In the

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

v.

PATSY T. MINK, et al.,

Respondents.

No. 71-909

Washington, D. C.
November 9, 1972

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Washington, D. C.,

Thursday, November 9, 1972.

The above-entitled matter came on for argument at 2:13 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

ROGER C. CRAMTON, ESQ., Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, D. C. 20530; for the Petitioners.

RAMSEY CLARK, ESQ., 1775 K Street, N. W., Washington, D. C. 20006; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-909, Environmental Protection Agency against Mink.

Mr. Cramton.

ORAL ARGUMENT OF ROGER C. CRAMTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. CRAMTON: Mr. Chief Justice, and may it please the Court:

This Freedom of Information Act suit was brought by respondents to compel the release of documents prepared for the President relating to the then proposed and now completed underground nuclear test at Amchitka Island, Alaska.

It presents fundamental questions concerning the scope and application of exemptions 1 and 5 of the Freedom of Information Act.

Whether documents prepared to advise the President with respect to an underground nuclear test, many of them containing top secret and secret information, are exempt from compulsory disclosure under the Act.

And whether a district court should be required to make an in camera inspection of the documents in order to determine whether portions are non-secret or factual in character.

The facts may be quickly summarized.

On July 28, 1971, Congressman Mink asked President Nixon to release reports prepared for him relating to the proposed Amchitka test. The President declined to do so, his counsel replying on July 30 that, quote, "these recommendations were prepared for the advice of the President and involve highly sensitive matters that are vital to our national defense and foreign policy."

Several weeks later respondents instituted this action pursuant to the Information Act.

A separate litigation, Committee for Nuclear Responsibility vs. Seaborg, the so-called CNR case, was brought by an environmental group to enjoin the test itself. This Court denied an application for an injunction in that case on November 6, 1971, a little more than a year ago. And the Amchitka test was conducted successfully later that same day.

A partial or total declassification and public release of declassified parts of three documents involved in this case occurred in connection with the CNR litigation. Respondents continued to seek the undisclosed material, including three classified documents not involved in any way in the CNR case.

The district court in this case, without in camera inspection, granted the government's motion for summary judgment, holding that the documents fell within exemptions 1 and 5 of the Act.

The district court relied on an affidavit of Under Secretary of State Irwin, who is chairman of the National Security Council Committee which prepared the report for the President on the Amchitka blast.

The nine documents sought by respondent are described in some detail in the Irwin affidavit. Three, including the report of the Irwin Committee itself, and a top secret report from Dr. Kissinger, are classified as top secret. Three others are classified as secret, including reports from the AEC and the Office of Science and Technology. And all nine documents, as the Irwin affidavit stated, and I quote, "were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents, so that the President might be fully apprized of varying viewpoints."

The Court of Appeals reversed and remanded the case to the district court for in camera inspection of the documents, and a determination whether disclosure should be ordered as to some of the materials.

It ruled that documents classified as top secret and secret, pursuant to Executive Order 10501, should be reviewed by the district court, to permit disclosure of any, quote, "non-secret components which are separable from the secret remainder."

With respect to the government's claim under exemption 5, that the nine documents were internal memoranda containing policy advice, the court held that the documents should be reviewed in camera to permit disclosure, and I again quote, "of factual information unless it is extricably intertwined with policy-making processes."

In both respects, I submit, the court below was grievously in error.

The starting point is the language of the Act. Exemption 1 excludes from the Act the disclosure requirements, and I quote, "matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."

"Matters specifically required by Executive order to be kept secret."

The legislative history makes it clear that this language means what it says, that the exemption protects from disclosure governmental records, such as six of the nine documents sought here, which have been classified as top secret or secret pursuant to the authority granted by Executive Order 10501.

Respondent's argument that the President must individually classify each document by a separate Executive Order is preposterous on its face. When Congress enacted the Freedom of Information Act in 1966, it legislated against

the backdrop of many years of operation of the classification system.

Executive Order 10501, which has provided the basis for classification of defense information since 1953, was repeatedly referred to during congressional consideration of exemption 1. And clearly it is an Executive Order which, quote,"specifically requires certain matters specified therein to be kept secret."

When a document is properly classified pursuant to the applicable Executive Order, the government is not required to review the document paragraph by paragraph, to determine whether portions of it are non-secret and may be disclosed.

Executive Order 10501, which is reprinted in the Appendix to our brief, treats the document as the appropriate unit for classification purposes.

QUESTION: Tell me again the difference between top secret and secret.

MR. CRAMTON: It's a difference in degree. The language of both Executive Orders, the new and the old, require somewhat greater showing of jeopardy to national defense and foreign policy interests for a classification as top secret rather than secret.

QUESTION: Is that the best you can do?

MR. CRAMTON: Both Executive Orders spell out, in as clear language as was available to the draftsmen, matters which

were vital to national defense. The latest Executive Order mentions --

QUESTION: I'm not saying that in criticism, I don't think you can do any better than that. I'm just not saying any criticism at all. It's just puzzling to me.

QUESTION: Well, there purports to be a criteria, the alleged criteria, set out on page 49 of your brief, top secret is (a), secret is (b).

MR. CRAMTON: Right. And then there's confidential as the third part of it.

QUESTION: And confidential is (c) in the --

MR. CRAMTON: It's just matters of degree.

QUESTION: A matter of degree.

MR. CRAMTON: The most secret and sensitive data falls into the top secret category.

Well, once a document which contains vital defense information has been classified, all material in the particular document is protected under exemption 1.

QUESTION: Would it be reasonable to assume that in most classified documents there are sentences and paragraphs and parts that are completely innocuous?

