UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 52 | Number 2 Article 7

12-1-1973

Administrative Law -- Needed -- Freedom of Information

W. G. Champion Mitchell

NOTES

Administrative Law—Needed—Freedom of Information

To what extent does the privilege for internal memoranda contained in executive files insulate such documents from exposure? *EPA v. Mink*[1] is only a partial resolution of the question. The decision holds that factual material embodied in internal memoranda of executive agencies must be disclosed if severable from those portions involving the deliberative and policymaking processes of the executive.[2] Access to internal memoranda will be governed by "the same flexible, common sense approach that has long governed private parties' discovery of such documents. . . ."[3] As part of this "common sense approach" to disclosure the Court found a possible limitation on judicial examination of agency memoranda[4] which had never been recognized under the Freedom of Information Act (FIA).[5]

I. The Case

Thirty-three members of Congress, acting as private citizens, sought disclosure under the FIA of recommendations made to the President by a special committee concerning the proposed nuclear test on Amchitka Island, Alaska.[6] The government refused, arguing that all of the documents came under the internal memoranda exemption of the FIA. As an additional ground the government maintained that some of the documents were also exempted because of their classified status.[7] The district court granted the government's motion for summary judgment on the ground that the documents fell within both exemptions.[8]

The court of appeals reversed, holding that including a document

---

[1]410 U.S. 73 (1973).
[2]*Id.* at 85-94.
[3]*Id.* at 91.
[4]*Id.* at 93.
[5]5 U.S.C. § 552 (1970).
[6]410 U.S. at 75-76 (1973).
[7]5 U.S.C. § 552(b) (1970) reads in part as follows:
(b) This section does not apply to matters that are—
(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy . . .
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . .
[8]Mink v. EPA, 464 F.2d 742, 744 (D.C. Cir. 1971).

in a classified file is not sufficient to consider the document itself classified and thus exempted from disclosure under the FIA.[9] The court also held that factual material contained in internal memoranda is not exempted under the act.[10] The court remanded ordering the district court to make an *in camera* review of all documents being sought. Those documents under defense classifications were to be examined to determine if nonsecret components were separable and could be read separately without distortion.[11] Any such separable components, along with those documents for which only the internal memoranda exemption had been claimed, were to be reviewed to allow disclosure of factual information unless inextricably intertwined with the policymaking process.[12]

Reversing the court of appeals, the Supreme Court held that once the government had shown a document classified pursuant to an executive order it was to be considered absolutely exempted. The judiciary can not further examine the document or question the justification for its classification.[13]

The Court agreed with the court of appeals that only factual information severable from language reflecting deliberations or recommendations by executive officials could be disclosed.[14] However, the Court limited *in camera* inspection of internal memoranda. The district court may not inspect the documents if the agency involved can demonstrate by testimony, affidavit, or sample document that the information sought is beyond the range of what a private party could discover in litigation with the agency.[15] Perhaps most importantly, *Mink* can be read as

---

[9] *Id.* at 746.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] 410 U.S. at 84.

[14] *Id.* at 91-93.

[15] *Id.* at 93-94. This portion of the Court's opinion is susceptible to at least two interpretations. The first is that the need of the claimant will be examined to decide whether *in camera* inspection will be allowed. *See* text accompanying notes 66-76 *infra*; Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 331-32 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.) (per curiam), *cert. denied*, 389 U.S. 952 (1967). A second interpretation is that the inquiry merely determines whether any of the documents would fall into a category which could never be discovered in litigation either because of some absolute privilege such as a state secret not covered by 5 U.S.C. § 552(b)(1) (1970) or because the information is of an extremely delicate nature.

The discussion of need in this note will deal only with that point in the proceedings after it has been decided that *in camera* examination is appropriate. The question of how that decision is to be reached will not be directly examined further, although many of the elements entering into a decision of what should be disclosed may also be important in deciding whether the court should investigate the documents.

holding that even information directed to the Chief Executive and used by him in making important national decisions does fall within the ambit of the FIA.[16]

The factual-deliberative distinction was based on a considerable number of discovery and FIA cases.[17] The decision to limit *in camera* review of internal memoranda was based on the belief that the purpose of the privilege, the encouragement of open expression of opinion on agency policy by agency employees, might be impaired even by requiring that the documents be examined *in camera*.[18]

This note will concern itself solely with the internal memoranda exemption.

