



2006

# Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA

Martin E. Halstuk

*Penn State College of Communications, meh21@psu.edu*

Eric Easton

*University of Baltimore School of Law, eeaston@ubalt.edu*

Follow this and additional works at: [http://scholarworks.law.ubalt.edu/all\\_fac](http://scholarworks.law.ubalt.edu/all_fac)



Part of the [Communications Law Commons](#)

## Recommended Citation

Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA, 17 *Stan. L. & Pol'y Rev.* 353 (2006) (with Martin Halstuk, Ph.D.)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

# OF SECRETS AND SPIES: STRENGTHENING THE PUBLIC'S RIGHT TO KNOW ABOUT THE CIA

Martin E. Halstuk, Ph.D.\* and Eric B. Easton, J.D.\*\*

## INTRODUCTION

Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act)<sup>1</sup> in the aftermath of government investigations into the September 11, 2001, terrorist attacks. The two principal investigations, conducted by the 9/11 Commission<sup>2</sup> and a joint panel of the Senate and House intelligence committees,<sup>3</sup> were harshly critical of the Central Intelligence Agency (CIA or the Agency), the Federal Bureau of Investigation, and the Pentagon's intelligence services for failing to share and publicize crucial information concerning terrorist threats. In particular, the reports singled out

---

\* Martin E. Halstuk is Assistant Professor of Communications in the College of Communications at Pennsylvania State University, where he teaches mass media law. He is also Senior Fellow at the Pennsylvania Center for the First Amendment. Formerly, he worked as an editor at the *Los Angeles Times* and a reporter at the *San Francisco Chronicle*.

\*\* Eric B. Easton is Associate Professor of Law at the University of Baltimore School of Law, where he teaches communications law. He is also a senior research associate at UB's Center for International and Comparative Law. He was formerly a professional journalist and is working toward a Ph.D. in Journalism at the University of Maryland.

1. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

2. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) [hereinafter 9/11 COMMISSION REPORT]. The 567-page 9/11 Commission report, released July 22, 2004, was prepared by a ten-member, nonpartisan panel headed by Thomas Kean, former governor of New Jersey.

3. JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, REPORT OF THE U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE AND U.S. HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, S. REP. NO. 107-351 & H.R. REP. NO. 107-792, (2002) [hereinafter SENATE AND HOUSE SELECT COMM. REPORT]. The nearly 900-page Senate and House joint report, prepared by a panel of the Senate and House intelligence committees, was released July 24, 2003.

the CIA, “the lead agency confronting al-Qaeda,”<sup>4</sup> for withholding vital information that could have averted a series of blunders and missteps in the critical weeks and months before the assault on New York City and Washington, D.C.<sup>5</sup>

The 9/11 Commission Report revealed that for nearly two years before the attacks, the CIA had been aware of the al-Qaeda ties of two 9/11 hijackers who were living in San Diego,<sup>6</sup> and the Agency had received reports of terrorist threats within the United States,<sup>7</sup> including information that al-Qaeda had plans to hijack passenger planes and use them as weapons.<sup>8</sup> The Senate and House joint panel found that the CIA had enough information before the attacks to warrant defensive measures such as strengthening airport security; placing suspected terrorists on watch lists; coordinating investigation efforts between federal and state authorities; and, finally, alerting the American public to the serious nature of the threats.<sup>9</sup> Both investigations concluded that the attacks might have been thwarted had the CIA disclosed some of its information about the activities of known and suspected al-Qaeda members.<sup>10</sup>

The impetus behind the Intelligence Reform Act was to prevent another terrorist attack on American soil. The statute completely overhauled the United States intelligence apparatus, largely by amending the National Security Act of 1947,<sup>11</sup> which created the CIA and established the Director of Central Intelligence (DCI) as its head. The purpose of this Article is to demonstrate that by renovating the fifty-seven-year-old National Security Act to create a modern intelligence infrastructure, Congress has also paved the way for a new

4. 9/11 COMMISSION REPORT, *supra* note 2, at 400.

5. *Id.* at 353, 355-56, 400-03; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xi, xvii.

6. *See* 9/11 COMMISSION REPORT, *supra* note 2, at 215-21; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 143-52.

7. *See* 9/11 COMMISSION REPORT, *supra* note 2, at 353-58; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 118. *See also* Dana Priest, *White House, CIA Kept Key Portions of Report Classified*, WASH. POST, July 25, 2003, at A1, A16; David Johnston, *Word for Word/Revisiting 9/11; The Warnings Were There, But Who Was Listening?* N.Y. TIMES, July 27, 2003, at A1.

8. *See* 9/11 COMMISSION REPORT, *supra* note 2, at 128-30 & 484 n.112 and SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 9. *See also* Walter Pincus & Dan Eggen, *Al Qaeda Unchecked For Years, Panel Says; Tenet Concedes CIA Made Mistakes*, WASH. POST, Apr. 15, 2004, at A1, A12.

9. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xv, 118.

10. 9/11 COMMISSION REPORT, *supra* note 2, at 353, 355-56, 400-03; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xvii. The Senate and House joint inquiry found that “[s]ome significant pieces of information in the vast stream of data being collected were overlooked, some were not recognized as potentially significant at the time and therefore not disseminated. . . . [T]he Intelligence Community failed to fully capitalize on available, and potentially important, information.” SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xi.

11. National Security Act of 1947, ch. 343, 61 Stat. 495-510 (1947).

intelligence-information paradigm. That paradigm can reduce what then-Senator Bob Graham, former Chairman of the Senate Intelligence Committee and a conferee on the Intelligence Reform Act, characterized as the intelligence community's "dangerous obsession" with secrecy.<sup>12</sup> Certain features of the Act<sup>13</sup>—an emphasis on broad dissemination of intelligence information,<sup>14</sup> enhanced declassification procedures,<sup>15</sup> and a recognition of civil liberties in the fight against terrorism<sup>16</sup>—have drawn into serious question the viability of *Central Intelligence Agency v. Sims*,<sup>17</sup> the 1985 Supreme Court decision that exempted the CIA from virtually any disclosure requirements under the Freedom of Information Act (FOIA).<sup>18</sup>

For the last two decades, near-blanket CIA secrecy has gone largely unchecked, principally because of the Court's ruling in *Sims*,<sup>19</sup> which granted the DCI broad and unreviewable authority to protect intelligence sources and methods from unauthorized disclosure.<sup>20</sup> Under the broad powers established in *Sims*, the CIA can sidestep strict classification procedures for withholding information<sup>21</sup> and can also withhold unclassified and declassified information merely on an *assertion* that "intelligence sources and methods" could be compromised. Further, the *Sims* ruling permits the CIA to avoid de novo judicial review of CIA assertions that "intelligence sources and methods" are actually at stake.<sup>22</sup>

The sweeping secrecy that the *Sims* Court has sanctioned effectively blocks public and press efforts to evaluate CIA performance, thus making accountability difficult, if not impossible. Indeed, the CIA's widely publicized failures in connection with the 9/11 terrorist attacks illustrate the folly of unchecked secrecy, which not only cloaks questionable Agency activities but also conceals grave problems in CIA management. These problems were further evidenced in the CIA's miscalculations and false assessments of Iraqi weapons strength, which were used to justify the American invasion of Iraq.<sup>23</sup>

Over the years, the *Sims* precedent has blocked access to CIA-held

---

12. 150 CONG. REC. S11939-01, 12001 (daily ed. Dec. 8, 2004).

13. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. at 3638-3872.

14. See *infra* notes 203-05 and accompanying text.

15. See *infra* notes 221-23 and accompanying text.

16. See *infra* notes 217-20 and accompanying text.

17. 471 U.S. 159 (1985).

18. 5 U.S.C. § 552 (2005).

19. 471 U.S. 159

20. *Id.* at 168-70.

21. *Id.* at 183-84 (Marshall, J., concurring).

22. *Id.* at 190 (Marshall, J., concurring).

23. REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. Rep. No. 108-301 (2004) [hereinafter PREWAR INTELLIGENCE REPORT].

information in a long line of cases that cover a wide array of issues of public interest.<sup>24</sup> In 2004, for example, the Supreme Court let stand a federal appellate court decision that cited *Sims* repeatedly in its rationale to allow the government to withhold basic information on persons detained after the terrorist attacks.<sup>25</sup>

The authors believe that *Sims* was wrongly decided in 1985, but this Article intends to show that, right or wrong, *Sims* is no longer controlling precedent when viewed in light of the Intelligence Reform Act. This Article asserts that the CIA's ability to deny FOIA requests should be sharply circumscribed in accordance with a new information paradigm of maximum dissemination as established in the Act. Part I discusses the FOIA, its statutory exemptions and its legislative history. Part II examines the *Sims* decision and argues that the Court's ruling contravened Congress's intent to require the fullest disclosure possible under the FOIA. Part III summarizes the changes established by the Intelligence Reform Act and examines the legislative history of the Act to clarify the plain meaning of its text. This Article concludes that the Intelligence Reform Act offers a new intelligence information policy that recognizes that *carte blanche* CIA secrecy has been outmoded and acknowledges that this nation has experienced a profound shift in terms of what

---

24. See, e.g., *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at \*14 (N.D. Tex. Feb. 26, 1999), *aff'd per curiam*, 208 F.3d 1007 (5th Cir. 2000) (rejecting a rival bidder's request for the unclassified records on CIA involvement in the award of an oil-production agreement with the former Yemen Arab Republic); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003) (rejecting a request for a forty-year-old CIA compilation of the biographies of Cuban leaders); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 1041 (2004) (rejecting a request for basic information on persons detained after the 9/11 attacks); *Maynard v. CIA*, 986 F.2d 547 (1st Cir. 1993) (withholding information concerning the disappearance of a pilot during a flight over Cuba in 1961. The request was made by his former wife in 1993.); *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989) (rejecting a request for information concerning the sabotage of the Greenpeace vessel "Rainbow Warrior," which was bombed and sank in a New Zealand harbor in 1985); *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) (rejecting a request for access to forty-year-old CIA records on an alleged plot by Dominican Republic government agents to kidnap President John F. Kennedy's daughter Caroline); *Rubin v. CIA*, 01 Civ. 2274 (DLC), 2001 U.S. Dist. LEXIS 19413 (S.D.N.Y. Nov. 30, 2001) (rejecting a doctoral student's request for information on the participation of deceased British poets Stephen Spender and T.S. Eliot in a CIA-funded European cultural organization); *Aftergood ex rel. Fed'n of Am. Scientists v. CIA*, Civ. No. 98-2107 (TFH), 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 12, 1999) (rejecting a request for the Clinton Administration's budget proposal for CIA intelligence-related activities in 1999).

25. *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (holding that the government can withhold the 9/11 detainees' names, their attorneys' names, dates of arrest or release, locations of arrest and detention, and reasons for detention). In this case, the Justice Department relied principally on Exemption 7, the FOIA exemption for law enforcement records. 5 U.S.C. § 552(b)(7) (2005). However, the case cited *Sims* at least eleven times as legal authority to withhold information on the detainees that had been obtained or held by the CIA.

the public has come *to expect* to know about what their government is doing in their name.

### I. THE FOIA AND OPEN GOVERNMENT

Government secrecy in matters of American national security has a history as old as the nation.<sup>26</sup> Often, however, the government's need for confidentiality in defending the nation and in conducting foreign relations conflicts with the democratic principles of an open society and the First Amendment rights of citizens to debate important national policy issues.<sup>27</sup> *CIA v. Sims* illustrates this clash between the competing democratic values of government transparency and the practical needs for government secrecy.<sup>28</sup> The challenge that faced the *Sims* Court was to resolve the conflict between the opposing policy objectives evinced in the Freedom of Information Act (FOIA)<sup>29</sup> and the National Security Act.<sup>30</sup> This Part discusses the FOIA and its legislative history.