MR. CRAMTON: There may well be.

Now, in many cases it would be impossible as a practical and administrative matter to separate them out. In many cases they will be inextricably intertwined.

There may be situations in which only a very small portion of a large document deals with classified matters. Many agencies have regulations that require a paragraph-by-paragraph classification. And the new Executive Order extends that practice more generally to the federal government as a whole, to the extent practicable.

My point is that Congress adopted the Executive Orders and deferred to the procedures applicable under those Executive Orders, and those Executive Orders refer to the document as a whole, except to the extent that the new Executive Order, promulgated last spring, does push agencies in the direction of a paragraph-by-paragraph marking of paragraphs of a larger document.

What significance would you give to the provisions of this legislation that provide for a de novo hearing in a district court and put the burden of proof on the government agency?

Any at all?

MR. CRAMTON: The significance is very considerable, under some of the exemptions of the Act. I think the significance is much greater --

QUESTION: Well, with respect to this one, as you say, an ex parte affidavit, and that's the end of it, right?

MR. CRAMTON: Congress has said that the matter is exempt and immune from disclosure,--

QUESTION: Well, it hasn't said anything about --

MR. CRAMTON: -- if it's classified pursuant to an Executive Order, dealing with national defense information.

QUESTION: And here we have an ex parte affidavit; am I right?

MR. CRAMTON: That's right.

QUESTION: No opportunity for a court to determine whether or not, even if this was stamped secret or top secret.

MR. CRAMTON: But absolutely no reason the affidavit itself, in its surrounding circumstances, to question the assertions in the affidavit itself.

And the circumstances of the test, here we are dealing with a weapons test in the atomic field, in an area in which it is known that not only our technological lead in the military field is vital to our national defense, but also in an area in which it's well known, because there are treaty obligations, because of the international -- the sensitivity of the international community on these matters, where it is well known that there are foreign policy repercussions.

And the Irwin affidavit places those documents plainly -- the six to which exemption 1 applies -- squarely within the core area of the interest that Congress intended to protect and remain privileged.

QUESTION: So, do I understand, then, that your

answer to my question is that with respect to category 1, this language just should be wholly disregarded, that the --

MR. CRAMTON: No, not entirely.

QUESTION: -- that the burden is not on the government agency, and that the court has no business determining the matter de novo, despite what Congress has enacted.

MR. CRAMTON: The court may properly impose a burden on the government to supply an affidavit which lays out the -- it describes the documents, and which lays out the surrounding circumstances. The government did that here.

Now, if you had a situation in which the likelihood or the possibility of any secret matter being involved, then further inquiry by the court might be appropriate.

QUESTION: Well, normally that's not the way a court operates, is it, to take ex parte affidavits and say that's the end of it, you've sustained your burden of proof.

MR. CRAMTON: It surely is in this area. This is -- the holding of the court below is totally novel. It is the first case which has ordered the United States to produce for in camera inspection documents which the United States claimed and plausibly showed by the surrounding circumstances in the affidavit, we're military or state secrets. This is the first case of that kind.

And let me refer to some of the other, some of the

earlier precedents.

QUESTION: Well, I have a bit of a problem showing that it has military significance, except your word that it is.

MR. CRAMTON: I don't see how anyone could doubt that the yield, the methods, the scientific technology involved in testing of atomic weapons involves the most vital and sensitive matters to our national security. And how anyone could think that a nuclear weapons test in the present international climate is not also a matter which involves vital foreign relations interests of the United States.

QUESTION: Does the affidavit say that's the only thing that's in this document?

MR. CRAMTON: No, it does not, but it says that the documents were prepared to advise the President, and that they contain classified and secret information.

QUESTION: Which they say would be injurious to the national welfare?

MR. CRAMTON: That is correct.

QUESTION: Which the government said.

MR. CRAMTON: That is correct.

QUESTION: Well, how do we test that?

MR. CRAMTON: The same way that you test a claim of the privilege against self-incrimination. You do not require the defendant who claims, or the witness who claims the privilege against self-incrimination to incriminate

himself, even before the judge in camera, in order to get the benefit of the protection which the law has designed to extend to it. All you require is that he give a hint as to why an apparently innocuous question may lead to the discovery of a clue to information that may be incriminating.

QUESTION: Please, Mr. Cramton, don't put the government's position on the same level as a defendant pleading the Fifth Amendment.

MR. CRAMTON: I do.

QUESTION: You do?

MR. CRAMTON: Under our constitutional scheme, --

QUESTION: Oh, that's where you're going to put it.

MR. CRAMTON: -- the operation of the Office of President, just as the operation of the Supreme Court of the United States and the Judiciary is --

QUESTION: Well, please don't put --

MR. CRAMTON: -- extremely important in its operation.

QUESTION: Please don't put me on the Fifth Amendment prong. I can't speak for the rest of the Court.

MR. CRAMTON: The limited role of the courts in passing upon classification determinations of the Executive Branch is well established in prior decisions.

We discuss the Epstein case in our brief.

QUESTION: Are there any constitutional issues

involved here? I thought this was purely a matter of statutory construction.

MR. CRAMTON: It is purely a matter of statute, except that you have to act and interpret the statute as the Court always does in the light of the constitutional backdrop. No claim of executive privilege has been made in this case.

QUESTION: I didn't think so.

MR. CRAMTON: But the Information Act does offer the great potential and the great risk of direct conflict between coordinant branches of government.

When the same question comes up in connection with the privilege for state secrets, in private civil litigation or in litigation in which the government is a party, there's never a direct order to a government official to produce or go to jail.