II. BACKGROUND ON THE FIA

The purpose of the FIA is to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . ."[19] It was hoped that the act would allow broad access into government files and remove the abuses[20] of section 3 of the Administrative Procedure Act of 1946 (APA).[21]

The internal memoranda exemption was included to protect the free exchange of ideas and advice among agency personnel[22] by preventing it from having to operate in a "fishbowl."[23] In addition, the exemption was designed to preclude the premature disclosure of agency records[24] and to avoid the use of the FIA as a substitute for discovery not allowed in litigation.[25]

The internal memoranda exemption has been recognized as being

---

[16]410 U.S. at 91-93.

[17]*Id.* at 85-90 & nn. 12-16.

[18]*Id.* at 92-94.

[19]S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP.].

[20]*See* H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6 (1966) [hereinafter cited as H. REP.]; S. REP. 5.

[21]Ch. 324, § 3, 60 Stat. 238.

[22]Outside consultants are usually considered to be within the exemption. It may be important whether the consultant is paid by the government, and whether he represents public or private interest. Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032-33 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 1352 (1973).

Limitations on the use of the exemption for outside consultants are suggested in Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1063-66 (1973).

[23]H. REP. 10; *see* Ackerly v. Ley, 420 F.2d 1336, 1341-43 (D.C. Cir. 1969).

[24]S. REP. 9; H. REP. 10.

[25]Benson v. United States, 309 F. Supp. 1144, 1146 (D. Neb. 1970); *see* Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969); H. REP. 10-11.

closely tied to executive privilege.[26] Indeed, it has been stated that the act incorporates the recognized executive privilege for internal memoranda.[27] Since courts are often hesitant to encounter unnecessarily the doctrine of executive privilege, an inquiry must first be made whether a document can be withheld under another specific statutory exemption before a court will consider applying the internal memoranda exemption.[28]

Areas of Judicial Agreement. It appears well settled that the internal memoranda exemption must be specifically raised by the agency wishing to invoke it.[29] The court then has the power to decide whether the material falls within the exemption.[30] If the court lacked this power, it would quickly become a "mere rubber stamp" for the agencies' conclusions.[31]

Because courts must decide whether material falls within an exempted class, it was felt until *Mink* that the only practical method for making this determination was *in camera* examination.[32] After *Mink*'s limitation on *in camera* examination it is uncertain whether such broad use of this procedure will continue.[33] However, because the government continues to bear a heavy burden of proof in showing that *in camera* examination is not warranted,[34] few instances will arise in

---

[26]Soucie v. David, 448 F.2d 1067, 1071-72 (D.C. Cir. 1971); Consumers Union, Inc. v. VA, 301 F. Supp. 796, 804 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

In determining whether disclosure is required under the FIA, the courts have followed the traditional treatment of the executive privilege of internal memoranda. Thus they allow purely factual material to be discovered. However, material of either an advisory or deliberative nature is exempted from disclosure. Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 580-82 (D.C. Cir. 1970); *see* 410 U.S. at 86-93. Factual material inextricably intertwined with recommendatory material is also exempted. Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

Though the factual material limitation on the interagency memorandum exemption is sound, a recent note has pointed out that courts have too often exercised the limitation without looking at the underlying policies. While the results may often be the same, the method of arriving at those results would be more rational and understandable as precedent if the appropriate factors were brought out into public view. Note, 86 HARV. L. REV., *supra* note 22, at 1052-57.

[27]Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[28]Soucie v. David, 448 F.2d 1067, 1072 (D.C. Cir. 1971).

[29]Soucie v. David, 448 F.2d 1067, 1071 (D.C. Cir. 1971); GSA v. Benson, 415 F.2d 878, 879 (9th Cir. 1969).

[30]Sterling Drug, Inc. v. FTC, 450 F.2d 698, 703-04 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1071 (D.C. Cir. 1971).

[31]S. REP. 8; H. REP. 9.

[32]Epstein v. Resor, 421 F.2d 930, 932-33 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970); *see* text accompanying note 15 *supra*.

[33]*See* note 15 *supra*.

[34]Weisberg v. United States Dep't of Justice, No. 71-1026 at 8 (D.C. Cir., Feb. 28, 1973);

which the courts will refuse such an examination.

In order to fulfill the purpose of full disclosure, courts have excerpted factual material from documents which were also of an advisory nature, [35] unless fact and opinion were inseparably intertwined.