Congress enacted the FOIA in 1966 and has amended it in significant respects over the past forty years.<sup>31</sup> The FOIA applies to records held by the dozens of varied executive branch agencies, such as the Federal Labor Relations Authority, the Food and Drug Administration, and the Environmental Protection Agency. It also applies to the cabinet offices, such as the departments of State, Defense and Commerce, and includes sub-departments such as the FBI.<sup>32</sup> The statute makes these records available to "any person"

26. See Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 349-50 (1986). For example, in the first twenty-nine essays of *THE FEDERALIST*, the main argument for the Constitution, as set forth by Alexander Hamilton, James Madison and John Jay, focused on the risks of foreign war and influence. See *id.* A decade earlier, George Washington wrote to one of his secret agents during the War of Independence: "The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . ." *Sims*, 471 U.S. at 172 n.16, (citing Letter from George Washington to Colonel Elias Dayton (July 26, 1777), in 8 WRITINGS OF GEORGE WASHINGTON 478-79 (J. Fitzpatrick ed., 1933)).

27. See Edgar and Schmidt, *supra* note 26, at 352.

28. *Sims*, 471 U.S. at 190 (Marshall, J., concurring).

29. 5 U.S.C. § 552 (2005).

30. National Security Act of 1947, ch. 343, 61 Stat. 495-510 (1947).

31. The FOIA was amended in 1974, 1976, 1986, and 1996. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat 3048 (1996).

32. U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & POLICY OVERVIEW MAY 28, 2002 [hereinafter FOIA GUIDE].

upon request.<sup>33</sup> A FOIA requester is not required to explain why a record is being requested, and the burden is on the government to explain why disclosure is refused.<sup>34</sup> The FOIA does not apply to records held by state or local governments, Congress, the courts, municipal corporations, private individuals, private companies, or private entities holding federal contracts.<sup>35</sup>

Since its enactment, the FOIA has proved to be a valuable tool for informing the public about important issues of public interest and for filling gaps in history with previously overlooked or concealed information.<sup>36</sup> Congress has noted that the FOIA has “led to the disclosure of waste, fraud, abuse, and wrongdoing” in the federal government, and the “identification of unsafe consumer products, harmful drugs, and serious health hazards.”<sup>37</sup>

The FOIA creates a judicially enforceable policy that embodies a strong presumption “of full agency disclosure”<sup>38</sup> grounded in the principle of accountability that in a representative democracy, the “public as a whole has a right to know what its Government is doing.”<sup>39</sup> As the Supreme Court observed in an early FOIA opinion, “The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>40</sup>

33. 5 U.S.C. § 552(f) (2005). *See also Sims*, 471 U.S. at 182 (Marshall, J., concurring).

34. 5 U.S.C. § 552(f) (2005). Before the FOIA was signed into law, the public and press had no legal remedy when they were denied access to government-held information. H.R. REP. NO. 89-1497, at 5 (1966). The FOIA replaced Section 3 of the Administrative Procedure Act (APA) of 1946. Administrative Procedure Act, 79 Pub. L. No. 404, 60 Stat. 238 (1946). APA Section 3 ostensibly was a public information provision to allow the public to gain access to “matters of official record” held by the federal government. S. REP. NO. 89-813, at 4 (1965). But the law was “full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities. . . .” S. REP. NO. 89-813, at 3.

35. FOIA GUIDE, *supra* note 32, at 29-31.

36. *See* H.R. REP. NO. 104-795, §§ 2(a)(3) & (4) (1996).

37. *Id.* In recent years, for example, the *Philadelphia Inquirer* used the FOIA to learn that federal citations for pollution law violations plummeted during the early years of the George W. Bush administration, dropping thirty-five percent in 2002-2003 compared to the previous year. Seth Borenstein, *Pollution Citations Plummet Under Bush*, THE PHILA. INQUIRER, Dec. 9, 2003, at A1. The *Dayton Daily News* obtained government documents under the FOIA disclosing that the government largely ignored sexual assault charges brought by women in the military against enlisted men and officers. FOI SERV. CTR., REPORTERS COMM. FOR FREEDOM OF THE PRESS, HOW TO USE THE FEDERAL FOI ACT 2 (Rebecca Daugherty ed., 9th ed. 2004). And the *San Francisco Chronicle* acquired records that revealed that during the 1950s and 1960s, the FBI covertly campaigned to fire University of California President Clark Kerr and conspired with the CIA director to pressure the California Board of Regents to force out liberal professors. Seth Rosenfeld, *Winning Series Uncovers FBI Secrets Using the FOIA*, THE BRECHNER REPORT, 8 (Dec. 2003).

38. S. REP. NO. 89-813, at 3.

39. *Id.* at 5.

40. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The FOIA's legislative history reflects that Congress was guided by a philosophy that linked a policy of full agency disclosure to a democratic society.<sup>41</sup> A 1965 Senate report, which is widely considered by Congress and the Supreme Court as the leading indicator of the FOIA's legislative intent,<sup>42</sup> instructs that: "[a] government by secrecy benefits no one . . . . It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."<sup>43</sup> In the years since the statute was signed into law by President Lyndon B. Johnson on July 4, 1966,<sup>44</sup> Congress has repeatedly reiterated this presumption of government openness,<sup>45</sup> and the Supreme Court has consistently recognized this principle.<sup>46</sup>

Although the FOIA's crafters understood that citizens in a democracy must have access to government information in order to make informed decisions,<sup>47</sup> lawmakers also recognized that at times secrecy is necessary for the government to function effectively.<sup>48</sup> Congress, therefore, created nine statutory exemptions that cover certain categories of information that agencies may, but are not required to, withhold.<sup>49</sup> Congress and the courts have made it clear that the exemptions are limited, and outside of these enumerated categories, "all citizens have a right to know."<sup>50</sup> Lawmakers declared that the statute thus provides a "workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible

---

41. See generally S. REP. No. 89-813; H.R. REP. No. 89-1497 (1965). See also Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 9-10 (2003).

42. In a series of majority opinions, the Supreme Court has cited this 1965 Senate report as the primary indicator of the FOIA's legislative purpose. Justice Byron White wrote: "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to . . . secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973) (citing S. REP. No. 89-813). Justice William J. Brennan wrote that the FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting S. REP. No. 89-813, at 3).

43. S. REP. No. 89-813, at 10.

44. See Act of 1966, Pub. L. 89-487, 80 Stat. 250 (1966).

45. See *infra* notes 53 to 93 and accompanying text.

46. See, e.g., *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 493-94 (1994); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *Robbins Tire & Rubber Co.*, 437 U.S. at 220; *Rose*, 425 U.S. at 360-61; *Mink*, 410 U.S. at 80.

47. See H. REP. No. 89-1497, at 2-3, 5-6 (1965).

48. S. REP. No. 89-813, at 3.

49. 5 U.S.C. § 552(b)(1-9) (2005). The FOIA does not apply to matters that fall under the categories of (1) classified information and national security; (2) internal agency personnel information; (3) information exempted by statutes; (4) trade secrets and other confidential business information; (5) agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological and geophysical information.

50. S. REP. No. 89-813, at 6.



disclosure.”<sup>51</sup> The Supreme Court has noted that the FOIA exemptions are strictly limited and “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”<sup>52</sup>

Congress strengthened the FOIA in 1974 through several amendments, which were prompted in great part by the Watergate scandal during the Richard M. Nixon Administration.<sup>53</sup> One of the major changes was a substantial revision of Exemption 1, the national security exemption, which is the only FOIA exemption that allows the executive branch, rather than Congress, to determine the criteria for disclosing information.<sup>54</sup> We turn next to an analysis of Exemption 1, which surfaced as a critical and divisive issue among the Court’s justices in *CIA v. Sims*.<sup>55</sup> The legislative history of the 1974 amendments plainly shows that Congress revised Exemption 1 explicitly to reiterate its intent to grant public access to federal agency records whenever possible—even when national security issues are raised.<sup>56</sup>

#### A. The National Security Exemption

Under Exemption 1’s current language, which was crafted in 1974, the FOIA does not apply to matters that are both “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy *and are in fact properly classified pursuant to such Executive order . . .*”<sup>57</sup> Exemption 1’s original 1966 language said only that the FOIA did not apply to matters “specifically required by executive order to be kept secret in the interest of national defense or foreign policy.”<sup>58</sup> The revised language reflects Congress’ intention to provide for judicial review of purportedly classified documents to confirm that the material does indeed fall under the enumerated categories of information that can be classified under

51. *Id.* at 3.

52. *Rose*, 425 U.S. at 361.

53. *Freedom of Information, Executive Privilege, Secrecy in Government: Hearing Before the Subcomms. on Administrative Practice and Procedure and Separation of Powers of the Comm. on the Judiciary, and the Subcomm. on Intergovernmental Relations of the Comm. on Governmental Operations*, 93d Cong. 209-10 (1973) (“Government secrecy breeds Government deceit . . . High government officials sat around in the Attorney General’s office calmly discussing the commission of bugging and mugging and kidnapping and blackmail . . . Federal officials who want their activities to remain hidden from public view are going to have to tell us why, and their reasons are going to have to be very convincing and very specific”) (statement of U.S. Sen. Edward Kennedy).

54. 5 U.S.C. § 552(b)(1) (2005).

55. *See Sims*, 471 U.S. at 188-90 (Marshall, J., concurring).

56. *See* An Act to Amend the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561, 1-3 (1974) (codified as amended at 5 U.S.C. § 552(a)(4)(B) (2005)); H.R. REP. No. 93-876, at 12 (1974); S. REP. No. 93-1200, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6290.

57. 5 U.S.C. § 552(b)(1) (2005) (emphasis added).

58. *Id.*

an executive order and to verify that the material was classified according to prescribed procedures.<sup>59</sup>

The 1974 amendment's check on *mere assertions* by the government that withheld information was classified came as a direct congressional response to a 1973 Supreme Court decision that restricted access to records on national security grounds, *Environmental Protection Agency v. Mink*.<sup>60</sup> This case concerned a FOIA request by Hawaiian U.S. Representative Patsy Mink, who asked the government to release environmental impact statements contained in a report on a planned underground nuclear test off the Alaskan coast.<sup>61</sup> The government refused to release the documents, arguing that the report was classified "top secret," and any material contained in the report was exempt from disclosure under Exemption 1.<sup>62</sup> Mink brought suit against the government to obtain the material.<sup>63</sup>

In a decisive seven-to-one opinion written by Justice Byron R. White, the Supreme Court held that classified documents were exempt from judicial review, and the government could meet its Exemption 1 burden simply by offering an affidavit that declared that the requested information was classified.<sup>64</sup> White reasoned that Exemption 1's plain text was ambiguous and provided no explicit oversight process to review whether proper procedure was used to classify a document.<sup>65</sup> He concluded that the national security exemption neither permitted nor compelled *in camera* inspection by judges to sort out documents that were not classified.<sup>66</sup> The *Mink* Court thus held that an agency's *mere assertion* that requested material was classified was sufficient to justify nondisclosure.<sup>67</sup>

Congress responded swiftly to the *Mink* Court's ruling. Declaring that the Court had contravened the FOIA's legislative intent,<sup>68</sup> lawmakers revised Exemption 1.<sup>69</sup> Under Exemption 1's new language, courts were allowed to

---

59. See H.R. REP. NO. 93-876, at 12; S. REP. NO. 93-1200, at 12; 88 Stat. 1561.

60. *Mink*, 410 U.S. at 73.

61. *Id.* at 75.