What happens is the government is penalized in the litigation if it refuses to produce information that the Court believes is relevant to the opponent's case.

The Information Act context is very different, because in the Information Act context you run the risk of an order directed to the Executive to produce materials which the Executive may believe are in fact constitutionally privileged, as well as privileged under this statute.

QUESTION: I thought the inquiry that the district court was supposed to make was a rather limited one, under

(b)(1).

MR. CRAMTON: He is supposed to determine whether portions of the document may be safely revealed to the public.

Now, it's our view that that is an inquiry that district judges should not make. One, it invites them to substitute their judgment for the executive who has made the classification determination.

QUESTION: I didn't think that -- well, you know more about the case than I do. But I thought that a lot of things, collateral documents, went under the big umbrella, because they --

MR. CRAMTON: No, all that was taken care of --

QUESTION: -- were merely related and not because they had been separately designated as secret by the Executive.

MR. CRAMTON: The government does not contest that part of the case, the decision below that deals with classification by association. Neither the earlier Executive Order nor the new Executive Order protect documents which contain no classified material but happen to be in a classified file. We do not contend that unclassified documents inside a large file are protected.

We do contend --

QUESTION: You have no claim, then -- no objection to their treatment under (b)(1)? The court --

MR. CRAMTON: What's -- under (b)(1), you mean --

QUESTION: Well, the Court of Appeals said that, on page 27 of the Appendix, the first full paragraph: Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified material.

MR. CRAMTON: That's right, our petition for certiorari says we do not contest that part of the case.

So it's clear that the Executive Order requires documents to be classified on the basis of the information they contain.

QUESTION: And the only other thing that I recall that they passed on was sub -- articles under (b)(5).

MR. CRAMTON: No, no, we do claim that the exemption (1) is applicable here. The exemption 1 is applicable as to six of the nine documents which are involved.

What we do not contend is the doctrine, the so-called classification by association that was so discussed by the Court of Appeals.

We do contend that the district court should not examine in camera top secret or secret documents in order to determine whether they were properly classified, whether they contain secret material or whether portions of them may properly be made available to the public.

We think that a district judge just doesn't have the

informational base to do that, and particularly if it has to be done in camera without the assistance of the adversary process.

QUESTION: Congress apparently did think the district court had the ability to do it, because it said: in such a case the court shall determine the matter de novo, and the burden is on the agency to sustain its action.

Now, do you --

MR. CRAMTON: But that's --

QUESTION: -- do you think the court's incapable? Maybe we might think it's incapable. But Congress gave that function to the district court.

MR. CRAMTON: That has to be interpreted in the past history and light of dealing with military or state secrets, which is the correlative evidentiary privilege that has always existed, and which this Court construed in the Reynolds case, in which the Court said the court should not make an in camera investigation, even in chambers where --

QUESTION: Was that on this statute, was it in construing this statute?

MR. CRAMTON: No, it was not.

QUESTION: Well, that's what we have here is statutory language, and what does it mean?

MR. CRAMTON: That it was adopted in the background and light, and the legislative history is very clear, that

what Congress was doing was not asking the courts to second-guess the classification determination of the federal government, --

QUESTION: Well, what does this language mean in your submission?

MR. CRAMTON: It means under exemption 1 as to whether or not, at the most, the classification determination made by the Executive is not arbitrary or capricious.

The government can be required to show by an affidavit and the surrounding circumstances that secret material is involved, and that has surely been done here, as it was done in the Reynolds case.

QUESTION: There's been no cross-examination of anybody.

MR. CRAMTON: No, there has not.

QUESTION: Normally, that's what happens in a district court, and there's no indication here that there should be more limited --

MR. CRAMTON: Even the respondents do not contend that the adversary process is going to be fully operative here, and that high government officials are going to be asked to testify and be cross-examined as to the exact content of this document. How could anything be maintained as secret? Any person, in bring an Information suit,could then get the secrets revealed merely in the process of trying to find out

whether or not they were exempt.

And I think the analogy of the privilege against self-incrimination, of the procedures used in the application of other privileges, are highly relevant here. And the Reynolds case, the Epstein case are directly in point.

QUESTION: How should we construe de novo, then?

MR. CRAMTON: It means that the court should decide on the basis of the information that satisfies it that t he exemption is applicable. And here the government's affidavit and the surrounding circumstances do provide information which show that military secrets and foreign policy secrets are involved here.

How could anyone think otherwise?

QUESTION: What did the district judge do with -- when that was presented to him?

MR. CRAMTON: He accepted that contention and he did not examine the documents.

And respondents have appealed.

QUESTION: Mr. Cramton, --

MR. CRAMTON: Yes, sir.

QUESTION: -- I'm looking at page 46 of your brief, which sets forth the Freedom of Information Act, subsection (b) thereof. I wonder whether you think that provision does not take out of the requirement for a de novo hearing altogether situations where the Executive has issued an order

of the character involved in this case.

MR. CRAMTON: It says it does not apply to matters that are specifically required by Executive Order; and I think that falls clearly within the language of this case.

QUESTION: In other words, --

MR. CRAMTON: Exemption 5, it seems to me, would give rise to somewhat more discretion of the court, because it refers in its own language to the procedures used by the courts in civil litigation on discovery.

QUESTION: But does the de novo provision apply at all to the two types of exemption you're relying on in this case?

I don't know; and I'm asking you for your opinion.

MR. CRAMTON: I think it does, I think it applies to the entire Act, but it has to be read in the light of the language of the particular exemptions, and the desire of Congress to protect certain material from public disclosure.

QUESTION: Well, I read this provision as meaning that if it fell within No. 1 of (b), that was the end of the matter, and --

MR. CRAMTON: That is the government's --

QUESTION: -- no could require that.