The exemption can be waived by an agency's actions. This waiver theory is generally recognized to rest not on the waiver of executive privilege found in discovery cases but on specific provisions of the FIA itself.[36] For example, the act requires that final opinions of agencies be disclosed.[37] If the agency were to base a final opinion solely on an exempted internal memorandum and that memorandum were allowed to remain exempted from disclosure, the requirement that final opinions be disclosed could be defeated.[38] Such a condition would allow the exemption to swallow the act. Therefore, staff opinions that are adopted as policies or interpretations of law, [39] or as the basis of a final order,[40] or as staff instructions affecting a member of the public[41] lose their exempt status. The manner in which the opinions are adopted by the agency is of no significance.[42] Nevertheless, a showing that the information offered by the government cannot be fully understood without the advisory material,[43] or that a portion of the material was disclosed,[44] is insufficient for waiver.

Areas of Judicial Disagreement. Prior to *Mink* a significant body of inconsistent precedent had been created by lower courts in interpret-

---

Tax Analysts & Advocates v. IRS, Civil No. 841-72 at 2 (D.D.C., June 6, 1973).

[35] *E.g.*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 938-39 (D.C. Cir. 1970).

[36] *See* Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 701-03 (D.C. Cir. 1969); Sears, Roebuck & Co. v. NLRB, 346 F. Supp. 751, 753-54 (D.D.C. 1972). *But see* GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[37] 5 U.S.C. § 552(a)(2)(A) (1970).

[38] At least for purposes of the FIA, an agency's final opinion is not simply a statement that "X shall do this thing." How much of the agency's reason for the opinion must be included is not clear, however. *Compare* American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 702-03 (D.C. Cir. 1969) *with* International Paper Co. v. FPC, 438 F.2d 1349, 1359 (2d Cir.), *cert. denied*. 404 U.S. 827 (1971).

[39] 5 U.S.C. § 552(a)(1)(D) (1970), *applied in*, GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[40] 5 U.S.C. § 552(a)(2)(A) (1970), *applied in*, American Mail Lines. Ltd. v. Gulick, 411 F.2d 696, 703 (D.C. Cir. 1969).

[41] 5 U.S.C. § 552(a)(2)(C) (1970), *applied in*, Sears, Roebuck, & Co. v. NLRB, 346 F. Supp. 751, 754 (D.D.C. 1972).

[42] GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[43] International Paper Co. v. FPC, 438 F.2d 1349, 1358-59 (2d Cir. 1971).

[44] Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661 (6th Cir. 1972), *modifying* 341 F. Supp. 1013 (M.D. Tenn. 1971).

ing the FIA.[45] There has been a split of authority on whether courts may go outside the specific statutory language to determine whether information is within the exemption. Some courts have felt that the FIA's grant of equitable jurisdiction allows them to apply general doctrines of equity to balance the effects of disclosure against the effects of nondisclosure on considerations not expressly included in the act.[46] Other courts have felt that the statutory provision which states that the exemptions authorize withholding of information only "as specifically stated in this section"[47] denies a court the power to introduce such general equitable considerations.[48]

There has also been considerable disagreement over the criteria to be used in determining whether material is disclosable. One group of cases suggests that if any litigational situation can be imagined in which discovery would be allowed, then disclosure should follow.[49] Other courts take a more restrictive view[50] and find support in one version of the act's legislative history.[51]

Probably the most important disagreement has concerned whether the party seeking disclosure must show a need for the material. Some

---

[45]For example, it had been decided that the portion of the act dealing with its judicial enforcement, 5 U.S.C. § 552(a)(3) (1970), applies to all sections of the act. American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 701 (D.C. Cir. 1969). A more limited application for that section had been prescribed shortly after passage of the act by the ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 15 (1967).

[46]GSA v. Benson, 415 F.2d 878, 880 (9th Cir. 1969) (effect on the public is the primary consideration); American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 699, 703 (D.C. Cir. 1969); Consumers Union, Inc. v. VA, 301 F. Supp. 796, 806 (S.D.N.Y. 1969).

[47]5 U.S.C. § 552(c) (1970).

[48]Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661-62 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670, 672 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

[49]Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972); Consumer Union, Inc. v. VA, 301 F. Supp. 796, 804 (S.D.N.Y. 1969).

[50]Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 705 (D.C. Cir. 1971); Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

The *Benson* court said the government must prove that in routine, but not in all actions, discovery would be denied. After such proof the claimant must show a situation exists in which the court should make the information available. 289 F. Supp. at 595.

