

1971

Administrative Law--Judicial Review, State Secrets, and the Freedom of Information Act

John H. Warren III

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Warren, John H. III (1971) "Administrative Law--Judicial Review, State Secrets, and the Freedom of Information Act," *South Carolina Law Review*. Vol. 23 : Iss. 2 , Article 8.

Available at: <https://scholarcommons.sc.edu/sclr/vol23/iss2/8>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

ADMINISTRATIVE LAW—JUDICIAL REVIEW, STATE SECRETS, AND THE FREEDOM OF INFORMATION ACT*

I. INTRODUCTION

The refusal of government agencies to abide by the spirit of existing public disclosure requirements and their continued use of the letter of those requirements as a “shield of secrecy,”¹ led Congress to enact the hopefully remedial Freedom of Information Act.² The Act attempts to provide “the necessary machinery to assure the availability of government information necessary to an informed electorate.”³ Although efforts to water down the literal meaning of the legislation began even before its enactment,⁴ the Act does eliminate requirements which federal agencies have consistently relied on to withhold information unnecessarily. The Act removes the requirement that the requesting party show good cause for production.⁵ The Act further provides that upon the denial of any agency to produce the information requested, the requesting party may file suit in federal district court to challenge the denial. Such court proceeding is to be *de novo*,⁶ in order that “the court can consider the propriety of withholding instead of being restricted to judicial sanctioning of agency discretion.”⁷ The Act also states that the agency has the burden of proving that withholding information is justified,⁸ and it limits withholding to nine specifically stated exemptions to a general rule of production.⁹ The first of these exemptions, and the one with which this comment is concerned provides that all material “specifically required by Executive order to

* *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970), *cert. denied* 398 U.S. 965 (1970).

1. H. R. REP. NO. 1497, 89TH CONG., 2D SESS. 12 (1966) (hereinafter cited as House Report).

2. 5 U.S.C. § 552, *as amended*, (Supp. V, 1970).

3. House Report, at 12.

4. Davis, *The Information Act, A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763 (1967).

5. 5 U.S.C. § 552 (a) (3) (Supp. V, 1970) provides: “[E]ach agency . . . shall make the records promptly available to any person.”

6. 5 U.S.C. § 552 (a) (3) (Supp. V, 1970).

7. House Report, at 9.

8. 5 U.S.C. § 552 (a) (3) (Supp. V, 1970).

9. U.S.C. § 552 (b) (1)-(9) (Supp. V, 1970).

be kept secret in the interest of the national defense or foreign policy”¹⁰ need not be disclosed.

II. EXECUTIVE PRIVILEGE

A. Background

The Supreme Court of the United States recognized, in the landmark case of *United States v. Reynolds*,¹¹ that the common law privilege of the executive branch of government to withhold whatever information it deemed absolutely necessary, existed at least as early in our history as the *Burr* trial.¹² It is reported that Thomas Jefferson was the first member of that branch to attempt to extend that privilege to all executive documents, regardless of sensitivity.¹³ Thus the privilege, and the tendency to abuse it, have existed for more than one hundred and fifty years.¹⁴ In any event, the *Reynolds* case stands for the general proposition that a compromise between executive privilege and the public right to know, is necessary and that the judiciary is the proper organ to determine what that compromise will be.¹⁵

B. A Modern View

In 1967, Julius Epstein, a research associate at Stanford University's Hoover Institution on War, Revolution, and Peace, petitioned the Department of the Army for declassification and production of an Army file entitled “Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul.”¹⁶ The file, which contains documents of both United States and British origin,

10. 5 U.S.C. § 552 (b) (1) (Supp. V, 1970).

11. 345 U.S. 1, 9 (1953); *See also* *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (D. Pa. 1912).

12. *United States v. Burr*, 25 F. Cas. 187 (No. 14694) (D.C. Va. 1807).

13. J. WIGGINS, *FREEDOM OR SECRECY* 67 (Rev. ed. 1964).

14. *Id.*

15. 345 U.S. 1, 8 (1953); *See also* *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956); *Royal Exchange Assur. v. McGrath*, 13 F.R.D. 150 (S.D.N.Y. 1952); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949); *Wunderly v. United States*, 8 F.R.D. 356 (E.D. Pa. 1948); *Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D.N.Y. 1943). The English rule is the opposite, i.e. that executive determination by the head of a department that information must be withheld is conclusive. *Duncan v. Cammell Laird and Co.* [1941] AC 624.