MR. CRAMTON: That is the government's view. Now, we do --

QUESTION: Who is to determine whether it falls within

that?

MR. CRAMTON: -- we do concede that the government by affidavit and surrounding circumstances has to make a showing that at least you're in the area of state secrets.

For example, if the respondents had sought documents dealing with hog prices on the Chicago market, put together by the Department of Agriculture, there might be some judges who would be properly skeptical of whether or not state secrets were involved, and the court could properly require a more detailed affidavit which would convince the court of whether or not you were in a core area that the privilege was designed to protect. But you should not destroy the interest you're trying to protect in the process of showing whether or not the privilege is applicable.

QUESTION: On the other hand, the government could say these hogs are involved in atomic energy research, and then that would be it.

MR. CRAMTON: No, the court can require more than that. Then you know more than that. This was --

QUESTION: How much more?

MR. CRAMTON: -- the Amchitka test blast involving nuclear weapons.

QUESTION: How much more, in your hog case?

MR. CRAMTON: These were documents prepared by Dr. Kissinger, and the National Security Council, and so on.

You know a great deal more, and you know that all of the information that relates to environmental matters, bushel baskets of it, has already been made public.

What the respondents want are the advice given to the President in connection with a secret underground military weapons test, and the military secrets that are involved in those documents.

Now, I'd like to turn briefly to exemption 5.

QUESTION: In (b)(5), the inter-agency documents, you find a split among the experts as to whether or not this is relevant to the military aspect of the problem or not.

MR. CRAMTON: Well, exemption 5 is designed to protect the decisional, deliberative process of the government itself and make sure the deciders get candid and frank advice, just as this Court needs it among itself, and with its personnel.

Now, it's our view that all of the documents involved in this litigation fall within exemption 5.

Under Secretary Irwin's affidavit states that these documents were prepared and used solely for transmittal to the President as advice and recommendation, and the respondents concede that that's the case.

Congresswoman Mink's request for the document was to the President, and she said she wanted the reports and recommendations that he had received.

The argument is that a district court should look at these reports and recommendations and advice and try to separate out the factual material from the judgmental and policy material.

Well, in the first place, I don't think that can be done, and particularly in the context of presidential decision-making. Here you have the heads of agencies, and the most trusted advisers be forced to briefly condense their facts and arguments so the President can decide an important national issue.

The selection of facts, the organization of facts, the arguments and the relationship to arguments is fully as much of the policy-making process as the selection of facts and arguments in a brief is part of the art of advocacy.

So the separation in the light of this case seems to me to point to the entire documents clearly falling within the core area of privilege.

Now, the decisions say that where you have low-level, routine, factual reports, that those can be made available and the district court can properly separate out judgmental or policy aspects that are usually found in introductory paragraphs or conclusions.

But you don't have that kind of a case here. Whatever may be done in cases that deal with such matters as scientific

testing of VA hearing aids, or with the routine appraisal of property by a government appraiser, or with the inspection of the physical wreckage of a plane by government mechanics, whatever may be done in those cases, in terms of a more detailed affidavit, or even, in some instances, an in camera inspection, is not appropriate here where we have the highest level of decisions, where we have a special matter of great importance, complexity and delicacy, and which falls right in the core area that Congress was trying to protect with exemption 5.

QUESTION: If I read the Reynolds case correctly, the government had the choice, was put to the choice by the court -- that was an airplane crash case --

MR. CRAMTON: That's right.

QUESTION: -- where there were a lot of military equipment, sights, and various things; and the court put them up to the choice of either defaulting on the judgment or yielding the information. Was that correct?

MR. CRAMTON: Mr. Chief Justice, if I may correct you, I think that it is not. In the Reynolds case, government affidavits and government affidavits alone asserted that that plane crash had been in connection with a testing of a military airplane. There was involved secret electronic equipment. That affidavit was accepted on its face by this Court, and this Court went on and said: on that kind of

showing, with the surrounding circumstances, the aircraft investigation reports would not be made available even to the judge in camera, because otherwise --

QUESTION: Yes, but, wasn't the government required then to submit?

MR. CRAMTON: The government was the defendant.

QUESTION: In terms of liability.

MR. CRAMTON: The court actually went on and held that since the Tort Claims Act had waived the liability of the United States only under such conditions as it consented to, that you could not penalize the government where it was a defendant under the Tort Claims Act.

But in a civil litigation, in the criminal prosecution situation, where the same question arises, that is the result that's usually reached. That is, the government is penalized as a litigant because it does not supply information that the court thinks is relevant, and the government then has the option, unlike the Freedom of Information Act situation, of losing the litigation or abandoning it, and preserving the secrecy of information that it thinks should not be divulged in the public interest.

QUESTION: Mr. Cramton, as I thought, in advance of the argument in this case, that we would be faced here with a matter of construction of a statute and only that, no constitutional questions, and no questions of evidence

law or federal common law, but just with the construction of a statute.

And in that connection, I wonder if you could tell me, the word "section" on page 46 of your brief, does "section" mean the entire Freedom of Information Act? It's a little confusing to me, where it says "This section does not apply".

MR. CRAMTON: Yes, it means Section 552, it's an exemption from all the provisions of the Act.

QUESTION: Of the whole Act?

MR. CRAMTON: If I might clarify --

QUESTION: "Section" means the entire Act, is that it?

MR. CRAMTON: That's right.

If I might clarify your comment. Constitutional questions are involved here only in the sense that they provide a backdrop for the interpretation of statute.