Additionally, there is a problem based on the difference between the House and Senate versions of the legislative history. Only the House Report refers to information which could be "routinely" discovered. Some courts have held that when differences are important, only the Senate Report should be examined because this report was available to the House and should, therefore, more accurately reflect a legislative consensus. Soucie v. David, 448 F.2d 1067, 1077 & n.39 (D.C. Cir. 1971); *cf.* Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wash. 1968); *see* K. DAVIS, ADMINISTRATIVE LAW TEXT § 3A.2 (3d ed. 1972).

[51]H. REP. 10.

early decisions[52] were apparently grounded on a belief that the internal memoranda privilege is based on executive privilege.[53] They stated that the balancing test used in executive privilege cases should be used in FIA cases[54] and held that the need of the party seeking disclosure must be balanced against possible injurious consequences of disclosure to the executive and to the country.[55]

A slightly larger group of cases has held that need is not a criterion to be considered under a FIA. This line of thought began with a highly influential article by Professor Kenneth Culp Davis.[56] The article was cited and its reasoning adopted without question in a subsequent group of cases.[57] These cases, in turn, were cited as precedent for later decisions.[58] Nevertheless, even the courts following the Davis reasoning have felt it necessary to examine the availability of alternative means of gathering the information sought.[59]

III. Effects of Mink

The issues that *Mink* resolved are simply put. The Court approved disclosure only of factual material that is not inextricably intertwined with advisory opinions.[60] It held that the internal memoranda exemption was a limited one which required judicial determination of whether the exemption had been properly invoked.[61] It supplied a guideline for what a court should consider before deciding to conduct an *in camera* examination.[62]

Unfortunately, the case contains contradictory dicta which raise questions at least as significant as those which it answers. For example, the Court first states that the act apparently does not permit inquiry into

---

[52]Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969); American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 703 (D.C. Cir. 1969).

[53]Ackerly v. Ley, 420 F.2d 1336, 1340-41 (D.C. Cir. 1969).

[54]Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 659-60 (D.C. Cir. 1960).

[55]Cases cited notes 50 & 54 *supra*.

[56]Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 795-97 (1967); *see* text accompanying notes 64-66 *infra*.

[57]Soucie v. David, 448 F.2d 1067, 1071 (D.C. Cir. 1971); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 581-82 (D.C. Cir. 1970).

[58]Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704-05 & n.5 (D.C. Cir. 1971); Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971) (Black, J.).

[59]E.g., Soucie v. David, 448 F.2d 1067, 1084-85 (D.C. Cir. 1971).

[60] 410 U.S. at 92.

[61]*Id.* at 85-94.

[62]*Id.* at 93-94; *see* text accompanying note 15 *supra*.

the need of the complainant;[63] yet immediately thereafter it explicitly assumes "that Congress legislated against the backdrop of this [discovery] case law . . ."[64] These two statements are in diametrical opposition. When discovery is sought of documents for which the executive has raised the internal memoranda privilege, the court decides whether to grant discovery by balancing the need of the party against the possible injury to effective governmental operation that disclosure may cause.[65]

IV. AN ARGUMENT FOR NEED

As noted above, [66] the concept that the particularized need of the claimant may not be examined under the FIA arose from an interpretation given to the act by professor Kenneth Davis. This construction is based on reading the statutory language that information be made available to "any person"[67] as removing from consideration such personalized criteria as need. It is argued that additional support is given to this construction by the impersonal terms of the internal memoranda exemption.[68]

Notwithstanding the reasonableness of this construction, it is neither the only one which can be given to the statute nor, as Professor Davis admits,[69] is it the most desirable. The Supreme Court itself balked at the possibility that a party with no need for the information might

---

[63]*410 U.S. at 86.*

[64]*Id.* at 88-89; *see* text accompanying note 3 *supra.*

It is also worthy of note that the portion of the Court's opinion dealing with *in camera* examination of memoranda looks to discovery decisions rather than the more liberal FIA precedent. 410 U.S. at 92-93.

[65]Committee for Nuclear Responsibility, Inc. V. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 331-32 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.) (per curiam), *cert. denied*, 389 U.S. 952 (1967).

[66]*See* text accompanying notes 56-59 *supra.*

[67]5 U.S.C. § 552(a)(3) (1970).

[68]The statute states that internal memoranda shall not be disclosed if they would not "be available by law to a party other than an agency in litigation. . . ." 5 U.S.C. § 552(a)(3) (1970). The argument is that since the Congress chose the words "a party" instead of the more specific "the party" it must have intended that such personalized aspects of a complaint as need not be considered. If this interpretation was not followed the information would not be available to "any person." Davis, *supra* note 56, at 795-96.