62. *Id.*

63. Mink sued in the U.S. District Court for the District of Columbia to obtain the information under the FOIA, and the court granted summary judgment in favor of the government. *Mink*, 410 U.S. at 78. The U.S. Circuit Court of Appeals for the District of Columbia reversed the decision, ruling that the national security exemption allowed the executive branch to withhold only the portions of the requested documents that were classified, not the entire record. The court of appeals directed the lower court to conduct an *in camera* review of the files to determine whether the specific information requested was not classified and could be released. *Id.*

64. *Id.* at 84-85.

65. *Id.* at 83.

66. *Id.* at 81.

67. *Id.* at 83-84.

68. See H.R. REP. NO. 93-1380, at 12 (1974); S. REP. NO. 93-1200, at 12 (1974).

69. 88 Stat. at 1561.

exercise de novo judicial review, including *in camera* inspection of documents, to look beyond the mere claim that material had been classified and to confirm that classification was proper.<sup>70</sup> In other words, the courts can review a document to make sure that it was withheld according to the President's executive order on Classified National Security Information, which sets out both substantive and procedural criteria for withholding national security information.<sup>71</sup> Substantive criteria enumerate which categories of information may be classified, and procedural criteria explain the strict process by which national security information is classified.<sup>72</sup>

In addition to establishing judicial review in an Exemption 1 FOIA case,<sup>73</sup> the 1974 amendments further strengthened the right to know by requiring all agencies to segregate and release nonexempt information from a record that contains exempt information.<sup>74</sup> As this Article will demonstrate in the next Part, it is significant to note that Congress explicitly intended that the segregation-and-disclosure rule applied to Exemption 1.<sup>75</sup>

By amending Exemption 1 to require de novo judicial review, and by establishing that the segregation-and-disclosure requirement applies even to matters of national security, Congress took its first step to explicitly check exclusive CIA authority over whether to release a government record. Two years later, Congress for the second time nullified a Supreme Court FOIA decision that granted agencies too much discretion over nondisclosure decisions.

---

70. *Id.*

71. See S. REP. No. 93-1200. Presidential classification standards vary from administration to administration. See, e.g., George W. Bush Admin. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003); William J. Clinton Admin. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995); Ronald Reagan-George H.W. Bush Admin. Exec. Order No. 12,356, 3 C.F.R., 166 (1982); Jimmy Carter Admin. Exec. Order No. 12,065, 3 C.F.R. 190 (1978). [Eds. BB 14.7 says not to include the name of the president who issued the order, but including it seems to make sense in this context]

72. For example, some of the categories mentioned in the current executive order include military plans, programs for safeguarding nuclear materials or facilities, foreign relations activities and intelligence operations. See George W. Bush Admin. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003). Regarding process, only specifically designated officials may classify information, and classified information must be marked to show the identity of the classification authority, the classification level, and classification instructions. *Id.*

73. Under Exemption 1's revised language, judicial oversight is still strictly limited. A judge cannot challenge the classification standards adopted by a president; a judge can only determine whether the information was classified according to its content and proper procedure as set forth in an executive order.

74. 5 U.S.C. § 552(a)(4)(B) (2005). See also FOIA GUIDE *supra* note 32, at 122-23.

75. See *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996); *Krikorian v. U.S. Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993).

## B. Congress Restricts Agency Discretion

In 1976, Congress revised the FOIA again—this time to restrict an agency's discretion when an agency invokes Exemption 3<sup>76</sup> as ground for nondisclosure.<sup>77</sup> Under FOIA Exemption 3, agencies can refuse a FOIA request for information if that information is shielded from disclosure under any other federal statutes, including statutes enacted before the FOIA was passed.<sup>78</sup> This amendment pertains directly to *CIA v. Sims* because the CIA refused disclosure on the ground that the National Security Act<sup>79</sup> qualified as an Exemption 3 withholding statute.<sup>80</sup>

In *Administrator, FAA v. Robertson*,<sup>81</sup> a consumer rights group requested FAA reports in 1975 on the operations and maintenance performance of commercial aircraft. The FAA withheld the information, asserting that Section 1104 of the Federal Aviation Act of 1958<sup>82</sup> qualified as a withholding statute under Exemption 3.<sup>83</sup> Section 1104 allowed the administrator broad discretion to withhold a requested record when, in the administrator's view, disclosure would adversely affect the agency and was not required in the public interest.<sup>84</sup> The consumer rights group sued to gain access to the reports.<sup>85</sup>

On appeal, the Supreme Court reversed decisions by the D.C. District Court and the D.C. Circuit Court, both of which had ordered disclosure of the reports. Chief Justice Warren Burger, writing for the Court, upheld the FAA Administrator's broad discretion to withhold records, holding that a statute need not precisely identify specific categories of data that may be withheld in order to qualify as a withholding statute under Exemption 3.<sup>86</sup> Justices William O. Douglas and William J. Brennan dissented, supporting the lower courts' view that Section 1104's discretionary nature and vague public interest standard gave the agency more discretion than the FOIA allows.<sup>87</sup>

76. 5 U.S.C. § 552(b)(3) (2005).

77. H.R. REP. NO. 94-880, at pt. 1, 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2204-05. *See also* *Sims v. CIA*, 642 F.2d 562, 567 (D.C. Cir. 1980).

78. 5 U.S.C. § 552(b)(3) (2005); *see* FOIA GUIDE, *supra* note 32, at 154.

79. National Security Act of 1947.

80. *Sims*, 471 U.S. 159.

81. *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975).

82. 49 U.S.C. § 1504 (1982).

83. *Robertson*, 422 U.S. at 265-67 (citing 49 U.S.C. § 1504).

84. *Id.* at 259.

85. The U.S. District Court for the District of Columbia ruled against the government, holding that Section 1104 of the Federal Aviation Act did not qualify as an exempting statute under Exemption 3. *Robertson v. Butterfield*, No. 71-1970 (D.C. Cir. Oct. 31, 1972). The D.C. Circuit affirmed the district court's decision, holding that the discretionary nature of Section 1104 and its vague public interest standard were insufficient for it to qualify as a specific exempting statute under the meaning of Exemption 3. *Robertson v. Butterfield*, 498 F.2d 1031, 1036 (D.C. Cir. 1974).

86. *Administrator, FAA*, 422 U.S. at 266-67.

87. *Id.* at 268 (Douglas, J., & Brennan, J., dissenting).

In response to the *Robertson* opinion, Congress revised Exemption 3 explicitly to restrict an agency executive's discretion to withhold information.<sup>88</sup> In its original 1966 language, Exemption 3 said only that the FOIA did not apply to matters "specifically exempted from disclosure by statute."<sup>89</sup> Congress amended this language in 1976 with the addition of a limiting two-part test. Under the revised language, the FOIA does not apply to matters that are "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."<sup>90</sup> Echoing the dissenting opinion by Justices Douglas and Brennan, lawmakers said they made these changes because the Court's broad construction of Exemption 3's 1966 plain text gave too much discretion to agency officials and conflicted with Congress's intent to provide as much disclosure as possible.<sup>91</sup> Congress declared that the Supreme Court's majority interpreted Exemption 3 in a way that granted the FAA Administrator "*carte blanche* to withhold any information he pleases."<sup>92</sup>

As this Part has shown, the FOIA's strong presumption for disclosure is evinced clearly in its plain text and has been reiterated frequently through its extensive legislative history.<sup>93</sup> This policy stands in sharp relief against the objectives of the National Security Act of 1947,<sup>94</sup> which was the statutory basis that the CIA invoked to justify withholding in *CIA v. Sims*.<sup>95</sup>

---

88. H.R. REP. No. 94-880, pt. 1, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2204-05.

89. 5 U.S.C. § 552(b)(3) (1966) (prior to the 1976 amendment).

90. 5 U.S.C. § 552(b)(3) (2005).

91. H.R. REP. No. 94-880, pt. 1, at 23.

92. *Id.*

93. In 1996, the last time Congress amended the FOIA, lawmakers nullified a Ninth Circuit Court opinion because, in Congress's judgment, the ruling contravened the FOIA's legislative intent to require as much disclosure as possible. In *SDC Development Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976), the Ninth Circuit Court upheld the government's right to withhold a computerized database on the ground that electronically recorded and stored information does not qualify as "agency record" under the FOIA. The House report that accompanied the 1996 amendments (commonly known as the Electronic Freedom of Information Act of 1996) rejected the Ninth Circuit Court's decision, emphasizing that government-held information in *any* form, including electronic or computerized formats, is subject to the FOIA's disclosure requirements and strong presumption of disclosure. See H.R. REP. No. 104-795, at 20 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3463.

94. National Security Act of 1947.

95. *CIA v. Sims*, 471 U.S. 159 (1985).

## II. CIA V. SIMS

*CIA v. Sims* concerned a FOIA request for records detailing a series of illegal CIA psychological experiments<sup>96</sup> conducted in the United States between 1953 and 1966.<sup>97</sup> This research, code-named “MKULTRA,” was authorized in an effort to compete with Soviet and Chinese experiments in brainwashing and interrogation techniques.<sup>98</sup> About eighty private and public research facilities—including several major American universities such as Stanford, Harvard and Princeton, along with various hospitals and prisons<sup>99</sup>—participated in the clandestine project in which unsuspecting subjects were given then-experimental drugs such as LSD and mescaline.<sup>100</sup> In all, 185 researchers were involved. In some of the experiments, subjects were picked up in bars by prostitutes, given drugs, and then taken for observation to CIA safehouses in New York and San Francisco that were equipped with recording devices and two-way mirrors.<sup>101</sup> As a result of these and other experiments, at least two persons died and others suffered health problems.<sup>102</sup>

Information about these experiments and other questionable CIA activities, such as domestic spying during the Vietnam War era, was leaked to the press and reported in newspapers; this information prompted Congress to investigate CIA operations.<sup>103</sup> Public Citizen, a Ralph Nader organization, filed a FOIA request for the CIA’s MKULTRA records, seeking the names of the research facilities, the identities of the researchers, and the details of the project’s

96. These CIA psychological tests were an illegal violation of the charter that established the Agency. Under the National Security Act, the CIA was specifically denied powers of domestic intelligence gathering, specifically, “no police, subpoena, or law enforcement powers or internal security functions.” Pub. L. No. 80-253, § 102(d)(3) (codified at 50 U.S.C. § 403-4(d)(1)).

97. *Sims*, 471 U.S. at 161-62.

98. *Id.*

99. Also included among the universities that were identified are Massachusetts Institute of Technology, Cornell, and the University of Michigan. *Sims v. CIA*, 479 F. Supp. 84, 85 n.2 (1979).

100. *Sims*, 471 U.S. at 161-62.

101. MARTIN A. LEE AND BRUCE SHLAIN, *ACID DREAMS: THE CIA, LSD, AND THE SIXTIES REBELLION* 32 (1985).

102. *Sims*, 471 U.S. at 159-60, 162 n.4; LEE & SHLAIN, *supra* note 101, at 29-31; *See also* 9/11 COMMISSION REPORT, *supra* note 2, at 89.