16. The matter of forced repatriation of Soviet citizens subsequent to World War II has received congressional attention in the past. 105 CONG. REC. 61 (1959).

originated in the World War II Allied Forces Headquarters, which had classified it top secret. After the war, the Army stored the file as an historical document and continued to classify it top secret under the authority of Executive Order 10501.¹⁷ Classification of the file had been reviewed and retained by the Army in 1954. Upon appellant's petition, the classification was again reviewed and again retained. In February 1968, appellant made a second request for declassification and was advised that the file was being currently reviewed on a paper-by-paper basis. In March 1968, appellant brought suit in United States District Court under authority of the Freedom of Information Act, to enjoin the Secretary of the Army, appellee, from continued withholding of the file.

The United States District Court for the Northern District of California granted summary judgment in favor of the government.¹⁸ The court held that the *de novo* jurisdiction granted by the act did not apply to information which fell within one of the exemptions, so that, in this case, judicial review of agency classification did not extend to the circumstances of exemption, but only to whether the classification was arbitrary or capricious.¹⁹ The court based its holding on the language of title 5 of the United States Code, section 552 (b), which provides that "[t]his 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;" This meant that the judicial review granted in title 5 of the United States Code, section 552 (a) (3) existed only as to information not exempted.²⁰ The court concluded that the government proved that the classification under Executive Order

17. 2, 3 C.F.R. 280 (1970). This Order, entitled SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES, provides generally that information affecting national defense may be classified TOP SECRET, SECRET, or CONFIDENTIAL and sets out instructions as to the classification, storage, and dissemination of such information. The authorization for TOP SECRET classification in 2,3 C.F.R. 280 (1970) is as follows:

(a) *Top Secret* . . . The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

18. Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969).

19. *Id.*, at 217.

20. *Id.*

10501 was not arbitrary or capricious by virtue of an affidavit filed by the Adjutant General.²¹

On appeal, in which the American Civil Liberties Union of Northern California appeared *amicus curiae* for appellant, the United States Court of Appeals, Ninth Circuit, three judges sitting, affirmed the judgment of the district court, while somewhat correcting the holding.²² The first argument taken up in the opinion was the government's contention that *de novo* judicial review, with the burden of proof on the agency, did not extend to the circumstances under which an agency claimed an exemption.²³ The court began discussion of the issue by finding the Act to be awkwardly phrased.²⁴ After finding that the legislative purpose was to make as much information as possible available to the public, the court held that the broad judicial review granted by the act did extend to the question of "whether the conditions of exemption in truth exist."²⁵ Indeed, it appears that no court, other than the district court in this case, has held that the grant of judicial review did not so extend or has even mentioned the government's argument. Most courts interpreting the Act have either

21. The affidavit, dated May 29, 1968, is set out in *Epstein v. Resor*, 421 F.2d 930, 932 (9th Cir. 1970) as follows:

This review of individual papers has been completed with the Department of the Army and coordination is now in progress with the Joint Chiefs of Staff and the Department of State to verify the position of the United States Government with respect to each paper. The outcome of this effort will determine the possibility of requesting a review and redetermination of the classification of some or all of the documents by the British Government. This Department will continue on its present course of coordinating the declassification of the files with the concerned agencies. The complexity of interests in these files indicates considerable time will pass before a final determination is made. In the meantime, the documents remain classified Top Secret . . .

22. 421 F.2d at 933.

23. *Id.* at 932.

24. *Id.*, see also, Davis, *The Information Act*, *supra* note 4, at 761. Also, not only is the Act awkwardly drawn, but the legislative history is little help in interpretation since not only do the committee reports conflict with the literal meaning of the words of the Act, but also conflict with each other. Compare House Report with S. REP. NO. 813, 89th Cong., 1st Sess. (1965); See Davis, *supra* at 763.