However, it should be observed that the term "any party" was incorporated solely to avoid the restrictive interpretation given the term "properly and directly concerned" in the APA of 1946. H. REP. 1; S. REP. 7; *see* text accompanying note 21 *supra.*

[69]Davis, *supra* note 56, at 795-96.

compromise the legitimate policy of fostering staff opinions on controversial issues by forcing even partial disclosure of internal memoranda.[70] There is an even greater danger. If parties with no need for the information abuse the liberal spirit of the FIA, courts may interpret the act more strictly and thus thwart its purpose when disclosure is most sorely needed.

The answer to this problem may be to read the act as requiring a showing of need, as was done by some of the early FIA cases.[71] There are three justifications for such a reading. First, the statutory section requiring that records be made "available to any person" simply is not applicable when the courts are considering the disclosure of documents for which the executive has claimed the internal memoranda privilege. By the express terms of the statute, "[t]his section does not apply to matters that are . . . inter-agency or intra-agency memorandums. . . ."[72] Secondly, the use of "a party" in the exemption rather than "the party" was grammatically necessary to make the qualification that discovery precedent involving litigation between two agencies was not applicable.[73] Moreover, finding the intent of Congress through such grammatical detail as the choice of an article ignores the universal recognition that the FIA was not carefully drafted.[74] Finally, any other interpretation aborts the congressional intent that the act not be used as a substitute for discovery not allowed in litigation.[75] Therefore, it is most reasonable to construe the FIA to read that internal memoranda will be disclosed to any party only to the extent such documents would be disclosed to him through the discovery process were he in litigation with the agency.[76]

---

[70]410 U.S. at 92.

[71]*See* cases cited note 52 *supra*.

[72]5 U.S.C. § 552 (1970) reads in part as follows:

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

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

[73]5 U.S.C. § 552(b)(5) (1970) provides, "inter-agency or intra-agency memorandums or letters which would not be available by law to *a party* other than an agency in litigation with the agency" are excluded from the operative area of the FIA. (Emphasis supplied.) One may not say *"the party* other than an agency in litigation with the agency" because such a statement is grammatically incorrect. For the reason why such a ridiculous argument is necessary, see *Note*, 86 HARV. L. REV., *supra* note 22, at 1050-51.

[74]K. DAVIS, *supra* note 50, at 85-87.

[75]*See* authority cited note 22 *supra*.

[76]See H. REP. 9; S. REP. 2. This concept is somewhat akin to the determination by a few courts that the statute gives the courts a broad general equity jurisdiction. *See* text accompanying notes

V. EFFECTS OF ADOPTING NEED

Adopting the criterion of need in determining the applicability of the internal memoranda exemption does not remove all uncertainty from disclosure disputes. The Court has emphatically understated that, "[i]n many important respects, the rules governing discovery in such litigation [where internal memoranda and letters are involved] have remained uncertain from the very beginnings of the Republic."[77] Furthermore, discovery in such cases is enmeshed with the question of the scope of executive privilege, a question which has never been answered.[78]

Before deliniating how the principles of discovery should be applied to an action brought under the FIA, two initial considerations must be made. First, the positions of the parties in FIA proceedings must be analogized in some way to the positions of parties in ordinary discovery proceedings. Often what can be discovered depends upon whether the government is plaintiff or defendant,[79] party or non-party.[80] Secondly, certain aspects of existing FIA practice will remain unchanged and other aspects should remain unchanged.

The problem whether the agency should be viewed as plaintiff or defendant in FIA proceedings seems partially resolved by the statutory mandate that the agency is to bear the burden of sustaining its action.[81] Thus it should be placed in the most disadvantageous role, usually that of the plaintiff when seeking to avoid disclosure.[82]

The cases on discovery have been largely affected by whether the government is a party to the litigation. Discovery has been more fre-

---

46-48 *supra*. The important difference is that a theory of broad equitable powers is based on an assumption that the court is granted true equity jurisdiction. However such jurisdiction is not specifically provided for in the FIA, and no criteria for its exercise are given. By contrast, the relation between the internal memorandum exemption and discovery precedent is specifically required by 5 U.S.C. § 552(c) (1970).

[77]410 U.S. at 86.

[78]Nor is there likely to be an answer of broad application found in the present controversy over the Watergate tapes, *In re* Grand Jury Subpoena Duces Tecum Issued to Nixon, Misc. No. 47-73 (D.D.C., August 30, 1973), because the Special Prosecutor as a matter of trial tactics narrowly circumscribed the issues in hopes of improving his position. Brief for Petitioner at 19-21.