103. News reports that the CIA had engaged in illegal activities and abuses were published in 1974 by *The New York Times*. *See, e.g.*, Seymour Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1, A16. The first congressional probe resulted in the Rockefeller Commission Report in 1975, which disclosed details of the MKULTRA operation. Consequently, Sen. Frank Church was named to head a Senate committee to further investigate those and other allegations. *Sims v. CIA (Sims I)*, 642 F.2d 562, 564 (D.C. Cir. 1980). *See also* BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* 42 (1999).

research contracts and grants.<sup>104</sup> The CIA disclosed the names of fifty-nine research facilities and the terms of the contracts, but refused to name twenty-one other facilities and kept secret the identities of all the project's researchers.<sup>105</sup>

Public Citizen sued to obtain the remaining records, embarking on an eight-year-long court fight that ended in 1985 when the Supreme Court ruled that the CIA could withhold the information on the ground that the National Security Act of 1947<sup>106</sup> granted the DCI broad discretion to protect "intelligence sources and methods" from unauthorized disclosure.<sup>107</sup>

### A. The Supreme Court Majority Opinion

*CIA v. Sims* reached the Supreme Court after the U.S. Court of Appeals for the District of Columbia Circuit ruled that an "intelligence source" is defined as someone who is promised confidentiality *and* whose information could not be obtained through other means.<sup>108</sup> Under this definition, the CIA would have

104. *Sims*, 471 U.S. at 162-64. John Cary Sims was the Public Citizen attorney who filed the lawsuit. A second respondent, Sidney M. Wolfe, M.D., was director of Public Citizen Health Research Group. *Id.* at 162-63.

105. *Sims*, 471 U.S. at 163. It was revealed during the committee hearings headed by Sen. Church that, in 1973, CIA Director Richard Helms had ordered all MKULTRA records and documents destroyed to avoid their ever being disclosed. However, in a bizarre and unexpected revelation, a CIA staff member testified that he discovered about 8000 pages of documents that inadvertently escaped destruction. The information sought by Public Citizen was contained in these records. *Id.* at 163 n.5. See also JAMES X. DEMPSEY, *The CIA and Secrecy*, in *A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW* 41-42 (Athan G. Theoharis, ed., 1998).

106. National Security Act of 1947.

107. See *Sims*, 471 U.S. at 174-77.

108. *Sims v. CIA (Sims II)*, 709 F.2d 95, 99-100 (1983). Before reaching the Supreme Court, the *Sims* case was heard by lower courts in *Sims v. CIA*, 479 F.Supp. 84 (D.D.C. 1979); *Sims v. CIA (Sims I)*, 642 F.2d 562 (D.C. Cir. 1980); and *Sims v. CIA (Sims II)*, 709 F.2d 95 (D.C. Cir. 1983).

Initially, the D.C. District Court held that the names of institutions and researchers could not be withheld because they were not "intelligence sources" within the meaning of Section 102(d)(3) of the National Security Act of 1947. The district court reasoned that in order for the CIA director to declare the researchers to be "intelligence sources," there must be "clear, non-discretionary guidelines to test whether an intelligence source is involved in a particular case." *Sims*, 479 F. Supp. at 87-88.

On appeal, the D.C. Circuit Court held in *Sims I* that the district court's analysis of Section 102(d)(3) lacked a coherent definition of "intelligence sources." The D.C. Circuit Court remanded the case to the district court for reconsideration based on a definition of "intelligence sources" crafted by the appellate court:

(A)n 'intelligence source' is a person or institution that provides, has provided or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it. *Sims I*, 642 F.2d at 571.

been required to release the names of MKULTRA researchers who did not explicitly request confidentiality. Both sides appealed because the Agency wanted to withhold all the names in question, whereas Public Citizen wanted all the identities disclosed.

Chief Justice Burger, writing for the Court majority, framed two principal issues in *Sims v. CIA*:<sup>109</sup> whether Section 102(d)(3) of the National Security Act qualified as a withholding statute under FOIA Exemption 3,<sup>110</sup> and whether the MKULTRA researchers qualified as “intelligence sources” under Section 102(d)(3).<sup>111</sup>

### 1. The National Security Act

After World War II, the National Security Act was enacted by Congress to reorganize the nation’s military and intelligence establishments and to mandate changes in foreign policy.<sup>112</sup> The law was approved in the aftermath of harsh government and public criticism over the inadequate performance of U.S. intelligence operations in connection with the attack on Pearl Harbor.<sup>113</sup> A 1947 Senate report that accompanied the National Security Act pointed to this nation’s “limited intelligence of the designs and capacities of our enemies” as convincing evidence that the United States “would be imperiled were we to ignore the costly lessons of the war and fail to . . . prevent the recurrence of these defects.”<sup>114</sup>

The National Security Act created the CIA and the National Security Council in an effort to improve the nation’s ability to gather and analyze intelligence information not only during times of war but also during peacetime.<sup>115</sup> The CIA was formerly known as the Central Intelligence Group, one of a number of small decentralized postwar intelligence groups.<sup>116</sup> The National Security Act authorized the CIA to be the exclusive organization for

---

On remand, the district court held that the CIA should disclose the identities of researchers who did not request confidentiality and ordered the Agency to disclose the names of the forty-seven researchers. On a second appeal, the D.C. Circuit Court held in *Sims II* that the district court incorrectly applied the definition of “intelligence sources.” The D.C. Circuit Court clarified that a researcher could be considered an “intelligence source” only if the researcher is promised confidentiality, and the information provided by the researcher could not be obtained through other means. *Sims II*, 709 F.2d at 99-100. After the D.C. Circuit Court’s *Sims II* decision, both sides appealed to the Supreme Court. *CIA v. Sims*, 471 U.S. 159 (1985).

109. *Sims*, 471 U.S. at 167.

110. *Id.* at 167, 177-81.

111. *Id.* at 167, 175-77.

112. S. REP. No. 80-239, at 2-3 (1947); *see also* H.R. REP. No. 80-961, at 2-3 (1947).

113. S. REP. No. 80-239, at 2-3; *see also* H.R. REP. No. 80-961, at 2-3.

114. S. REP. No. 80-239, at 2.

115. *See* H.R. REP. No. 80-961, at 2-3.

116. *See id.*



collecting and evaluating foreign intelligence information.<sup>117</sup>

The *Sims* majority's decision was based principally on a key provision in the National Security Act that made the DCI "responsible for protecting intelligence sources and methods from unauthorized disclosure."<sup>118</sup> The majority held that this statutory mandate qualified the National Security Act as a withholding statute under FOIA Exemption 3.<sup>119</sup>

However, neither the National Security Act's plain text nor its legislative history ever defined "intelligence sources" or provided clarifying language for this term, thus leading to the second issue identified by the *Sims* Court: whether the MKULTRA researchers qualified as "intelligence sources" under Section 102(d)(3). In order to resolve this question, the *Sims* Court needed to settle on a definition for "intelligence sources."

At the outset, the Court majority rejected the D.C. Circuit Court's definition of "intelligence sources." Under the appellate court's interpretation of Section 102(d)(3), the CIA director is authorized to protect intelligence sources from disclosure under the FOIA only if such confidentiality is needed to obtain information that could not be acquired by other means.<sup>120</sup> The Supreme Court reasoned that this definition was drawn too narrowly and would result in disclosure of more information than should be made public.<sup>121</sup> Had Congress intended such a limitation, Burger argued, lawmakers would have drafted legislation that narrowed the category of protected sources.<sup>122</sup> In the judgment of the Court majority, a narrow interpretation of "intelligence sources" ignored the practical necessities of intelligence gathering and the unique responsibilities of the Agency:<sup>123</sup> "To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosure that would unnecessarily compromise the Agency's efforts."<sup>124</sup>

The Court therefore fashioned a new definition: "An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations . . . related to the Agency's intelligence function."<sup>125</sup>

117. National Security Act of 1947: Hearing on H.R. 2319 Before the Comm. on Expenditures in the Exec. Dep't, 80th Cong, 5-6 (1947).

118. *CIA v. Sims*, 471 U.S. 159, 167-68 (1985) (citing 50 U.S.C. § 403(d)(3)).

119. *Sims*, 471 U.S. at 167.

120. *Id.* at 169.

121. *Id.* at 169-70.

122. *Id.* at 169.

123. *Id.*

124. *Id.*

125. *Id.* at 177. It is noteworthy that the source for this definition was the CIA itself. The original language for the CIA's proposed definition for "intelligence sources" can be found in Agency briefs filed with the D.C. Circuit Court in *Sims I*, 642 F.2d at 576 n.1.

## 2. Defining the Term ‘Intelligence Sources’

Burger said the Supreme Court’s definition of “intelligence sources” comports with the National Security Act’s plain text and legislative history, which suggest a broad authority for the CIA director to protect all sources of intelligence information from disclosure.<sup>126</sup> Burger reasoned that the government has a compelling interest in protecting not only secret information crucial to national security, but also the appearance of confidentiality, which is essential to the effective operation of the CIA.<sup>127</sup> The Chief Justice quoted Allen W. Dulles, one of the CIA’s founders and CIA director from 1953 to 1961, who said that even sources who freely supply intelligence information would “close up like a clam” unless they can count on the government for complete confidentiality.<sup>128</sup>

Burger frequently stressed the importance of showing “great deference” to Agency discretion, particularly decisions made by the DCI to withhold information.<sup>129</sup> Burger wrote that the DCI is granted broad powers specifically through Section 102(d)(3),<sup>130</sup> and the granting of such power is sound policy because the director is the only person familiar with the whole intelligence picture. According to Burger, the DCI is the person best suited to determine whether individual pieces of information—although not obviously important by themselves—can reveal intelligence sources and methods.<sup>131</sup> “The decisions of the Director, who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.”<sup>132</sup> Burger flatly rejected the idea that judges should have the power of de novo review in FOIA litigation for CIA-held information.<sup>133</sup> Burger asserted that de novo review in CIA cases poses inherent dangers because judges have “little or no background in the delicate business of intelligence gathering.”<sup>134</sup>

To defend the Court’s sweeping definition of “intelligence sources” and to further bolster the *Sims* Court’s rationale for granting the DCI broad and unreviewable authority over disclosure decisions under the FOIA, Burger pointed to an amendment to the National Security Act, known as the Central Intelligence Agency Information Act of 1984.<sup>135</sup> The amendment’s legislative history shows that the law was enacted after years of prodding by the Agency,

---

126. *Sims*, 471 U.S. at 169-170, 173.

127. *Id.* at 175.

128. *Id.*

129. *Id.* at 179.

130. *Id.* at 170.

131. *Id.* at 178.

132. *Id.* at 179.

133. *Id.* at 176.

134. *Id.*

135. *Id.* at 168 n.11, 174 n.19, citing Pub. L. No. 98-477, 98 Stat. 2009 (1984).

which wanted Congress to provide additional assurance that CIA sources would remain confidential.<sup>136</sup>

The 1984 amendment exempted the CIA's "operational files" from disclosure under the FOIA.<sup>137</sup> Some examples of information contained in operational files include details about organizational structure, numbers of personnel assigned to certain functions, and personnel names, titles, and salaries. The House report accompanying the amendment described operational files as those that consist of "records which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA. . . . A decade of experience has shown that certain specifically identifiable CIA operational records systems, containing the most sensitive information directly concerning intelligence sources and methods, inevitably contain few, if any, items which can be disclosed to FOIA requesters."<sup>138</sup> Therefore, these files were shielded from disclosure, because the CIA wanted relief from bureaucratic requirements to comply with certain FOIA requests that the Agency typically rejected.<sup>139</sup>

The CIA Information Act is particularly relevant to this Article's analysis because, unlike the National Security Act, the CIA Information Act was approved *after* FOIA's enactment. While Burger focused mainly on a provision of the CIA Information Act that enhanced confidentiality by exempting "operational files,"<sup>140</sup> he ignored key language that actually limits agency discretion over all other CIA documents and records.<sup>141</sup> Although the amendment exempted CIA "operational files" from disclosure, it also made clear that remaining Agency files are subject to the FOIA.<sup>142</sup> The House report that accompanied the CIA Information Act clearly stated that one of the purposes for exempting operational files was to improve the CIA's ability to respond to FOIA requests "in a timely and efficient manner, *while preserving undiminished the amount of meaningful information releasable to the*

136. H.R. REP. No. 98-726, at 4 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3742.

137. P.L. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C. § 431); *see also* H.R. REP. No. 98-726, at 4 (House Permanent Select Comm. on Intelligence). The CIA Information Act defines "operational files" as "(1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements of information exchanges with foreign governments or their intelligence or security services; (2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and (3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." P.L. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C. § 431).

