sensitive national security cases also must be resolved. Individuals with proper security clearances, not to mention time to spare, may be in short supply, and the parties may object to the judge's choice of a master. Finally, at least one judge has suggested that using a special master in a (b)(1) case will not save judicial resources, because only the judge can make the final determination regarding exemption.232

Special masters have seldom been drawn upon in FOIA (b)(1) cases, but experience in a current case provides a model for using this innovative procedure in difficult (b)(1) cases. In Washington Post v. United States Department of Defense,233 the court appointed a special master to select a representative sample of withheld documents and summarize the legal arguments that both sides could make.234 A more detailed examination of that case provides insight into how using a special master may give the courts a way to provide the litigants with a procedure that more closely approaches the adversarial process, and that helps judges provide meaningful de novo review in national security cases.

The case arose from a FOIA request by Washington Post reporter Scott Armstrong235 for approximately 2,000 documents view of a classified Vaughn index. Id. at 973. The court reasoned that “danger to the national security, delay, and ethical considerations” justified excluding the plaintiff. Id. Similarly, the court in Weberman v. NSA, 668 F.2d 676 (2d Cir. 1982), held that the “risk presented by participation of counsel . . . outweighs the utility of counsel, or adversary process,” in reviewing a classified government affidavit. Id. at 678.

Short of obtaining security clearances for plaintiff’s counsel, one way of partially accommodating plaintiffs in this situation might be through the process of using special masters in (b)(1) cases. Through that process, plaintiff’s counsel and government counsel meet with the masters to narrow the issues, which naturally gives the plaintiff’s lawyer additional insights regarding the government’s reasons for withholding information and may promote negotiated resolution of some issues.

232. In re United States Dep’t of Defense, 848 F.2d 232, 240 (D.C. Cir. 1988) (Starr, J., dissenting) (“If the trial judge carefully reviews each decision made by the master, it is doubtful that the judicial time or resources will have been conserved to any significant degree.”).


234. Id. at 4. The decision by Judge Oberdorfer of the District Court for the District of Columbia survived a petition for a writ of mandamus brought by the defendant Department of Defense. See In re United States Dep’t of Defense, 848 F.2d 232 (D.C. Cir. 1988).

235. Armstrong left the Post during the course of the lawsuit and was later added as plaintiff-intervenor, while the Post withdrew from the litigation.
relating to the failed attempt in 1980 to rescue U.S. hostages in Iran. The Department of Defense withheld nearly all of the documents—which consisted of about 14,000 pages—under the (b)(1) exemption.

After reviewing the unclassified Vaughn index, Judge Louis Oberdorfer of the District Court for the District of Columbia announced that he was considering appointing a special master to review the withheld documents. While the plaintiff supported the idea of a master, the government opposed it. Hoping to persuade the judge to grant summary judgment on the basis of government affidavits alone, the government instead submitted a more detailed, but classified, document index. Furthermore, the government proposed that the judge decide whether the (b)(1) exemption applied by reviewing in camera a government-chosen “random sample” of the documents.

Not satisfied with that proposal, Judge Oberdorfer instead wrote a Notice to Counsel explaining why he felt engaging the assistance of a master was better than any of the alternative ways to review the documents and to shed light on the legal issues involved. He cited difficulty obtaining security clearances for his law clerks and other court personnel who would be involved if the court were to conduct sampling or other document review. He also questioned the wisdom of allowing the government to select a document sample for review by the court, stating that “the integrity of sampling by the government has been authoritatively questioned.” Finally, the judge rejected random sampling as not “particularly appropriate for the circumstances here.”

Judge Oberdorfer reasoned that “[t]he best solution” would be to appoint a special master who held or had recently held an appropriate security clearance to review the documents, and to “focus the master’s responsibility on developing the sample and summarizing to the [c]ourt the arguments that each party has made, or could make, with respect to the exemptions claimed by defendant.” Sensitive to his responsibility under the Federal