[79]*See* cases cited note 82 *infra*.

[80]*See* cases cited notes 83-84 *infra*.

[81]5 U.S.C. § 552(a)(3) (1970).

[82]*Compare* United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) *and* United States v. Procter & Gamble Co., 25 F.R.D. 485, 489-92 (D.N.J. 1960) (U.S. as plaintiff) *with* United States v. Reynolds, 345 U.S. 1, 12 (1953) *and* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958) (U.S. as defendant).

quently ordered where the government is a party,[83] because in such cases there are numerous sanctions short of contempt available for enforcing the court's order.[84] In addition, these sanctions have permitted the court to avoid allowing the government unconscionable advantage in the suit.[85]

In FIA cases discovery precedent involving the government as a party to the litigation is most directly in point because the statute mandates that information be made available to the complainant as if he were a party in litigation with the agency.[86] Nonetheless, certain general principles of the privilege can still be garnered from cases in which the government was not a party.[87]

Left for resolution is whether applying the full range of prior discovery decisions to FIA proceedings would change the rationale which the courts have applied. There will be very little change in decisional criteria. Most FIA decisions comport with discovery decisions or are based on unique criteria found within the statute itself. For instance, outside consultants are covered by the internal memoranda privilege.[88] The dichotomy of factual and advisory information is found in the discovery cases[89] as well as in FIA cases.[90] In both bodies of precedent

---

[83]Freeman v. Seligson, 405 F.2d 1326, 1337-39 (D.C. Cir 1968); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-26 (D.D.C. 1966) (government not a party); *see* cases cited note 84 *infra* (government a party).

[84]Bank Line, Ltd. v. United States, 163 F.2d 133, 136 (2d Cir. 1947); United States v. Andolschek, 142 F.2d 503, 506 (2nd Cir. 1944) (dismissal); United States v. Cotton Valley Operators Comm., 9 F.R.D. 719, 720 (W.D. La. 1949), *aff'd mem.*, 339 U.S. 940 (1950) (dismissal).

[85]United States v. Andolschek, 142 F.2d 503, 505-06 (2d Cir. 1944).

[86]5 U.S.C. § 552(b)(5) (1970).

[87]Probably only those decisions based on situations arising after 1958 will be useful. Prior to that time the government claimed privilege for such documents on the basis of a statutory provision, the "housekeeping statute," Act of Jan. 19, 1886, ch. 4, § 2, 24 Stat. 2. *See* Boske v. Comingore, 177 U.S. 459 (1900). In 1958 this section was amended to stop its use as a tool for avoiding disclosure. Act of August 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (1958). The section is now included in the APA as 5 U.S.C. § 301 (1970).

Most courts and authorities have agreed that the amendment removed most of the significance from cases decided under the statute. Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 713 (E.D. Pa. 1968); United States v. Procter & Gamble Co. 25 F.R.D. 485, 489 (D.N.J. 1960); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019, at 165 (1970) [hereinafter cited as WRIGHT & MILLER]. *But see* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.61 (4.-2) (2d ed. 1972) [hereinafter cited as MOORE].

[88]Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 661 (D.C. Cir. 1960); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 716 (E.D. Pa. 1968); *see* note 26 *supra*.

This result may be changed to the extent that discovery would not dissuade the consultant from giving advice in the future. Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 661 (D.C. Cir. 1960).

[89]Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir. 1963); Boeing Airplane Co. v. Coggeshall,

the privilege is a limited one which must be specifically raised,[91] and in both the court is usually called upon[92] to decide by *in camera* examination[93]whether the privilege has been properly invoked.[94] In both situations the court is given discretion to either excerpt unprivileged material or excise privileged material from the documents under consideration and to order disclosure or discovery of the unprivileged portions.[95]

The theory of waiver as delimited in FIA cases must remain unchanged. FIA waiver is based upon an interpretation of the act which is independent of analogy to discovery.[96] More importantly, if the waiver theory of discovery were adopted, the exemption might well be removed *in toto*. It is generally agreed that when the government is a defendant the assertion of executive privilege may be made to avoid discovery.[97] On the other hand, many discovery cases and commentators agree that the government, as plaintiff, waives the privilege.[98] Since the agency should be treated as the plaintiff in FIA proceedings,[99] the result would

---

280 F.2d 654, 660 (D.C. Cir. 1960); Simons-Eastern Co. v. United States, 354 F. Supp. 1003, 1006 (N.D. Ga. 1972); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 944 (Ct. Cl. 1958).