138. H.R. REP. No. 98-726, at 4-5.

139. *Id.* at 4.

140. *CIA v. Sims*, 471 U.S. 159, 168 n.11, 174 n.19 (1985).

141. *See* 50 U.S.C. § 431, 98 Stat. 2209, 2209-2210 (2005).

142. Pub. L. No. 98-477, 98 Stat. 2209-2212 (1984).

public.”<sup>143</sup> The report declared:

The Agency’s acceptance of the obligation under the FOIA to provide information to the public not exempted under the FOIA is one of the linchpins of this legislation. The [FOIA] has played a vital part in maintaining the American people’s faith in their government, and particularly in agencies like the CIA that must necessarily operate in secrecy. *In a free society, a national security agency’s ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.*<sup>144</sup>

Furthermore, the CIA Information Act of 1984 contained provisions that explicitly authorize CIA disclosure obligations under the FOIA.<sup>145</sup> For example, the Act states that operational files “shall continue to be subject to search and review” for information subject to investigations by Congress, the Department of Justice, or other investigatory bodies into improper or unlawful activities.<sup>146</sup> Another provision requires that the Agency consult with the Archivist of the United States, the Librarian of Congress, and appropriate representatives selected by the Archivist in order to conduct periodic and systematic reviews of documents for their historical value, their declassification, and their release.<sup>147</sup>

Finally, and most importantly, the CIA Information Act reiterates that the FOIA establishes that judicial review, including *in camera* inspection, is available to a FOIA requester who alleges that the CIA has withheld a record improperly.<sup>148</sup> In fact, Burger’s assertion in *Sims* that de novo review in CIA cases poses dangers because judges have “little or no background in the delicate business of intelligence gathering”<sup>149</sup> directly conflicts with the legislative history of the 1974 FOIA amendments, which revised Exemption 1. The need for de novo judicial review in national security matters was expressed forcefully by Representative John Moss of California, widely recognized as the driving force behind the Freedom of Information Act of 1966 and a principal crafter of the statute’s 1974 amendments.<sup>150</sup> Moss argued that judges have the capacity to review even sensitive matters of national security.<sup>151</sup> “I do not think

---

143. H.R. REP. No. 98-726, at 4.

144. *Id.* at 9.

145. *See* Pub. L. No. 98-477, 98 Stat. 2209-2212 (1984).

146. 50 U.S.C. § 431, 98 Stat. 2209, 2209-2210.

147. 50 U.S.C. § 431, 98 Stat. 2210.

148. *Id.*

149. *CIA v. Sims*, 471 U.S. 159, 176 (1985).

150. From 1955 until the FOIA was enacted in 1966, Rep. Moss chaired two committees that steered the legislation for the FOIA. The Moss committees, as they were called, held 173 hearings and published 17 volumes of transcripts and 14 volumes of reports. JOHN T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE* 6-9 (3d ed. 2000). O’Reilly’s book is the leading legal practice guide on The Freedom of Information Act and the Privacy Act.

151. *See* House and Senate Debate on Freedom of Information Act Amendments of 1974, House Debate and Vote, Mar. 14, 1974 (Statement by Rep. John Moss), *reprinted in*

we have to make dummies out of [judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret,” Moss said during the House debate on the 1974 FOIA amendments. “No bureaucrat is going to admit he might have made a mistake.”<sup>152</sup> Moss said it was the intent of Congress in 1966, and again in 1974, to make it “crystal clear” that the courts must be “free to employ whatever means they find necessary to discharge their responsibilities” through comprehensive de novo review with respect to classified information.<sup>153</sup>

### B. The Marshall-Brennan Concurrence

In a strongly worded concurring opinion by Justice Thurgood Marshall that was joined by Justice William J. Brennan, Marshall disagreed with the majority on two important issues. First, he argued that the Court majority’s broad definition of “intelligence sources” exceeded the plain meaning and legislative history of “any congressional act,” and that it conflicted directly with the FOIA’s broad mandate for disclosure.<sup>154</sup> Second, he asserted that the Court majority should have ordered the CIA to justify withholding under Exemption 1 and not under Exemption 3.<sup>155</sup>

Marshall said he agreed with the *outcome* of the majority opinion; the definition of “intelligence sources” crafted by the D.C. Circuit Court was too narrow and would release more material than should be disclosed in the *Sims* case.<sup>156</sup> He argued, however, that the *Sims* Court majority went to the other extreme, crafting a “sweeping alternative.”<sup>157</sup> He rejected the majority definition of “intelligence source,” contending that its overly broad construction improperly equates “intelligence source” with the nearly limitless term, “information source.”<sup>158</sup> Under the majority definition, he argued, even newspapers, road maps and telephone directories would fall under the Court’s definition of “intelligence sources,” thereby casting an irrebuttable presumption of secrecy over an “expansive array of information” held by the CIA, including information that is of no intelligence value.<sup>159</sup>

According to Marshall, the term “intelligence source” does not have a single and readily-apparent definition compelled by the plain language of §

---

THE 1974 FOIA GUIDE, *supra* note 32, at 257.

152. *Id.*

153. *Id.* at 258.

154. *Sims*, 471 U.S. at 182 (Marshall, J., concurring).

155. *Id.* at 189-90.

156. *Id.* at 181-82, 194.

157. *Id.* at 182.

158. *Id.* at 187.

159. *Id.* at 191.

102(d)(3), as the majority justices concluded.<sup>160</sup> He argued that the legislative history of the National Security Act suggests a congressional intent to protect only those individuals who might be harmed or silenced if they were identified.<sup>161</sup> “The heart of the issue is whether the term ‘intelligence source’ connotes that which is confidential or clandestine, and the answer is far from obvious,” Marshall asserted.<sup>162</sup> He offered a compromise definition, which he said reflects the statutory language and legislative history of the National Security Act, while also falling within the congressionally-imposed limits on the CIA’s exercise of discretion.<sup>163</sup> He interpreted “intelligence sources” to refer only to sources who provide information on either an expressed or implied promise of confidentiality.<sup>164</sup> Marshall defended his definition, arguing that it would meet the CIA’s concerns about confidentiality because it would protect not only “intelligence sources” but also protect the kind of information that would lead to identifying such a source.<sup>165</sup>

Marshall reserved his harshest criticism for the CIA’s “litigation strategy,” which used Exemption 3 instead of Exemption 1 to withhold the requested MKULTRA data.<sup>166</sup> Marshall contended that by invoking Exemption 3 to withhold the information, the CIA “cleverly evaded” judicial *de novo* review<sup>167</sup>—a crucial check created by Congress specifically to limit federal agency discretion under the FOIA.<sup>168</sup> Marshall pointed out that Exemption 1 would have allowed for the same outcome—the withholding of the researchers’ identities—while at the same time preserving limits on Agency discretion.<sup>169</sup>

Exemption 1 provides two important checks on a federal agency’s discretion to withhold a record. The first restriction is procedural, in that an agency is not the judge of what can be classified; this determination is made by each presidential administration under an executive order.<sup>170</sup> Second, the judiciary has an important checking role through *de novo* review.<sup>171</sup> Under the power of judicial review in Exemption 1 cases, the courts have the authority to confirm that records asserted to be classified were indeed classified according

---

160. *Id.* at 187.

161. *Id.*

162. *Id.* at 186.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 184 n.3.

167. *Id.* at 190.

168. 5 U.S.C. § 552 (2005).

169. Marshall noted that under President Ronald Reagan’s executive order on classification, in effect at the time, “the Agency need make but a limited showing to a court to invoke Exemption 1 for that material.” *Sims*, 471 U.S. at 190 n.6 (Marshall, J., concurring) (citing Exec. Order No. 12,356, 3 C.F.R. 166 (1983)).

170. 5 U.S.C. § 552(b)(1)(A).

171. 5 U.S.C. § 552(a)(4)(B).

to guidelines established by an executive order.<sup>172</sup>

Marshall argued that the Court should have directed the CIA to withhold the MKULTRA materials under Exemption 1, the national security exemption.<sup>173</sup> He said Exemption 1 properly cloaks "classes of information that warrant protection, as long as the government proceeds through a publicly-issued, congressionally-scrutinized and judicially-enforced order."<sup>174</sup> He characterized the national security exemption as the keystone of a congressional system that balances deference to the executive branch's interest in maintaining secrecy with continued oversight by the judicial and congressional branches of government:<sup>175</sup> "Congress, it is clear, sought to assure that the government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure."<sup>176</sup>

In permitting the CIA to avoid *de novo* review, Marshall said the *Sims* majority enabled the CIA to sidestep requirements carefully crafted by Congress to limit the Agency's discretion.<sup>177</sup> As a result, the CIA has been exempt for the last two decades from releasing virtually any information that the CIA Director merely contends may qualify as, or compromise, a source of intelligence.<sup>178</sup> Under the sweeping *Sims* standard, the CIA:

(1) Need not go through a classification process to withhold information.<sup>179</sup>

(2) Can withhold unclassified information, regardless of how dated or innocuous it may be.<sup>180</sup>

(3) Need not assert that a disclosure conceivably could affect national security, nor even argue that it could reasonably be expected to cause

172. *Id.* "[T]he court shall determine the matter *de novo* and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section." See also H.R. REP. No. 93-1380, at 12 (1974); S. REP. No. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6290.

173. 5 U.S.C. § 552(b)(1). When the case was first heard by the U.S. District Court for the District of Columbia, the court held that the names of institutions and researchers could not be withheld because they were not "intelligence sources" within the meaning of Section 102(d)(3) of the National Security Act of 1947. *Sims*, 479 F. Supp. at 87. However, District Judge Louis F. Oberdorfer, who wrote the opinion, said that the names of the researchers could be classified for national security reasons under Exemption 1 to withhold their identities. *Id.* at 88. Oberdorfer indicated his willingness to reconsider the CIA's decision to withhold the MKULTRA information if the Agency refiled and claimed Exemption 1 protection. *Id.* at 88. However, the CIA stuck with its Exemption 3 litigation strategy throughout the proceedings.

174. *Sims*, 471 U.S. at 183 (Marshall, J., concurring).

175. *Id.*

176. *Id.* at 182, citing S. REP. NO. 89-813, at 10 (1965).

177. *Id.* at 189.

178. *Id.*

179. *Id.* at 183-84, 190.

180. *Id.* at 178 (majority opinion).

identifiable damage.<sup>181</sup>

(4) Is not required to show that an “intelligence source” had requested confidentiality.<sup>182</sup>

However, the passage of the Intelligence Reform and Terrorism Prevention Act of 2004<sup>183</sup> has seriously cast doubt on the viability of *Sims*. Because the new law amended the National Security Act of 1947,<sup>184</sup> any questions pertaining to access to CIA-held information under the FOIA must now be construed in light of the 2004 statute, which is examined in the next Part.