237. As is common in (b)(1) cases, some documents were found to contain nonclassified material and were released in redacted form. *Id.* at 8.
238. *Id.* at 4.
240. *Id.*
241. *Id.* Judge Oberdorfer asked the parties to submit names of candidates for the special master role, and ultimately decided to appoint Kenneth Bass, who
Rules of Civil Procedure\textsuperscript{242} not to delegate decisionmaking authority to a special master,\textsuperscript{243} Judge Oberdorfer carefully circumscribed the master's role. He noted that "the [c]ourt's Article III role would be preserved, and indeed enhanced beyond that performed by the [c]ourt in an \textit{in camera} review," because ultimate adjudication would be based on: 1) the master's expertise in choosing the representative sample of documents; 2) the court's appraisal of the method the master used to select and review the samples; 3) the court's consideration of the litigants' potential arguments for and against disclosure as produced in a report to the court by the special master; and 4) any additional arguments the parties would make as a result of the special master's review and report to the court.\textsuperscript{244} Finally, Judge Oberdorfer wrote that the master would "make no recommendation" regarding document disclosure.\textsuperscript{245}

The government sought a writ of mandamus against the judge based on his appointment of the special master, arguing that the Federal Rules of Civil Procedure require that a "special condition" must exist that "requires" the appointment of a special master, and that the judge could have used alternative procedures to resolve the case.\textsuperscript{246}

In response to the government's petition, Judge Oberdorfer took the unusual step of writing a memorandum to the Court of Appeals for the District of Columbia Circuit about his decision to appoint a special master, pointing out that this case is "somewhat different [than other petitions for a writ of mandamus] because it may require consideration of the appropriate \textit{modus operandi} for district judges responsible for resolving disputes under FOIA about voluminous, highly sensitive documents without benefit of impartial expert testimony, adversary process, or normal law clerk

\begin{footnotes}
\item[242] See \textit{Fed. R. Civ. P.} 53(b) ("[R]eference [to a master] shall be made only upon a showing that some exceptional condition requires it.").
\item[243] The issue of authority under Federal Rule of Civil Procedure 53(b) to appoint a special master in this type of case is analyzed in detail in an article by Judge Patricia Wald, who was on the panel of the Court of Appeals for the District of Columbia Circuit that upheld Judge Oberdorfer's decision. See Patricia M. Wald, "Some Exceptional Condition"—The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b), 62 \textit{St. John's L. Rev.} 405 (1988).
\item[244] Notice to Counsel at 2, \textit{Washington Post} (Civil Action No. 84-3400-LFO).
\item[245] \textit{Id.}
\item[246] \textit{In re} United States Dep't of Defense, 848 F.2d 232 (D.C. Cir. 1988).
\end{footnotes}
assistance." He wrote that his decision to appoint a special master was informed by his experience with a previous (b)(1) case, *Nishnic v. United States Department of Justice*, a "much less technical and sensitive FOIA case" that took "several months in 1987 with valuable law clerk assistance, but without a special master."

A three-judge panel of the Court of Appeals for the District of Columbia Circuit denied the writ of mandamus. The appeals court viewed the appointment of a special master as a pragmatic solution that fulfilled the needs of the trial judge, while it avoided improper delegation of the court’s responsibility to rule on the ultimate issues in the case. Judge Patricia Wald, who wrote the majority opinion, commented in a law review article that Judge Oberdorfer faced one of the "exceptional conditions" that under Federal Rule of Civil Procedure 53(b) allowed him to exercise his discretion to appoint a special master. Put simply, the judge "needed a security-cleared expert fast, if the trial was to move ahead." The panel decision was also swayed by the observation that the special master's job in *Washington Post* was similar to masters' roles in overseeing document production in the pretrial phase of other complex civil cases. Courts have deemed such instances of "unusual discovery" to constitute sufficient "exceptional" conditions to warrant using a special master. Particularly noteworthy was the court's observation that the case required a special master because "it involves a FOIA claim with respect to which the judge has no access to impartial expert witnesses or other features of the adversary process in order to make his decision about disclosure."

Does the presence of the special master give plaintiffs a bet-

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249. Oberdorfer Memorandum, supra note 247, at 1.

250. *In re United States Dept. of Defense*, 848 F.2d 232 (D.C. Cir. 1988) (denying writ because mandamus is extraordinary remedy and Judge Oberdorfer did not abuse discretion).

251. Id. at 239.

252. Wald, supra note 243, at 416.

253. Id.

254. *In re Dept’t of Defense*, 848 F.2d at 235, n.5.