[90]*See* note 26 *supra*.

[91]United States v. Reynolds, 345 U.S. 1, 10-11 (1953); *see* text accompanying note 29 *supra*.

[92]Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 974-48 (Ct. Cl. 1958); *see* 410 U.S. at 93-94.

[93]Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir. 1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960); Simons-Eastern Co. v. United States, 354 F. Supp. 1003, 1006 (N.D. Ga. 1972); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 332 (D.D.C. 1966); *see* text accompanying note 32 *supra*.

[94]Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 603 (5th Cir. 1966); Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir. 1963); *see* text accompanying note 30 *supra*.

[95]Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir. 1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960); United States v. Procter & Gamble Co., 25 F.R.D. 485, 491-92 (D.N.J. 1960); *see* text accompanying note 31 *supra*.

[96]*See* text accompanying notes 36-41 *supra*.

[97]United States v. Reynolds, 345 U.S. 1, 6-8, 11 (1953); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 944-47 (Ct. Cl. 1958); MOORE ¶ 26.61 (6.-4); WRIGHT & MILLER § 2019, at 173-74.

There is some authority that consent to being sued waives the privilege. Bank Line, Ltd. v. United States, 76 F. Supp. 801, 804 (S.D.N.Y. 1948).

[98]United States v. Andolschek, 142 F.2d 503, 506, (2d Cir. 1944); United States v. Gates, 35 F.R.D. 524, 529 (D.C. Colo. 1964); United States v. Continental Can Co., 22 F.R.D. 241, 245 (S.D.N.Y. 1958). *But see* Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879, 891-892 (1962); United States v. Procter & Gamble Co., 25 F.R.D. 485, 492 (D.N.J. 1960).

This is of course based in part on the practical consideration that there are sanctions short of contempt available. *See* notes 84-85 and accompanying text *supra*.

[99]*See* text accompanying note 82 *supra*.

Contempt is specifically provided as the sanction in FIA proceedings. 5 U.S.C. §552(a)(3) (1970). There is a limited sanction available for violation of § 552(a)(2), which is not applicable here.

be an automatic waiver of the exemption if discovery precedent on waiver applied. Thus the discovery precedent seems not only inappropriate but also outside of congressional intent. Congress would hardly have listed the exemption only to waive it in the same sentence. This is but another example of the poor drafting and lack of forethought that is found throughout the FIA.

VI. QUO VADIS?

In summary, if the full range of discovery criteria ia applied to the internal memoranda exemption,[100] three consequences are clear. First, the government will be regarded as if it were the party plaintiff seeking to avoid discovery in litigation.[101] Secondly, most of the decisional criteria used in present FIA cases to determine what information is disclosable will remain unchanged.[102] Finally, the present doctrine of waiver under the internal memoranda exemption rather than waiver as used in discovery should continue to be applied to FIA cases.[103] Thus it appears that the major change caused by adopting the full body of discovery law into FIA proceedings is that the need of the party becomes a relevant criterion in the decision.[104]

The recent revision of the federal civil discovery rules which removed need from consideration in Rule 34 has not changed this factor in cases involving executive privilege. As the Advisory Committee pointed out, "Protection may be afforded to claims of privacy or secrecy or of undue burden . . . under what is now Rule 26(c). . . ."[105] Rule 26 sets the scope of discovery and provides protection from abuse. To be discoverable, a document must be "not privileged."[106] Because a showing of need is required to remove the information from the asserted privilege, need was not dispensed with by the change in the Rules.[107]

---

[100]*See* text accompanying notes 71-76 *supra*.

[101]*See* text accompanying notes 81-87 *supra*.

[102]*See* text accompanying notes 88-95 *supra*.

[103]*See* text accompanying notes 96-99 *supra*.

[104]United States v. Reynolds, 345 U.S. 1,11 (1953); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960).

[105]FED. R. CIV. P. 34, *Notes of the Advisory Comm. on Rules*, 28 U.S.C.A. (Supp. 1973).

[106]"Parties may obtain discovery regarding any matter, not privileged. . . ."FED. R. CIV. P. 26(b)(1).

[107]WRIGHT & MILLER § 2019, at 164; MOORE ¶ 26.61 (6.-4); *see* Committee for Nuclear Responsibility, Inc. v. Seaborg, 436 F.2d 788, 792 (D.C. Cir. 1971); Simons-Eastern Co. v. United States, 354 F. Supp. 1003, 1005-06 (N.D. Ga. 1972).