25. 421 F.2d at 933. The court cited as authority for this holding the case of *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969) which held, *inter alia*, that "judicial review would be available for a violation of any part of the Act, not merely for subsection (3)".

ruled as did the circuit court in *Epstein v. Resor* or assumed the same result by implication.²⁶

The thrust of appellant's arguments was focused on the next question taken up by the court. Appellant argued that since the broad grant of judicial review was applicable, the district court should have ordered the Army to turn the file over to the court for the purpose of an *in camera* review to decide whether, after twenty-four years, further withholding was justified. The court in *Epstein* refused to extend judicial review under the Act to that extent "*at least in this case.*"²⁷ The court found that although judicial review extends to the underlying factual contention in cases arising under other exemptions in the Act, it does not extend to title 5 of the United States Code, section 552 (b) (1) because that exemption, by its own words, specifically assigns the decision concerning secrecy to the executive branch. The courts are limited "to the question whether an appropriate executive order has been made as to the material in question."²⁸ As additional authority, the court refers to the concept developed in *Chicago and Southern Airlines, Inc. v. Waterman S.S. Corp.*²⁹ and *United States v. Curtiss-Wright Export Corp.*,³⁰ which states that questions involving national interest and foreign policy are peculiarly appropriate for executive consideration and inappropriate for judicial consideration.

Thereupon the *Epstein* court made two findings. First, the court found that the executive order was appropriate, noting (1) the present classification was not solely based on an initial classification which had outlived its necessity, (2) the Army was not hiding material by giving it a top secret classification merely because it related for filing purposes to material properly classified top secret, and (3) there was no "footdragging passing of responsibility" by the Army to other

26. See *Grumman Aircraft Engineer Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, 938-40 (D.C. Cir. 1970); *Acherley v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969); *General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969); *Cooney v. Sun Shipbuilding and Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968); *But see H. R. REP. NO. 1497*, 89th Cong., 2d Sess. 2426 (1966). See generally, *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1006 (2d Cir. 1969); *Tuchinsky v. Selective Service System of the United States*, 294 F. Supp. 803 (N.D. Ill. 1969).

27. 421 F.2d at 933 (emphasis added).

28. *Id.*

29. 333 U.S. 103, 111 (1948).

30. 299 U.S. 304, 320-322 (1936).

agencies or countries.³¹ Secondly, the court accepted the lower court's ruling that courts had authority to determine whether the classification was arbitrary or capricious, and went on to find that it was not. The court reasoned that the origin of the file alone rebutted such a conclusion as to the original classification and, further, that although many years had passed since that classification, the government had shown cogent reasons for retaining it.³²

III. A REASONABLE COMPROMISE

The questions involved in this area of the law arise infrequently, at best, as the paucity of cases testifies. When they do, however, two broad and well-entrenched rules meet head on. One rule is that the executive branch of government must be able to decide what information is to be withheld from the public, including the courts, in the nation's best interests.³³ The other rule is that the courts must re-examine such executive decisions, and do so in such a manner that its access to evidence in a case is not "abdicated to the caprice of executive officers."³⁴ When the facts of any case irresistibly suggest that one rule must prevail over the other, resolution is comparatively easy. An example of this would be military defense plans recently promulgated by NATO and classified top secret by that agency. Clearly, little fault could be found with an executive decision to withhold these from the public and the courts. Just as clearly, little reason could be put forward for classifying a file containing figures on troop strength during World War II, when such information is commonly available. The problem arises when the facts, such as those in *Epstein*, do not irresistibly suggest one rule or the other. A compromise must be reached, and it is submitted that there are at least three questions which a court must answer in order to reach a just compromise.³⁵

The first question is whether the facts of the case indicate that the

31. 421 F.2d at 933.

32. *Id.*

33. 345 U.S. 1 (1953); *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912).

34. *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *See Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958); *Evans v. United States*, 10 F.R.D. 255 (W.D. La. 1950); *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by equally divided Court*, 339 U.S. 940 (1950); *See also*, cases cited in note 15, *supra*.

35. The initial question prior to *United States v. Reynolds* was whether executive classification as to state secrets was a justiciable question. That case held that it was.

executive decision to withhold is appropriate. This question, like most in the area of state secrets, lends itself to vague judicial reasoning. The *Epstein* court, however, chose to formulate specific findings (as to outdated classification, the type of filing system used,³⁶ and passing of responsibility) which led to its deciding the question in favor of the government. The necessary implication from such a choice is that if the Army had not satisfied the court as to the propriety of its actions in these three areas, the decision in the case would probably have been different.