Common law questions are involved in connection with exemption 5, because exemption 5 by its very language refers to whether or not a private party, in a hypothetical litigation with the government, would be able, on discovery, to get that information from the government. And the rule is that it would if information would routinely be made available.

My time has expired.

QUESTION: Now, one other question, if I may, going

to the last line in the Act: "This section is not authority to withhold information from Congress."

That declares, I take it, simply that this Act is not directed at the congressional powers to secure information which they do usually by the subpoena process, I take it?

MR. CRAMTON: That is right. I did not see fit to stress or reply to respondents' arguments that Congressmen have special rights under this Act. It is clear that they do not.

The rights of the Act extend to any member of the public, the language in paragraph (c) on page 47 is clearly a savings clause. It just says -- this Act has nothing to do with the powers of Congress as an institution to compel information. And it surely is a somewhat, I think, even shocking notion that an individual Congressman could compel information either from the government or from other private citizens, just on his own say-so.

QUESTION: Well, when a Member of Congress comes into the courts, he comes in just as any other citizen.

MR. CRAMTON: That is right. The law treats us all equally.

QUESTION: This is not an action authorized by some committee, is it?

MR. CRAMTON: No, the Congress is not involved in any institutional capacity. The respondents are acting in

their individual capacities only as "any persons" under the Freedom of Information Act.

MR. CHIEF JUSTICE BURGER: Mr. Clark.

ORAL ARGUMENT OF RAMSEY CLARK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CLARK: Mr. Chief Justice, and may it please the Court:

I think in fairness to the court below I should point to a few facts that primarily show there was an urgency at the time of considerations below that do not obtain now. And that explain the posture of the case.

I say that particularly in connection with the last question.

Actually the Court of Appeals began its opinion and ended its opinion with the observation that it didn't answer all of the questions before it. It was dealing with a motion for summary reversal.

The case, in a sense, began with a newspaper article. It's, I think it's very important for the Court to consider it in the light of the New York Times case, because it's closely related; you may recall the Solicitor General in the New York Times argument referring to the fact that there could have been a case under the Freedom of Information Act to have obtained those documents.

In a sense, this case may tell us whether the Elsberg

way, so to speak, is the only way available, or whether there is a judicial sancition that can be used to cause the disclosure of information.

On July 26, 1971, there was an article in the Washington Star that said two agencies, the Department of Defense and the Atomic Energy Commission, were urging going forward with this Cannikin-Amchitka five-megaton detonation, which was then scheduled for October of that year.

It went on to say that there was a controversy within the government, that five agencies were opposing the test; and it described them as being the Department of State, the United States Information Agency, the Office of Science and Technology, the Council on Environmental Quality, and the Environmental Protection Agency.

Then it, as you can see from the record, it alluded briefly to the reasons.

Now, when that came forth, Congressmen who were particularly concerned about the test and primarily people from Hawaii and California, because there had been earthquakes from seismic action in the Aleution chain that had caused deaths and great damage in Hawaii and in California, immediately sought to determine what the nature of these reports was, what facts there were within these reports, because, as Congresswomen and men they had two actions coming up before them in the immediate future: the Authorization

Act for the Atomic Energy Commission was before them in July of that year, and in August; and the Appropriations Act for that agency and for this very test.

Now, it was in that urgent context that this went before the court. The suit was filed on August the 11th, it was disposed of by partial dismissal and partial summary judgment for the government. On August 27, the Court of Appeals expedited, as did the court below, in accordance with the mandate of the Act itself, and the situation as well, and heard argument in late September, mid to late September, and decided the case October 15.

Now, as I said at the beginning it began, it summarily reversed, but it began with the observation that after considering the argument of counsel, and these covered the entire range of the complaint and the responses and the motions for summary judgment that both parties had filed, that this case was inappropriate for summary disposition. And that it was not going to summarily dispose of the case, but it wanted, in a practical way, to give some guidance to the district court so there could be some expedition in review of this information to see if it could be submitted to the Congress before the test.

And it's in that way that the case went back down, and there were only two areas in which the Court of Appeals summarily disposed of the issues before it.

First, it said that classification by association is erroneous.

Now, all it had before it was the Irwin affidavit. All it knew about the documents was what was said in the Irwin affidavit. When you look at the Irwin affidavit, you'll see that one document, the Impact statement, so-called, was, as a matter of law, public; the Congress required that it be published. That each of the other nine was restricted as secret, top secret, or under the Atomic Energy Commission as restricted data.

Now, when you see what happened in a parallel case with these very documents, that it's now argued that we should not be able to see at all, you find that they have been reviewed. Three were partially disclosed in a collateral case, of these very documents, that the government is now arguing we shouldn't be able to see, were disclosed to the plaintiff in the environmental case, the Nuclear Responsibility case.

Six were permitted -- I say permitted, in the sense that the government conceded that the district court could review them. Here it's in camera, here it said that that shouldn't happen.

Of the six that were reviewed in camera, the six of these ten, five were specified in the Irwin affidavit. It didn't say they're partially classified top secret; it

said they are classified top secret, or secret, as the case may be.

Yet these were reviewed, five of these.

Two were entirely, insofar as the record in that case which is before the Court shows, were entirely classified secret or top secret and they were reviewed by the court below. The very thing that is not permitted here now.

All the Court of Appeals said was: if there is matter within these documents that can be separated without distorting its meaning, if it's not so inextricably interwoven -- the phrase below -- that it can be separated, do it. That's what it directed summarily, by summary disposition, the district court to do.