Although some courts have held that a document remains privileged if its disclosure would be injurious to the public interest,[108] most courts have balanced the possible injury to governmental operations against the need of the particular litigant.[109] A major problem is that no court has defined "need." The best that can be gleaned from the cases is some of the factors that a court will consider in determining whether need exists, whatever it *is*. Need depends not only upon whether the party is plaintiff or defendant, but also upon whether there are alternative sources of information available,[110] whether the government has offered the information in another form[111] and upon the degree of diligence the party seeking discovery has shown in attempting to obtain the information either from the government or from alternative sources.[112]

The Freedom of Information Act requires that the courts exercise a Solomonic wisdom to respect the need of a free citizenry for informa-

---

[108]*E.g.*, Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 944-46 (Ct. Cl. 1958).

[109]United States v. Reynolds, 345 U.S. 1, 11 (1953); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (DC. Cir. 1960).

[110]United States v. Reynolds, 345 U.S. 1, 11 (1953); Freeman v. Seligson, 405 F.2d 1326, 1336-37 (D.C. Cir. 1968).

[111]United States v. Reynolds, 345 U.S. 1, 3, 11 (1953); Machin v. Zuckert, 316 F.2d 336, 339-41 (D.C. Cir. 1963).

[112]Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 328 (D.D.C. 1966).

At this point analysis approaches a full scale discussion of the executive privilege . . . and stops. The executive privilege is a perfect circle with no beginning and no end, the latter of which this note must have. The Supreme Court is not itself clear as to the definition and extent of the privilege. *Compare* United States v. Burr, 25 F. Cas. 30, 34-38 (No. 14,692d) (C.C.D Va. 1807) *and* United States v. Burr, 25 F. Cas. 187, 191-93 (No. 14,694) (C.C.D. Va. 1807) *with* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499-501 (1867). *Compare* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) *and* New York Times Co. v. United States, 403 U.S. 713, 727-730 (1971) *with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Two brief quotations illuminate the policies in issue.

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.

Justice Reed in Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958) (Sitting as Emergency Judge).

> A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives

9 THE WRITINGS OF JAMES MADISON 103 (Hunt Ed. 1910).

tion and at the same time protect the institutions of government from exposure which might render them disfunctional. May they be granted greater wisdom than mortal men.

W. G. CHAMPION MITCHELL

Constitutional Law—School Desegregation—De Facto Hangs On

In *Keyes v. School District No. 1*,[1] a case involving the Denver schools, the Supreme Court handed down an opinion that differs strikingly from earlier desegregation rulings. All prior high court decisions dealt with Southern school systems with long histories of legally enforced segregation. This sort of segregation, termed de jure segregation, was ordered eliminated "root and branch"[2] and was the target of the Court's far-reaching order in *Swann v. Charlotte-Mecklenburg Board of Education*.[3] Since such state-ordered segregation was never present in Denver, *Keyes* was viewed as the first opportunity for the Court to confront the question of de facto segregation,[4] segregation supposedly brought about by "neutral" factors such as residence.[5]

The cases following *Brown v. Board of Education*[6] did not question the constitutional mandate to eliminate segregation, but instead considered what remedies were appropriate for dismantling dual systems. *Keyes* largely ignores the remedy question[7] and returns to an earlier stage in analysis of school problems to consider under what conditions a federal court may act at all in a school case.

The return to consideration of the constitutional right involved was accompanied by a further deterioration of the Court's unanimity in school cases. From *Brown* to *Swann*, all such cases were handed down

---

[1]93 S. Ct. 2686 (1973). The prior reported opinions in this case may be found at 303 F. Supp. 279 (D. Colo. 1969) (preliminary injunction); 303 F. Supp. 289 (D. Colo. 1969) (supplemental findings); 313 F. Supp. 61 (D. Colo. 1970) (opinion on the merits); 313 F. Supp. 90 (D. Colo. 1970) (opinion on remedies); 445 F.2d 990 (10th Cir. 1971) (affirmed in part and reversed in part); 396 U.S. 1215 (1969) (order of Brennan, J. reinstating a preliminary injunction); 402 U.S. 182 (1971) (per curiam order vacating stay entered by the court of appeals before Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), was decided).

[2]Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

[3]402 U.S. 1 (1971).

[4]93 S. Ct. at 2701.

[5]Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 276 n.6 (1972).

[6]347 U.S. 483 (1954), *implemented* 349 U.S. 294 (1955).

[7]This note will also limit its scope to the constitutional right involved in school desegregation.