The second question is whether the court can order the material to be produced for *in camera* inspection by the judges alone. If the documents requested are merely "official" information, a court may order *in camera* review.³⁷ If the documents are alleged to contain state secrets, *in camera* review may³⁸ or may not³⁹ be ordered, there being no fixed rule. However, the Supreme Court in *Reynolds* outlined the analysis required in each decision involving state secrets; a court should not require *in camera* review if the government is able:

to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.⁴⁰

The court refused to follow the lower court's holding that *in camera* review was required by the applicable rules of evidence.⁴¹ Both the district court and the circuit court in the *Epstein* cases seem to have followed the *Reynolds* analysis, although no specific mention of the

36. As to manipulation of filing systems by government agencies in order to withhold information, see *Nader, Freedom from Information: The Act and The Agencies* 5 HARV. CIV. RIGHTS L. REV. 1,9 (1970).

37. See *United States v. Certain Parcels of Land, etc.*, 15 F.R.D. 224 (S.D. Cal. 1953); *United States v. Cotten Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by equally divided Court*, 339 U.S. 940 (1950); 8 WIGMORE, EVIDENCE §2379 (McNaughton rev. 1961).

38. See generally cases cited in n. 34, *supra*.

39. See generally cases cited in n. 33, *supra*.

40. 345 U.S. 1, 10 (1953).

41. *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951); Judge Maris, in his opinion, cited 8 WIGMORE, EVIDENCE p. 799 (3d Ed. 1940) as authority. However the discussion there does not mention state secrets; See 8 WIGMORE, EVIDENCE § 2379 (McNaughton Rev. 1961) (*in camera* review may not be available as to state secrets); Justices Black, Jackson, and Frankfurter dissented for substantially the same reasons as contained in the opinion of Judge Maris.

case is made in either opinion. Although the circuit court in *Epstein* did not require *in camera* review, two qualifications must be noted. The first is that this was not a last-ditch stand by Epstein since the court had received government assurance that a paper-by-paper review was in process and that it would request British acquiescence in the event of a decision to declassify. Secondly, the court stated such review "in this narrow area"⁴² was not necessary *in this case*. The court thus acknowledged the possibility of future cases involving state secrets where such a review would be appropriate.

The third question is whether the court is required under the Act to order the production of information it finds to be outside of the stated exemptions. The *Epstein* court did not reach this question. It would seem there could be no answer other than that the court is so required, by reason of the plain words of the statute.⁴³ At least one court, however, has held that the statute grants power to enjoin,⁴⁴ which means equity jurisdiction, and, therefore, judicial discretion may be exercised to refuse to order production even when the withholding is not justified under any of the exemptions.⁴⁵ Whether the power of granting injunctions implies power to use discretion depends on statutory construction and legislative intent.⁴⁶ However, the statutory construction of title 5 of the United States Code, Section 552(c) and the legislative intent to provide access to as much government information as possible seem incompatible with a grant of judicial discretion.

IV. CONCLUSION

The circuit court in *Epstein* made a solid contribution to the area of the law concerning the discovery of state secrets. It did so by outlining specific criteria, as to the duration of the initial classification, the type of filing system employed, and the attitude of the withholding agency, to be used by the courts in adjudging the propriety of executive

42. 421 F.2d at 933 (1970).

43. 5 U.S.C. § 552 (c) (Supp. V, 1970) provides: "This section does not authorize withholding . . . except as specifically stated in this section."

44. 5 U.S.C. § 552 (a) (3) (Supp. V, 1970).

45. *Consumers Union of the United States, Inc., v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); this case is criticized in Comment, *Freedom of Information*, 5 HARV. CIV. RIGHTS L. REV. 121 (1970). Comment, *Administrative Law—The Freedom of Information Act*, 44 TUL. L. REV. 800 (1970).

46. *United Steelworkers v. United States*, 361 U.S. 39, 41 (1959); *Hecht Co. v. Bowles*, 321 U.S. 321, 328-329, 331 (1944).

classifications and by leaving the door open to future *in camera* review in such proceedings. It should also be noted that the government had an unusually favorable case since the classification involved the interests of another nation. It is to be hoped that agencies and courts which are involved in future cases concerning state secrets will continue in the same vein as the *Epstein* court. It is to be hoped that all parties who have occasion to deal with the Act, in any manner, will do so in the spirit in which it was enacted:

The public business is the public's business. The people have the right to know. Freedom of Information about public records and proceedings is their just heritage . . . These rights must be raised to the highest sanction . . . The First Amendment points the way.⁴⁷

JOHN H. WARREN III

47. H. CROSS, *THE PEOPLE'S RIGHT TO KNOW*, 132.