### III. INTELLIGENCE REFORM ACT NEGATES *SIMS* HOLDING

After years of government hearings and official reports on September 11th, Congress enacted the massive 234-page Intelligence Reform and Terrorism Prevention Act of 2004.<sup>185</sup> Among other provisions, the act completely overhauled the leadership of the United States intelligence apparatus,<sup>186</sup> largely by amending the National Security Act of 1947.<sup>187</sup> The “sources and methods” language that was construed in *Sims* appeared in Section 102(d)(3) of the original National Security Act,<sup>188</sup> which established the CIA and the Director of Central Intelligence, who headed both the Agency and, at least nominally, the entire intelligence community. This section provided, in pertinent part, that “the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure . . . .”<sup>189</sup>

#### A. Statutory Construction

That entire section was stricken by Section 1011 of the Intelligence Reform Act, which is subtitled “Reorganization and Improvement of Management of Intelligence Community.”<sup>190</sup> The new section completely rewrites Sections 102-104 of the National Security Act to create a new Director of National Intelligence (DNI), who, significantly, does not head the CIA, but rather stands above it as “head of the intelligence community” and “principal adviser to the President, to the National Security Council, and the Homeland Security

181. *Id.* at 190 (Marshall, J., concurring).

182. *Id.*

183. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

184. National Security Act of 1947, ch. 343, 61 Stat. 495-510.

185. Intelligence Reform and Terrorism Prevention Act of 2004.

186. *Id.* at §§ 1001-1103.

187. National Security Act of 1947.

188. *Id.* at § 102(d)(3).

189. *Id.*

190. Intelligence Reform and Terrorism Prevention Act of 2004 § 1011 (codified at 50 U.S.C. § 403 (2005)).



Council” on intelligence matters.<sup>191</sup>

In language almost identical to the old Section 102(d)(3), the new Section 102A(i)(1) charges the new DNI to “protect intelligence sources and methods from unauthorized disclosure.”<sup>192</sup> The similarity in language might appear to support merely transferring the statutory construction in *Sims* to any new case that might arise: the Supreme Court has certainly held Congress to the Court’s previous construction of a word or phrase when Congress uses the same word or phrase in a new statute.<sup>193</sup>

However, several factors grounded in text, context, and public policy militate against following that canon in this case. Above all, Congress itself had explicitly declined to endorse the *Sims* interpretation of that language more than a decade earlier.<sup>194</sup> In their report accompanying the Intelligence Authorization Act for Fiscal Year 1993,<sup>195</sup> House and Senate conferees declined to take any position “with respect to the interpretation of similar language in existing law in *ClA v. Sims* . . . .”<sup>196</sup>

Whether there is justification to permit the DCI to withhold information concerning intelligence sources and methods which is not classified, in response to requests made under the FOIA is a matter that deserves closer, more systematic review by the committees of jurisdiction prior to taking further legislative action. The conferees believe that this conference report, which addresses organizational structure, is not the appropriate vehicle to address this issue. Thus, in enacting subsection 103(c)(5) as contained in section 705, the conferees do not intend their action to constitute an endorsement of the holding in *Sims*.<sup>197</sup>

The Supreme Court has held that legislative history explicitly rejecting a prior statutory construction of reenacted legislative language is sufficient to put that construction to rest.<sup>198</sup> Surely, legislative history refusing to endorse a

191. 50 U.S.C. § 403(b)(1)-(3) (2005). Indeed, the new DNI is precluded from serving as what is now called “the Director of the Central Intelligence Agency.” § 403(c).

192. 50 U.S.C. § 403-1(i)(1) (2005).

193. *See, e.g.,* *Caminetti v. United States*, 242 U.S. 470, 487-88 (1917) (“This definition of an immoral purpose was given [by the Court] prior to the enactment of the act now under consideration, and must be presumed to have been known to Congress when it enacted the law here involved.”).

194. H.R. CONF. REP. NO. 102-963, at 88 (1992), as *reprinted in* 1992 U.S.C.C.A.N. 2605, 2614.

195. Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, 106 Stat. 3180 (1993).

196. H.R. CONF. REP. NO. 102-963, at 88

197. *Id.*

198. *See, e.g.,* *Commissioner v. Bilder*, 369 U.S. 499, 503 (1962). This case concerned the 1939 enactment of the tax code, under which meals and lodging in connection with medical treatment had been construed by the court as deductible expenses. When Congress reenacted the code in 1954, including the language regarding medical deductions, the House and Senate committee reports explicitly rejected the meals and lodging deduction. When the court faced the issue again in 1962, it held that the legislative history of the new act trumped the court’s construction of the old one.

prior statutory construction would defeat any argument that Congress acquiesced to that construction.

Although the review suggested by the conferees never took place, both the text and legislative history of the new act indicate that Congress created the new position of DNI, not because sensitive information was released too freely, but because it was not released freely enough.<sup>199</sup> As then-Senator Bob Graham (D-Fla.), former Chairman of the Senate Intelligence Committee and a conferee on the new legislation, remarked during debate on the conference report, "Our intelligence community has developed an unhealthy obsession with secrecy . . . [which] poses a serious and continuing threat to our national security."<sup>200</sup>

This legislation addresses this problem by directing that more rational guidelines for intelligence classification be established, and that an independent board be empowered to review these decisions. This is an important first step toward abandoning this dangerous obsession, and making sure that secrecy decisions are made for reasons of national security, rather than because agencies are trying to bury their mistakes.<sup>201</sup>

Textually, both old and new statutes discuss the dissemination of intelligence information within the sections prescribing protection for sources and methods. But whereas the old statute merely charges the CIA with "appropriate dissemination" of intelligence within the government,<sup>202</sup> the new statute expressly imposes a check on discretion to withhold information by requiring the DNI to "maximize the dissemination of intelligence" by establishing and implementing "guidelines" for the intelligence community.<sup>203</sup> Furthermore, these guidelines are to cover not only "classification of information," but also "access to and dissemination of intelligence."<sup>204</sup>

Most importantly, the guidelines make more information available by providing for the "[p]reparation of intelligence products in such a way that source information is removed to allow for dissemination at the lowest level of classification possible or in unclassified form to the extent practicable."<sup>205</sup> Although this provision primarily governs dissemination within the government, it is plainly incompatible with the unfettered, case-by-case discretion that the *Sims* Court granted the DCI to determine what information might, however indirectly, compromise intelligence sources. If the guidelines comply with the mandate of Congress, and the agencies comply with the guidelines, unclassified records will necessarily protect those sources.

Apart from intelligence sources and methods, the operational files of the CIA generally constitute the most sensitive records within the Agency. Here,

---

199. See *infra* notes 228-70 and accompanying text.

200. 150 CONG. REC. S11939-01 (daily ed. Dec. 8, 2004).

201. *Id.*

202. National Security Act of 1947 § 102(d)(3).

203. 50 U.S.C. § 403-1(i)(2) (2005).

204. 50 U.S.C. § 403-1(i)(2)(A)-(B).

205. 50 U.S.C. § 403-1(i)(2)(C).

too, the new act limits the Agency's discretion to withhold those records from public scrutiny. Under the old National Security Act, as amended by the Central Intelligence Agency Information Act in 1984,<sup>206</sup> the DCI was authorized to exempt his own agency's operational files from disclosure under the Freedom of Information Act.<sup>207</sup> The new act now requires the "coordination of the Director of National Intelligence" before the Director of the CIA may exempt operational files.<sup>208</sup> Few would doubt that most such operational files will continue to be exempted,<sup>209</sup> but the imposition of a second, higher, and more detached approving authority must certainly be read as enhancing the possibility of disclosure where appropriate. At the very least, it checks the natural tendency of the CIA to issue blanket exemptions for all operational records.

Only one additional paragraph in the original National Security Act of 1947 pertains to the dissemination of intelligence, and it essentially gave the DCI access to national security intelligence held by other government departments and agencies, including, upon written request, the Federal Bureau of Investigation.<sup>210</sup> The new version, by contrast, contains several independent provisions that reinforce the legislative intent that intelligence information be shared more freely within the government and even with the private sector. Although only one of these specifically concerns the Freedom of Information Act,<sup>211</sup> the combination strongly suggests that a new frame of reference is required of any court considering intelligence-related FOIA requests.

For example, one provision subtitled "Intelligence Information Sharing" requires the DNI to "ensure maximum availability of and access to intelligence information within the intelligence community consistent with national security requirements."<sup>212</sup> That provision charges the DNI to "establish policies and procedures to resolve conflicts between the need to share intelligence and the need to protect intelligence sources and methods."<sup>213</sup> Another provision of the new act, similarly subtitled "Information Sharing," requires the President to create an "Information Sharing Environment" and renames the Information

206. CIA Information Act of 1984, Pub. L. 98-477, 98 Stat. 2209 (1984).

207. Freedom of Information Act § 701(a).

208. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1071(a)(6), 118 Stat. 3638-3872.

209. The Intelligence Reform and Terrorism Prevention Act of 2004 does, however, establish a comprehensive regime for judicial review of exemption decisions, § 431(f), and decennial review of all exempted files with a view toward removing the exemptions, § 431(g). These provisions are carried over from the CIA Information Act of 1984. *See supra* notes 140-47 and accompanying text.

210. National Security Act of 1947 § 102(e), Ch. 343, 61 Stat. 495-510. Similar, but more generous access is provided the DNI at 50 U.S.C. § 403-1(b).

211. National Security Act of 1947 § 485(b)(2)(A).

212. Intelligence Reform and Terrorism Prevention Act of 2004 § 1011(g) (codified at 50 U.S.C. § 403-1(g)(1) (2005)).

213. *Id.*

Systems Council established by presidential order<sup>214</sup> in August 2004 as the “Information Sharing Council.”<sup>215</sup> Although this provision specifically relates to terrorism information, rather than intelligence information generally, it reinforces the new policy paradigm by mandating an environment that “allows users to share information among agencies, between levels of government, and, as appropriate, with the private sector.”<sup>216</sup>

In addition to information sharing, the new act contains several provisions designed to protect civil rights and civil liberties, with respect to both intelligence and law enforcement functions. These provisions represent a further restraint on the agency’s proclivity toward secrecy. The Office of the Director of National Intelligence, for example, must include a Civil Liberties Protection Officer to “ensure that protection of civil liberties and privacy is appropriately incorporated in the policies and procedures developed for and implemented by” the intelligence community.<sup>217</sup> Moreover, a Privacy and Civil Liberties Oversight Board must be established within the Executive Office of the President.<sup>218</sup> Congress explicitly made the board subject to FOIA.<sup>219</sup> The act further declares that “[it] is the sense of Congress that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.”<sup>220</sup> The recognition of the protections for civil rights and civil liberties is significant to the extent that “civil liberties” encompasses the public’s right to know what its government is doing.

The new act also extends the Public Interest Declassification Board for another four years, through 2008.<sup>221</sup> The Board was authorized in 2000 to “promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and . . . activities . . .” by recommending “the identification, collection, and review for declassification of information of extraordinary public interest that does not undermine the national security of the United States. . . .”<sup>222</sup> The Board’s powers also are enhanced, particularly with respect to congressional requests

214. Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Aug. 27, 2004) (entitled “Strengthening the Sharing of Terrorism Information to Protect Americans”).

215. Intelligence Reform and Terrorism Prevention Act of 2004 § 1016 (codified at 6 U.S.C. § 485 (2005)).

216. 6 U.S.C. § 485(b)(2)(A) (2005).

217. 50 U.S.C. § 403-3d(b)(1) (2005).

218. Intelligence Reform and Terrorism Prevention Act of 2004 § 1061(b) (For more information see the notes contained in 5 U.S.C. § 601).

219. *Id.* § 1061(i)(2).

220. *Id.* § 1062. The Department of Homeland Security also receives an Officer for Civil Rights and Civil Liberties under the Act § 8303 (codified at 6 U.S.C. § 345 (2005)).

221. *Id.* § 1102 (f).