And it said that if it is necessary, then you should review in camera to determine these two issues, whether there are documents attached to other documents and classified, as was the case in fact, although the Irwin affidavit didn't show, and classified merely by association, and the Court of Appeals has never had that concession before it that was made here, the concession was made in footnote 4 of the petition for writ of certiorari here; that the mere attachment of an unclassified document to a classified document, even though specified in 10501 Executive Order to permeate the documents so attached with the highest classification. For purposes of the Freedom of Information Act,

it does not become so classified.

And then the other part is whether there are components within a single document that would not be classified, and that is all that the Court of Appeals has done, and it's asked the court below to look at these in camera. Now, I think --

QUESTION: Well, that goes considerably -- what the Court of Appeals has done goes considerably beyond the language of the exemption in (b)(1), does it not, which would seem, at least on the face of the literal words, that the court should limit its inquiry to determining whether these matters were specifically required by Executive Order to be kept secret in the interest of thenational defense or foreign policy.

Wouldn't you agree?

MR. CLARK: Well, no, I wouldn't.

QUESTION: Well, I've accurately read the exemption, haven't I?

MR. CLARK: Well, I think the key to it, though, is the Court of Appeals opinion. It expressly says that it is not going to resolve by summary disposition the test to be applied under exemption No. 1.

QUESTION: Yes.

MR. CLARK: We had urged to the district court that the test be the test that President Eisenhower and President

Kennedy and President Johnson and President Nixon had all prescribed for executive privilege when pled before the Congress, and that is that the President cause an independent review of each document and each part of each document as to which the privilege was to be extended be made, and that it be classified on that basis.

The government roughly, below, said that there is no power in the court to review it. We say it's classified; that's it. The court has no power to determine whether we're correct or not, or whether what we say is true.

QUESTION: Well, that's what the language seems to say, doesn't it?

MR. CLARK: No, I think not. I think when it says --

QUESTION: Well, what does it mean if it doesn't mean that, Mr. Clark?

MR. CLARK: Well, I think, first, that the Act clearly gives jurisdiction to the court to enjoin a government agency from refusing to disclose. It requires --

QUESTION: As a general proposition?

MR. CLARK: As a general proposition, yes.

QUESTION: But then this is a specific exception, is it not?

MR. CLARK: Well, there are nine specific exceptions.

QUESTION: Yes, well, we're only concerned now about No. 1.

MR. CLARK: Well, 1 and 5 both.

QUESTION: Yes, well, 1 primarily. When it says this section does not apply to matters that are, and then describes what there is under No. 1.

MR. CLARK: Well, I can think it can only mean one thing, and I really can't believe that the government would contend otherwise. It only means that this section does not require, or give the power to the courts to enjoin disclosure, where it is determined by the court as a matter of fact, that one of these exemptions applies. Otherwise the Act has no meaning.

QUESTION: That's right.

MR. CLARK: Has no value. All the party ever has to do is say: No. 4, it's trade secrets. You can't see whether it's trade secrets or not, you don't know what it is. You have to take their word for it. The veil of secrecy in the Executive Branch falls at that level, and there is no capacity, no power in the Judiciary, if that section means that these nine areas are completely exempt, it just means that the courts will decide, and if it decides that the material or the matter, as it says, is specifically required, then they cannot compel disclosure.

But the court must decide, not the Executive.

QUESTION: But under the language, what are the limits of the court's decision? That was my question.

MR. CLARK: Well, --

QUESTION: I suppose it could be read that if you find that this has been specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy, that's the end of the court's inquiry, even though they --

MR. CLARK: Well, there are several things that should be said, and I think --

QUESTION: That's certainly what the language seems to mean on its face to say.

MR. CLARK: I think, not necessarily "matters" doesn't mean all of an entire document; you may have something the thickness of a telephone book, you frequently do in this area. There may be one paragraph in the whole thing, as I think the government conceded; clearly this couldn't mean, and that's precisely what the Court of Appeals has pointed out.

And the only reason it did it was because of the ambiguity of the Irwin affidavit. The Irwin affidavit in some places would say "this document is separably classified top secret", in others he would merely say, "it is classified top secret". From that, on the basis of our knowledge, we assume that it was classified perhaps by association, and we asked the court below, the trial court, and the Court of Appeals to face that issue. If it's classified, if the

document itself is not classified secret, but it is attached to one that is, are we not permitted to get it under this Act? And the government has now conceded, in that situation, that we are.

QUESTION: I think that perhaps the government has conceded more than it needed to do under this language.

I'd suggest that the way this is worded, that it could be well argued that the limits of the court's inquiry with respect to exemption No. 1 under (b) is whether or not it has in fact been required by the Executive to be kept secret.

No matter if it's the District of Columbia telephone book.

MR. CLARK: I really think not. I think even if that's true, that the new Executive Order 11652, which, by the way, became the prevailing law in this area two days after the petition for certiorari in this case was granted, requires this very paragraph-by-paragraph, or generally contemplates this paragraph-by-paragraph classification, which is the only thing that makes any sense.

Our contention below has been that even 10501 is not the specific requirement that was contemplated, and the Attorney General's memo that was promulgated in June of 1967, this Act become effective on the 4th of July, which was an appropriate day because I think this Freedom of Information

is essential to freedom in a democratic society.

QUESTION: You put a great deal of weight in your argument, as I understand it, on the adverb "specifically", don't you?

MR. CLARK: Yes, I do. I really dont think this issue is before this Court at this time, unless it wants to consider matters the Court of Appeals didn't consider. Because the Court of Appeals specifically says, it is not going to dispose of that by summary disposition, and I thin k very wisely, for the very reasons that the Chief Justice, in the New York Times case, said we don't have the facts. Let's get the facts.