255. Id. Judge Starr dissented, focusing on whether this case “required” appointing a special master. Id. at 239-43 (Starr, J., dissenting).

256. Id. at 236.
ter chance to mount their strongest legal and factual arguments, and thus improve the quality of the de novo review process? Although there has not been enough experience to draw general conclusions, some of the answers to these questions are already apparent in the conduct of the Washington Post case since the special master began his work.

The special master began meeting with the parties to attempt to narrow the plaintiff’s request, and the special master directed the government to prepare a list of documents that presented common legal issues.257 After reviewing the entire classified Vaughn index and some of the actual documents, the special master informed the parties that he saw two ways to approach further document review and selection of a representative sample for analysis.258 The first model would focus on a sample from various sets of documents with common factual content; the second alternative was to select a sample that was “fairly representative of the legal issues presented by the documents.”259 He chose the second alternative, with the thought that a sample based on the legal issues raised by the withheld documents would lead to rulings that would be “sufficiently dispositive or controlling that they would significantly reduce the scope of any further proceedings.”260

A few months later, the special master identified the legal issues for the parties and received further comments from both parties.261 Soon after, the master announced that he had selected twenty-five representative documents for in-depth analysis.262 Four other documents were added to the sample in response to a request by the plaintiff.263 The master then prepared a draft description of the sample documents and submitted it to the government for classification review.264 Once that review was completed, both parties and the court were given the master’s description of the sample documents.265

After conducting another FOIA review, the government re-

258. Id. at 8.
259. Id.
260. Id.
261. Id. at 9.
262. Id. at 10.
263. Id.
264. Id. at 11.
265. Id.
leased some portions of the sample documents. Judge Oberdorfer recently issued a memorandum opinion ruling on some of the legal issues raised in the master's report, and approving the government's decision to conduct a fresh review of the entire population of withheld documents in light of the master's recommendations.

Although it is too early to cite the Washington Post case as a model for future (b)(1) cases, the experience so far suggests that special masters can at least be employed for limited purposes in such cases, saving court time and facilitating resolution of the issues between the parties.

CONCLUSION

After twenty-five years of experience with the landmark public access law known as the Freedom of Information Act, it is clear that the broad meaning given to the term national security through exemption (b)(1) of the FOIA has impeded the flow of vital information to the public. Congress has expressed its intent that the federal courts review executive agency decisions to withhold information from the public. The courts, however, have interpreted the legislative history of the FOIA to severely limit their de novo review power in cases involving classified information.

When the government attempts to withhold information from a FOIA requester for reasons of "national security," it must prove that the information is "properly classified." Instead of defining these critical terms in the FOIA, Congress chose to adopt the standard of the Executive Order on Classification, which currently allows information to be classified only if its unauthorized disclosure "reasonably could be expected to cause damage to the national security." The difficult—some would say impossible—task of assuring that the government proves that "damage" may be the result of disclosure has fallen to the courts as they decide FOIA cases involving classified documents.

This article contends that the courts do not lack the tools necessary to carry out the de novo review that the FOIA requires in cases involving national security information. Using these tools, the courts must exercise the review power Congress has given them. This means overturning executive agency decisions

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267. Id.
to withhold information if the government does not meet its burden of proof.

More vigilant judicial oversight in this area should involve greater use of potentially labor-intensive procedures that may serve to balance the adversarial scale in litigation over national security information. These procedures may include greater reliance on extra-judicial assistants such as special masters to assist courts in the fact-finding process. Courts should also intensify their scrutiny of government affidavits that purport to describe the withheld documents and to justify withholding on national security grounds. Finally, courts should review carefully all evidence the plaintiff presents that might undermine the government's position.

Such fine-tuning of the adjudication process in FOIA national security cases would add balance to this type of litigation by putting the burden of proof on the government to justify withholding documents, and by providing plaintiffs with the factual information necessary to present such cases in an adversarial manner. These procedures should also assist courts in finding facts upon which to base their decisions on the central question these cases present: Is the withheld information properly classified?

Improvements in the process of judicial review of government decisions to withhold information on grounds of national security may or may not lead to greater disclosure. Despite this unknown, judicial activism in this area is necessary if the principles of public access embodied in the FOIA are to be upheld.