222. Pub. Interest Declassification Act of 2000, Pub. L. 106-567, § 703(b)(2)-(3), 114 Stat. 2856 (2000) (*see* 50 U.S.C. § 435 note).

for information.<sup>223</sup>

Finally, one cannot leave the text of the Intelligence Reform Act without noting the paean to freedom of the press embodied in the act's section on "Promotion of Free Media and Other American Values."<sup>224</sup> Declaring that "[f]reedom of speech and freedom of the press are fundamental human rights,"<sup>225</sup> the act establishes as the policy of the United States the "promotion of freedom of the press and freedom of media worldwide. . . ."<sup>226</sup> A cynic might look upon this provision as little more than a mechanism for American propaganda, but one could be forgiven for thinking that Congress actually meant what it said—that these sentiments apply with equal or greater force within the United States. Significantly, this provision appears in Title VII of the act, titled "9/11 Commission Implementation Act."<sup>227</sup> The recommendations of that Commission, along with Congress's Joint Panel Report, anchor the new act's legislative history, which further supports the assertion that *Sims* is no longer controlling precedent.

## B. The 9/11 Investigations

The 9/11 Commission Report<sup>228</sup> and the Senate and House Joint Panel Report<sup>229</sup> form the essential factual predicate for the Intelligence Reform Act.<sup>230</sup> Both of these investigations were harshly critical of the nation's intelligence community and found that the terrorist attacks might have been thwarted if the spy agencies had done a better job of sharing and publicizing some significant information they possessed about the activities of known and suspected al-Qaeda members.<sup>231</sup>

### 1. The CIA's failed leadership role

Both reports frequently singled out the CIA in particular for concealing information from the public that revealed a string of operational failures and

223. *Id.* § 703 (b)(5).

224. Intelligence Reform and Terrorism Prevention Act of 2004, § 1061(b), § 7108 (see 22 U.S.C. § 1431 note).

225. *Id.* § 7108(b)(1)(A).

226. *Id.* § 7108(b)(2)(A).

227. *Id.* § 7001.

228. 9/11 COMMISSION REPORT, *supra* note 2.

229. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3.

230. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

231. 9/11 COMMISSION REPORT, *supra* note 2, at 353, 355-56, 400-03; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xvii. See also David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1, A13; See Dana Priest, *Hill's 9/11 Probe Finds Multiple Failures; White House, CIA Kept Key Portions of Report Classified*, WASH. POST, July 25, 2003, at A1, A16.

missteps in the weeks and months before the attacks on New York City and Washington, D.C. In examining the roles and responsibilities of the nation's respective intelligence agencies, The 9/11 Commission Report said that "[b]efore 9/11 the CIA was plainly the lead agency confronting al-Qaeda," and the Agency had gathered vital information about potential acts of terrorism.<sup>232</sup> For example, Commission investigators found that for nearly two years before the attacks, the CIA had been aware of the terrorist ties of two 9/11 hijackers who were living in Southern California.<sup>233</sup> The Agency had received reports of terrorist threats within the United States but did not consider issuing a public alert.<sup>234</sup> The 9/11 Commission Report also revealed that the CIA had received a briefing paper entitled "Islamic Extremist Learns to Fly" just weeks before the attacks.<sup>235</sup> The briefing told of the arrest of Zacarias Moussaoui, who was taken into custody in Minnesota in mid-August 2001 after his behavior in a flight school aroused the suspicions of his flight instructor who contacted local authorities. The CIA failed to investigate that information further.<sup>236</sup>

However, as early as December 1998, four months after Usama bin Laden ordered the bombings of two U.S. embassies in East Africa, former CIA Director George J. Tenet issued a memo to several top intelligence officials declaring war on the bin Laden terror network.<sup>237</sup> "We are at war," Tenet wrote. "I want no resources or people spared in this effort."<sup>238</sup> The CIA shared some information with a small circle of senior government officials, but the imminent dangers perceived by the Agency and its declaration of war were never made public.<sup>239</sup> In other words, the 9/11 Commission concluded, the CIA fought this "war" in secret and without the aid of perhaps the nation's most powerful weapon—an alerted American public, fully informed about the grave threats posed by bin Laden and al-Qaeda.<sup>240</sup>

The 2003 Joint Panel Report, which was issued a year before The 9/11 Commission Report, concluded that the CIA-led intelligence community possessed enough solid information before the attacks to prompt a "heightened sense of alert" and recommend defensive measures such as strengthening aviation security, placing suspected terrorists here and abroad on watch lists,

---

232. 9/11 COMMISSION REPORT, *supra* note 2, at 400.

233. *See id.* at 215-21; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 143-52.

234. *See* 9/11 COMMISSION REPORT, *supra* note 2, at 353-58; SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 118. *See also* Priest, *supra* note 233; Johnston, *supra* note 7.

235. 9/11 COMMISSION REPORT, *supra* note 2, at 347.

236. *Id.* at 347.

237. Tenet resigned June 3, 2004 and left his post on July 11, 2004. He was succeeded by Porter Goss, a former U.S. Representative from Florida.

238. 9/11 COMMISSION REPORT, *supra* note 2, at 357.

239. *Id.* at 357.

240. *See id.* at 103.

coordinating investigation and law enforcement efforts with local and state authorities, and alerting the American public to the seriousness and immediacy of the potential threat.<sup>241</sup> In strongly worded language, the Joint Panel Report noted that the excessive secrecy practiced by the CIA, along with other intelligence services, resulted in “missed opportunities” that would have “greatly enhanced” the chances of exposing Usama bin Laden’s terrorist conspiracy.<sup>242</sup>

One of the overarching themes that ran consistently and repeatedly throughout the 9/11 Commission and Joint Panel reports was that for decades the CIA had been able to avoid accountability, not only to Congress, but also to the public. The intelligence committees that reported to the Senate and House Joint Panel inquiry recommended, for example, that:

The president should review and consider amendments to the executive orders, policies and procedures that govern the national security classification of intelligence information, *in an effort to expand access to relevant information* for federal agencies outside the intelligence community, for state and local authorities, which are critical to the fight against terrorism, *and for the American public.*<sup>243</sup>

The Joint Panel Report made clear its view that an informed public should be a goal of an effective information dissemination policy: “[t]he record of this Joint Inquiry indicates that, prior to September 11, 2001, the U.S. Intelligence Community was involved in fighting a ‘war’ against Bin Laden largely without the benefit of what some would call its most potent weapon in that effort: an alert and committed American public.”<sup>244</sup>

Similarly, the 9/11 Commission Report emphasized repeatedly that greater oversight and accountability of the nation’s intelligence processes are vital to help avert future terrorist assaults on American soil. Among the references to

241. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at xv, 118.

242. *Id.* at xv.

243. *Excerpts From Report on Intelligence Actions and the Sept. 11 Attacks*, N.Y. TIMES, July 25, 2003, at A12, A13. In its analysis of the report by congressional intelligence committees, the *New York Times* found repeated calls for increased accountability and oversight of the nation’s spy agencies, especially the CIA. Included among the intelligence committees’ findings are the following recommendations: “Recognizing the importance of intelligence in this nation’s struggle against terrorism, Congress should maintain vigorous, *informed and constructive oversight* of the intelligence community”; “[T]he National Commission on Terrorist Attacks Upon the United States should study and make recommendations concerning how Congress may improve its *oversight of the intelligence community*”; Such recommendations should consider “the extent to which classification decisions impair *congressional oversight*”; “Assured *standards of accountability* are critical to developing the personal responsibility, urgency and diligence which our counterterrorism responsibility requires”; “[T]he director of central intelligence and the heads of intelligence community agencies should require that measures designed to *ensure accountability* are implemented throughout the community”; “[A]s part of the confirmation process for intelligence community officials, Congress should require from these officials an affirmative commitment to the implementation of *strong accountability mechanisms* throughout the intelligence community.”

244. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 124.

the importance of accountability and oversight of intelligence operations, the report noted:

1. "Congress needs dramatic change . . . to strengthen oversight and focus accountability."<sup>245</sup>

2. "[T]he oversight function of Congress has diminished over time. . . . The unglamorous but essential work of [intelligence operations] oversight has been neglected, and few members (of Congress) past or present believe it is performed well."<sup>246</sup>

3. "Of all our recommendations, strengthening congressional oversight may be among the most difficult and important."<sup>247</sup>

4. "Congressional oversight for intelligence—and counterterrorism—is now dysfunctional."<sup>248</sup>

The 9/11 Commission Report, like the Joint Panel Report, also underscored the crucial role that an informed public must play, in connection with effective congressional oversight, to hold the CIA and the intelligence community at large accountable: "[T]he Intelligence committees [that operate under CIA secrecy constraints] cannot take advantage of democracy's best oversight mechanism: public disclosure. This makes them significantly different from other congressional oversight committees, which are often spurred into action by the work of investigative journalists and watchdog organizations."<sup>249</sup>

The importance of CIA accountability to the public was also expressed in the testimony of several key witnesses before the 9/11 Commission. In his testimony before the Commission, Arizona Republican Senator John McCain echoed the Joint Panel Report's finding that more access to CIA information should be granted not only to Commission and congressional investigators, but also to the general public:

I support the fullest possible public disclosure of all commission hearings and findings consistent with existing law and the national security precautions written into the enacting legislation. I encourage you to hold public hearings as frequently as possible and to publicly issue substantive, interim reports on the Commission's progress as envisioned and allowed in the enacted legislation.<sup>250</sup>

The need to have an informed American public actively engaged in the discourse about national security was also articulated by former Clinton Administration Secretary of Defense William S. Cohen in his testimony to the 9/11 Commission. In considering the various courses of action that could be

---

245. 9/11 COMMISSION REPORT, *supra* note 2, at xvi.

246. *Id.* at 105.

247. *Id.* at 419.

248. *Id.* at 420.

249. *Id.* at 103.

250. John McCain, Statement to the National Commission on Terrorist Attacks Upon the U.S. (May 22, 2003) (*available at* LexisNexis Congressional Universe, 4 CIS J 89255, at 3).



taken to avert another attack, Cohen testified that it was important to:

[d]evelop meaningful, in-depth public discussion—among our citizens and not just our elected officials—regarding what compromises on privacy we are willing to accept in order to remain safe and free. . . . We must elevate public discussion on these matters, and do our best to remove them from electoral manipulation at least until we truly understand the issues and choices.<sup>251</sup>

## 2. The Call for a New Intelligence-Information Paradigm

The legislative history of the Intelligence Reform Act contains considerable evidence to support the notion that a new paradigm must be developed for intelligence information dissemination—a modern 21st century model that reflects open government and public accountability.

Indeed, the protracted political wrangling between the Administration and 9/11 Commission focused nearly entirely on access to information that the White House resisted disclosing. The White House had a strained relationship with the 9/11 Commission and its chair, former New Jersey Republican Governor Thomas H. Kean, ever since Congress created the Commission over Bush Administration objections.<sup>252</sup> Virtually all of the disputes centered around access to CIA-held information. This conflict was not new. In the Joint Panel Report released before the 9/11 Commission was formed, congressional investigators sharply criticized the CIA for “information hoarding.”<sup>253</sup> For example, the Administration, on the recommendation of the CIA, redacted 28 pages from the nearly 900-page Joint Panel Report. The *New York Times* later reported that the 28 pages focused mainly on Saudi Arabia, the home nation for 15 of the 19 hijackers, according to people who saw the section.<sup>254</sup> Sources familiar with the redacted material said the passages were a “searing indictment” of how Saudi Arabia’s rulers used Islamic charities and other organizations as a conduit to distribute millions of dollars to terrorists.<sup>255</sup> The newspaper said the redactions aroused resentment in Congress, where some lawmakers accused the Administration of concealing crucial facts about the attacks.<sup>256</sup> “I’ve reviewed the 28 pages twice, and my judgment is that 90 to 95 percent could be released and not compromise our intelligence in any way,”

---

251. William S. Cohen, Statement to the National Commission on Terrorist Attacks Upon the U.S. (Mar. 23, 2004) (available at LexisNexis Congressional Universe, 4 CIS J 892137, at 24).