And here you don't have the urgency in this Court now, and this can go back and the trial court can look at it, and it can make, after it sees these documents, that judgment.

Now, the idea that courts cannot look at documents classified secret is beyond my comprehension at this time. I thought they brought 47 volumes into this Court and into the courts below in the New York Times case.

We've seen throughout the wiretap area that the Solicitor General comes in in COLOD? and other cases, seeking in camera inspections. We've seen the same thing in the grand jury cases, Dennis v. U. S., where they seek the court ex parte, by an in camera proceeding. And I'm frankly not high on in camera proceedings; but that's all this Court of

Appeals judgment gives us at this time. I don't think it's cut off the other.

QUESTION: Well, you referred to some constitutional cases, would you -- am I wrong in thinking that the only issue in this case is the meaning of a statute enacted by the Congress of the United States, that there are no constitutional issues here at all. Am I wrong in that?

MR. CLARK: I think they're clearly constitutional issues in those parts of the case that the Court of Appeals specifically declined to pass on by way of summary disposition.

I think that appropriately this Court would only consider the statute, because I think that that is all that the Court of Appeals did. But if you want to go in under the general problem of Executive privilege, and that has not been raised here, it has not been thoroughly briefed, and I think in terms of judicial administration it would be a serious mistake, why, that can be done. I think the district court is going to have to do it. I think it's raised by the pleadings.

But I think the Court of Appeals, because it had before it a motion for summary reversal, wanted to get this thing moving. As a matter of fact, the blast went off on November the 6th, and at that time we had not been able to obtain the information. It's very unlikely that the Congress --

there are 33 plaintiffs here who are Congresswomen and men -- could have done anything about it.

QUESTION: Then I'm not wrong, if I understand what you said, in understanding that this is a matter of the construction of an Act of Congress, isn't that what we have?

MR. CLARK: I think, as a matter of proper judicial administration, that's right. I think, as a matter of jurisdiction, this Court has jurisdiction over the whole case, in issues that the Court of Appeals specifically declined to pass are before you if you want to pass on them.

I think it would be unfortunate to get into them. I think that all the Court of Appeals said was that when you claim an exemption under 1 or 5, it is imperative that parts that can be severed from that, because the purpose of this Act is to reveal as much information to the public as can possibly be done.

QUESTION: Does the Executive Order now meet that problem -- the new Executive Order that you've just referred to, Mr. Clark, that it was obviously intended to give more flexibility to go through a document and if there's a lot of material that's perfectly innocuous, as there's bound to be in any classified document, that that can be severed out.

With that, isn't the problem as to the truly classified material still going to remain under Section 1 or paragraph 1, with the Executive?

MR. CLARK: Well, I think that the new Executive Order, if implemented, as I assume it will be, will narrow the range of review that a court will have to make. But I think ultimately, that when it comes before the court, and it comes before the court very infrequently, I don't believe there have been forty cases at this time that have raised this issue; and when the government pleads exemption for matters under exemption No. 1, because they involve military or diplomatic secrets, then the court will have to review first to see if there is matter combined in there that should have been weaned out under the new Executive Order but wasn't; and, second, whether they were arbitrary and capricious in their judgment.

Now, that issue is really not properly before this Court at this time, because of the nature of the summary disposition, below.

QUESTION: Are you suggesting, Mr. Clark, that perhaps this whole case in this Court is premature?

MR. CLARK: Well, we opposed the cert. And I think --

QUESTION: On that ground? Of prematurity?

MR. CLARK: This was a summary disposition, and we opposed it as being something that -- for instance, we didn't get all the rulings we wanted below either, but we saw no reason to counter-petition because we thought our opportunity was still viable in the court below. So, yes, sir, we did

-- we did on that ground.

But I think that it would be wrong to dismiss as improvidently granted at this time, I think the Court of Appeals is entitled to an affirmance. I think it's -- I think what it's done here is the very minimum.

QUESTION: But if we dismiss as improvidently granted, that would leave their judgment, of course, to stand undisturbed, wouldn't it?

MR. CLARK: But I think we know the problems in judicial administration here, and I think both the Court of Appeals and the district court are entitled to have review on what -- I don't think you should go, this is just my judgment of sound judicial administration, beyond what the Court of Appeals did.

And all the Court of Appeals really did is said: Look at these documents and where there is -- where there are documents, first, that are severable, sever them. And there were some.

But the Court of Appeals never got to see them. The Congressmen never got to see them. The district court in this case never got to see them. They were severed, and in another case they came out.

And then where within a document there is material that's severable, do that.

Now, that's precisely what Judge Hart did, he went

through documents in the Nuclear Responsibility case that were both classified secret or top secret, and as to which there was an exemption No. 5, the decisional processes of the Executive Branch claimed; and he extricated some and disclosed it, required its disclosure, and he left others secret.

In other words, he performed the judicial function that I think this Act requires: he tried the matter de novo; he placed the burden on the government of showing the exemption. I don't think the burden on the government means anything of showing the exemption if the exemption is totally excluded by the fiat of the Executive, any consideration of the matter before them.

QUESTION: Mr. Clark, I realize that subdivision (6) is not relevant in this case, on page 46, paragraph (6) I think you'd called it under (b); but suppose the personnel and medical file of some individual were involved, and there was some matter which he did not want disclosed. Is it your view that a district judge should examine the medical file and see whether this should be disclosed or not, or is the medical file of the treatment of a person completely private?

MR. CLARK: Well, I think at the very least there would be a judicial responsibility to look and see if this is just a medical file, or if it's a file that says "medical"

on it, and it's got all other kind of matter in it.