252. Philip Shenon, *Bush Agrees to Answer All Of 9/11 Panel’s Questions*, N.Y. TIMES, Mar. 10, 2004, at A14.

253. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 7.

254. David Johnston, *Classified Section of Sept. 11 Report Faults Saudi Rulers*, N.Y. TIMES, July 26, 2003, at A1.

255. *Id.*

256. *Id.*

said Alabama Republican Senator Richard C. Shelby.<sup>257</sup>

Eventually, after several confrontations between the White House and Kean, most of the contested information was made available to the 9/11 Commission.<sup>258</sup> In his testimony before the 9/11 Commission, McCain deplored the Administration's information-withholding practices for "creating the appearance of bureaucratic stonewalling."<sup>259</sup> For example, McCain criticized the Administration for withholding from the 9/11 Commission some information that had previously been gathered by the intelligence committees that reported to the Senate and House Joint Panel. McCain recounted one incident in which U.S. Representative Tim Roemer, who had served on the Joint Panel investigation, was later denied access to material contained in the Joint Panel Report after Roemer, an Indiana Democrat, was appointed to the 9/11 Commission. Eventually, the Administration complied with Roemer's request. "I find it particularly troubling," McCain testified, "that Commission member and former Congressman Tim Roemer, who helped write the congressional report as a member of the House Intelligence Committee, was until this month denied access to his committee's own product."<sup>260</sup>

The findings of the Congressional Joint Panel Report and the 9/11 Commission Report, combined with the history of the troubled relationship between 9/11 investigators on the one side and the Administration and CIA on the other side, reveal the true nature of the core struggle: Who is to control government-held information on issues of vital public concern, including questions of national defense? The fact that this struggle is even taking place reflects the emergence of a growing movement to effect change and to move away from the kind of outdated model evinced in The National Security Act of 1947<sup>261</sup> and the Supreme Court's rationale in *CIA v. Sims*.<sup>262</sup> The developing model seems to be one that is firmly grounded in the accountability principles of democracy in an open society—even when it comes to intelligence matters.

According to the Joint Panel Report, the intelligence community must "overcome bureaucratic information-hoarding" and "take decisive steps to reexamine the fundamental intellectual assumptions that have guided the IC's [Intelligence Community's] approach to managing national security information."<sup>263</sup> Specifically, the report noted that it may become necessary to "create a new paradigm wherein 'ownership of information,' did not belong to

---

257. Editorial, *Credible Classifications*, WASH. POST, July 13, 2004, at A14.

258. Shenon, *supra* note 252.

259. John McCain, Statement to the National Commission on Terrorist Attacks Upon the U.S., Second Public Hearing (May 22, 2003) (available at LexisNexis Congressional Universe, 4 CIS J 89255, at 2).

260. *Id.*

261. Pub. L. No. 80-253, § 102(d)(3) (codified at 50 U.S.C. § 403(d)(3) (2005)).

262. *Sims*, 471 U.S. 159 (1985).

263. SENATE AND HOUSE SELECT COMM. REPORT, *supra* note 3, at 7.

the collectors.”<sup>264</sup> This idea of creating a new paradigm for intelligence information dissemination is reiterated throughout the Joint Panel’s analysis:

[I]t becomes clear that the sort of sophisticated pattern-analysis and semi- or fully-automated “data-mining” capabilities that will be necessary for intelligence analysis to keep up with complex transnational threats such as those presented by Usama bin Laden’s Al-Qa’ida organization are not compatible with traditional notions of inter-Intelligence Community secrecy and restrictions upon access based upon an outsider’s “need to know” as determined by the agency information-holders themselves.<sup>265</sup>

This emerging belief that current intelligence information-dissemination systems are outmoded and no longer effective was also expressed by former Clinton Administration Secretary of State Madeleine K. Albright in her 9/11 Commission testimony.<sup>266</sup> Albright said that the practices of excessive secrecy and habitual withholding of government-held intelligence-related information were routine and even appropriate during the Cold War when the government cloaked all of its intelligence information:

except from those with a very specific need to know. . . . The dissemination of information was controlled by the originating agency. And clear separations were maintained between public and private, domestic and international, law enforcement and intelligence. . . . The old system was appropriate for the times but the times have changed.<sup>267</sup>

Finally, the matter of CIA mistakes and misjudgments in connection with the 2003 invasion of Iraq bears mentioning in this analysis because these lapses also demonstrate how excessive secrecy has undermined Agency effectiveness and good management. In a unanimous report released in July 2004, the Senate Intelligence Committee concluded after its investigation that CIA assessments of Iraqi weapons strength—particularly chemical, biological and nuclear weapons of mass destruction—were overstated or unfounded.<sup>268</sup> The 511-page report described the Agency as a broken and dysfunctional corporate culture suffering from poor management:<sup>269</sup> “In the end, what the President and the Congress used to send the country to war was information provided by the intelligence community, and that information was flawed.”<sup>270</sup>

264. *Id.* at 7.

265. *Id.* at 33.

266. Madeleine K. Albright, Statement to the National Commission on Terrorist Attacks Upon the U.S. (Mar. 23, 2004) (available at LexisNexis Congressional Universe, 4 CIS J 892134, at 21).

267. *Id.*

268. See PREWAR INTELLIGENCE REPORT, *supra* note 23. See also Douglas Jehl, *Senators Assail C.I.A. Judgments on Iraq’s Arms as Deeply Flawed*, N.Y. TIMES, July 10, 2004, at A1; Dana Priest, *supra* note 231, at A1.

269. See PREWAR INTELLIGENCE REPORT, *supra* note 23.

270. *Id.*

## CONCLUSION

The government's need to protect confidential sources is an inherent aspect of effective intelligence operations. However, the Court majority in *CIA v. Sims*<sup>271</sup> equates the term "intelligence sources" with any source of information,<sup>272</sup> thus creating an irrebuttable presumption of secrecy over a vast array of CIA-held materials, including information that is of questionable intelligence value.<sup>273</sup>

In so ruling, as Justice Marshall pointed out,<sup>274</sup> the Court contravened the plain text and legislative intent of the FOIA.<sup>275</sup> As this Article has shown, the *Sims* majority discounted the FOIA's extensive legislative history, including the seminal 1965 Senate report that accompanied the original legislation,<sup>276</sup> and the 1974<sup>277</sup> and 1976<sup>278</sup> amendments, which reflected Congress's intent to require as much disclosure as possible, even in matters of national security. Additionally, the Court's selective reading of the 1984 CIA Information Act<sup>279</sup> is an exercise in historical revisionism; the Court majority completely ignored key provisions in the Act that made clear that the FOIA's disclosure rules apply to all materials that fall outside the narrowly defined category of "operational files."<sup>280</sup> In effect, the Supreme Court replaced Congress's policy judgments with those of the *Sims* majority.

As a result, the CIA has been able to shroud itself in secrecy and insulate itself from the twin spurs of public criticism and public accountability, undermining not only Agency effectiveness but also the public's trust in government. CIA failures surrounding the 2001 terrorist attacks and the 2003 invasion of Iraq illustrate that the deference to secrecy that the Court read into the National Security Act of 1947<sup>281</sup> is no longer warranted, if it ever was, as congressional lawmakers strongly suggested when they refused to endorse the *Sims* decision in the 1993 Intelligence Authorization Act.<sup>282</sup>

The old paradigm—which is grounded in the belief that *carte blanche* secrecy in matters of intelligence and national security automatically outweighs the public benefits of disclosure—does not reflect the culture of post-Cold War

---

271. *Sims*, 471 U.S. 159 (1985).

272. *Id.* at 187 (Marshall, J., concurring).

273. *Id.* at 191.

274. *Id.* at 182.

275. 5 U.S.C. § 552 (2005).

276. S. REP. NO. 89-813 (1965).

277. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

278. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

279. Pub. L. No. 98-477, 98 Stat. 2009 (1984).

280. *See supra* note 137.

281. National Security Act of 1947, Ch. 343, 61 Stat. 495-510.

282. Pub. L. No. 102-496, 106 Stat. 3180.

and post-9/11 America.<sup>283</sup> Echoing former Secretary of State Albright, who called for reforming intelligence information policy, the nonpartisan 9/11 Commission concluded: “[T]he national security institutions of the U.S. government are still the institutions constructed to win the Cold War. The United States confronts a very different world today.”<sup>284</sup>

The 9/11 Commission Report recommended that Congress devise a fresh model of governmental management in this new era.<sup>285</sup> The Intelligence Reform and Terrorism Prevention Act of 2004,<sup>286</sup> which adopted many of the 9/11 Commission’s findings, recognizes how unchecked secrecy can conceal serious problems in Agency management and also understands that an informed public must perform an important function in any system created to ensure effective congressional oversight of the intelligence services.<sup>287</sup> Specific features of the Act—its provisions for the broadest possible dissemination of intelligence information<sup>288</sup> and for enhanced declassification procedures,<sup>289</sup> its respect for civil rights and civil liberties,<sup>290</sup> and even its promotion of press freedom<sup>291</sup>—leave little doubt that the information-dissemination policy paradigm has changed and *Sims* is no longer a viable statutory construction under the FOIA.<sup>292</sup>

With *Sims* removed as an obstacle to disclosure, it is now possible to revisit what Congress actually intended for the courts to do when it comes to handling FOIA requests for CIA-held information. We propose a two-part approach. First, the CIA should no longer be allowed to use Exemption 3<sup>293</sup> to sidestep Exemption 1’s provisions requiring de novo judicial review of classified information and mandating the segregation and release of unclassified material contained in a classified document.<sup>294</sup> The national security exemption represents a carefully crafted check on Agency discretion that balances deference to intelligence secrecy concerns with judicial oversight. Second, when the question of defining an “intelligence source” arises, as it certainly will, the courts should adopt a definition that provides a nondiscretionary test to clarify whether a source of information is an “intelligence source” and deserving of confidentiality. For such a definition, the test crafted by Justice

283. 9/11 COMMISSION REPORT, *supra* note 2, at 399.

284. *Id.*

285. *Id.* at 406.

286. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

287. 9/11 COMMISSION REPORT, *supra* note 2, at 103.

288. See *supra* notes 203-05 and accompanying text.

289. See *supra* notes 222-23 and accompanying text.

290. See *supra* notes 217-20 and accompanying text.

291. See *supra* notes 224-27 and accompanying text.

292. 5 U.S.C. § 552 (2005).

293. 5 U.S.C. § 552(b)(3).

294. 5 U.S.C. § 552(b)(1).

Marshall still has merit today. Under this standard, confidentiality would extend to “intelligence sources” who provide information on either an explicit or implicit promise of confidentiality, or who would be harmed or silenced if identified. Further, confidentiality also would be extended to information that could reasonably be expected to lead to the identification of an intelligence source.<sup>295</sup>

We understand that if the courts were to adopt this approach, obstacles to access would still persist. Classification criteria are determined by the President, and these standards vary with each administration. Also, the executive branch agencies historically have overused the “classified” stamp, creating vast storerooms of “secret” documents.<sup>296</sup> However, the serious problem of overclassification, which must be resolved as well, is a distinctly separate issue and beyond the scope of this Article.

This Article’s proposal for court treatment of CIA nondisclosure decisions offers a significant step toward protecting legitimate “intelligence sources” while also providing for more government transparency and greater access to the kind of intelligence information necessary for meaningful public discourse on the vital policy questions facing this nation.

---

295. *Sims*, 471 U.S. at 193-94 (Marshall, J., concurring).

296. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (“[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.”)