I think that's --

QUESTION: Well, what if it's an affidavit of the Commandant, let us say, of one of the military hospitals, that the -- all the documents inside of this file relate to the diagnosis and treatment of the named subject; and there is no matter here except that, and it is of the utmost privacy. Some such statement.

Then is the district judge, under this Act, to look at it and see if the doctor is telling the truth, or does it make --

MR. CLARK: I think that absolute, yes. First, not just because we have an adversary system, and that really relates to personal privacy, I felt very strongly about that exception when the Act came in.

But, second, really this is part of a system of checks and balances; that's what this statute is about.

QUESTION: Well, it's here now, it's passed.

MR. CLARK: That's correct.

QUESTION: And I still have difficulty getting away from the language "this section does not apply".

MR. CLARK: By the very nature of that one, you know, we haven't -- this section does not -- but it says "which would constitute a clearly unwarranted invasion of personal privacy". A doctor is supposed to make that decision?

Or a judge is supposed to make that decision?

Suppose it's quite important to a plaintiff in a case. Suppose that this individual to whom this file would relate has done something and this information is important.

QUESTION: Well, I'm not raising this question in terms of getting some information in a lawsuit involving some injuries, I'm talking about these plaintiffs in this case, or plaintiffs like these, asking that the information be made public, not as evidence in a lawsuit. Just as a matter of general public interest.

MR. CLARK: Well, I think the test is --

QUESTION: Do you suggest that --

MR. CLARK: I think the test is whether it would constitute a clearly unwarranted invasion of personal privacy, and I think that's a judicial test to be made under the Act by the Judiciary.

I don't think that --

QUESTION: Then (b),"this section does not apply", doesn't have very much meaning.

MR. CLARK: Well, I think it has meaning. I think it tells you exactly the material that the courts cannot compel disclosure of.

But I think the Act tells you that the courts have to determine whether the matter in question is that, falls under one of those exemptions.

I think if that's not true, then the Act really has no value because labeling can read the Act out of operation, all you've got to do, all the Executive has to do, ndawe're talking about checks and balances, and we're talking about something that the Congress has done, and I don't know another area where the Congress has acted where the courts have not performed the judicial function that's essential in that situation.

QUESTION: Mr. Clark, doesn't this get us right back to the questions that Justice Stewart has been asking. You referred a little while ago to (b)(4) having to do with trade secrets, and clearly someone has to determine what a trade secret is. And you say this is the district court. (b)(1) speaks of "specifically required by Executive order", and isn't that just as far as the court has to determine the situation, whether it is or is not specifically required.

I think this was Mr. Justice Stewart's inquiry of you.

MR. CLARK: Yes, right.

QUESTION: As I understand it, you want to go one step further and say not only whether it was specifically required, but whether it was in the interest of thenational defense or foreign policy; you want to go into that lower or further inquiry; am I correct in that?

MR. CLARK: Well, I see it a little different.

I think I don't want to go that far, by one step, simply because the Court of Appeals has specifically, in its opinion, declined to make that adjudication by way of summary disposition. All it has said, and I think it follows necessarily, is that if there's a document that is not classified but is attached to another document, then it would, I suppose you could say, inherently be incapable of having been specifically designated.

Somebody may have slapped a poster on it, but the Act wanted full disclosure, compatible with these key interests here.

QUESTION: Well, I suppose, Mr. Clark, one of the keys here is that section 3, anyway, isn't it, what the court is supposed to do, as I read this, order the production of any agency records improperly withheld from a complainant. And in order to determine whether it's improperly withheld, if the claim is it falls under (b)(1) or anywhere from (b)(1) to (b)(9), a judge has got to decide whether the particular papers satisfy 1 to 9, and if they say they do not, then they are improperly withheld, is that it?

MR. CLARK: That's my understanding of it, yes, sir, Your Honor.

They have to look at the papers to do that, very frequently.

QUESTION: But in the determination whether something

is improperly withheld, I guess that's what the next sentence means, "in such a case the court shall determine the matter de novo," and the burden is on the agency to sustain its action?

MR. CLARK: That's the only meaning that I can read out of it. I think, in connection with Justice Blackmun's question, that there are two steps to No. 1, but I don't think those steps were considered or adjudicated by the court below or should be by this Court.

But I think first it determines whether it was specifically required, and second whether it was clearly erroneous. At least that would be the standard that I propose.

But the Court of Appeals didn't feel it necessary, and I think wisely so, to determine that test at that time.

QUESTION: Mr. Clark, turning to No. 3, there are two of these which have a qualification that the other paragraphs do not have, No. 1 has specifically required by the Executive; No. 3 has "specifically exempt by the statute."

Now, in one case it's the Congress speaking by statute and in the other case the Executive by order. Do you think that 1 and 3 are different in this regard from the others?

MR. CLARK: No, I think --

QUESTION: What inquiry would a district judge make on a matter if its specifically exempt from disclosure by

statute?

MR. CLARK: Well, I think the analogy here would be if the Executive came in and said, Here is the statute, Your Honor, and cites the statute, therefore you can't look at this matter; you have to take my word because it's in the statute.

QUESTION: Well, suppose the statute said that all medical records of any military hospital shall be exempt from disclosure?

MR. CLARK: Then I think the judge would have to look and see whether there is anything in the file other than military records, medical records from a military hospital. I don't think that in our adversary system, or particularly in a place of critical checks and balances, that we have here, because obviously if you can put a stamp on these things and preclude judicial review, the Act has no value in terms of checks and balances.

I think that the court would have to look at that file and determine in its work, but it's the function that is imposed upon the judiciary by this Act.

So we would urge affirmance.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:13 p.m., the case was submitted.]