SENATE BILL NO. 1 AND THE FREEDOM OF INFORMATION ACT: DO THEY CONFLICT?

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Superficially, no two pieces of legislation take a more divergent view of what should be communicated to the public than the Freedom of Information Act ("FOIA")[1] and "S. 1," the Criminal Justice Reform Act of 1975.[2]

THE FREEDOM OF INFORMATION ACT— REQUIRING DISCLOSURE

The FOIA is an attempt to maximize public access to federal governmental information. It establishes as a rule disclosure of identifiable information requested from federal agencies by private citizens.[3] Of course this rule has many exceptions—so many in fact that Congress has spent no small part of its time amending the original Act so that exceptions to it will not become the rule.

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[1] 5 U.S.C. § 552 (Supp. IV, 1974).

[2] S. 1, 94th Cong., 1st Sess. (1975). The original version of the bill, introduced on January 15, 1975 (hereinafter "S. 1") as the Criminal Justice Reform Act of 1975, was extensively revised and reported by a Judiciary Subcommittee to the full Committee in Committee Print of August 15, 1975 (hereinafter "S. 1, *as amended*"). S. 1, *as amended*, includes amendments of the portion of the bill dealt with in this article, namely Chapter II, Subchapter C, "Offenses Involving National Defense—Espionage and Related Offenses," §§ 1121–1128 inclusive.

[3] 5 U.S.C. § 552(a)(4)(B) (Supp. IV, 1974), *amending* 5 U.S.C. § 552(a)(3) (1970).

The National Defense or Foreign Policy Exemption To Disclosure

One of these exceptions, the so-called (b)(1) exemption, covers classified documents. This exemption now frees from disclosure matters which are "(a) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive Order."[4] The purpose of (b)(1), obviously, is to permit disclosure to the public of some classified information *even though* it has been classified.

S. 1, on the other hand, forbids the publication or other communication of certain information even though it *has not* been classified. In fact, S. 1 is so broadly drafted that it penalizes the communication of information that perhaps *could not* be classified under existing classification regulations.

Yet when one looks beyond the facial disparities between these two acts and examines the practical application of the (b)(1) exemption particularly in the context of the litigation surrounding Victor Marchetti who sought to publish classified CIA information—it appears that the FOIA may be no more than a snare and delusion, and that the policies of the FOIA and S. 1 may not be so divergent after all.

As originally enacted, the (b)(1) exemption covered information "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."[5]

In *EPA v. Mink*[6] the Supreme Court concluded that a court reviewing an agency denial of information based on the (b)(1) exemption was not permitted to inspect the documents *in camera* to determine whether they were properly classified.[7] In 1974, Congress, in response to *Mink* and the intensified concern over government secrecy generated by Watergate, enacted important amendments to the FOIA.[8] The amendments gave the courts specific authority to examine *in camera* the documents at issue in order to determine if they

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[4] 5 U.S.C. § 552(b)(1) (Supp. IV, 1974), *amending* 5 U.S.C. § 552(b)(1) (1970).

[5] *Id.*

[6] 410 U.S. 73 (1973).

[7] Justice White's majority opinion noted that the (b)(1) exemption did not ". . . permit *in camera* inspection of such documents to sift out so-called 'non-secret components.'" *Id.* at 81. He concluded that upon the government's showing that a document was classified, it:

> . . . had met (its) burden of demonstrating that the documents were entitled to protection under Exemption 1, and the duty of the District Court under § 552 (a)(3) was therefore at an end. [*Id.* at 84.]

[8] 5 U.S.C. § 552 (Supp. IV, 1974), *amending* 5 U.S.C. § 552 (1970).

warranted exemption from disclosure.[9] The (b)(1) exemption was amended in October 1974 to require both the propriety and fact of classification.

In determining the propriety of classification under (b)(1) a court must look to the precise substantive standard established by the Executive Order under which the information is allegedly classified. If the government has not proven that the document falls within this standard, a court should order disclosure. Moreover, according to the Conference Report on the FOIA amendments, a court is further required to consider whether the agency followed the procedure specified in the appropriate Executive Order.[10]

The substantive standard for classification is a variable one. Rather than establishing a precise standard in relation to national defense and foreign policy, the FOIA incorporates by reference the standard of the Executive Order under which the information was classified. This is the essential weakness in the (b)(1) exemption. Instead of dealing with the hard question of what should be classified and what should not, the statute delegates the answer to that question to the Executive through the rule-making process. Needless to say, the Executive branch has hardly distinguished itself in recent years with clear or narrow regulations as to what should be classified and what should not.

It has been estimated that there are 20 million documents that currently bear classified markings and that more than 15,000 government employees possess the authority to classify.[11] The fatal flaw in the (b)(1) exemption, however, is not the lack of a requirement of clarity in drafting; it is rather the total reliance the exemption places on the Executive itself. All that is required is that the Executive make up some substantive standard—any kind—and then comply with its own standard.

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[9] 5 U.S.C. § 552(a)(4)(B) (Supp. IV, 1974), *amending* 5 U.S.C. § 552 (1970). In considering whether to enjoin the agency from withholding information, the amendment provides:

> The court shall examine 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 exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

[10] H.R. REP. No. 1380, 93d Cong., 2d Sess., 11–12 (1974). Information is to be withheld only if it is properly classified "pursuant to both procedural and substantive criteria contained in such Executive Order." *Id.*

[11] *See* INTERAGENCY CLASSIFICATION REVIEW COMMITTEE, IMPLEMENTATION OF EXECUTIVE ORDER NO. 11652 ON CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL (1975).

The most famous of the classification regulations issued is Executive Order No. 10501 ("E.O. 10501"),[12] drafted by Attorney General Brownell in 1953. It was issued by President Eisenhower and it established the first major classification system.

E.O. 10501 achieved fame in the *Pentagon Papers* case when that case was first brought by the government against *The New York Times*. The government used the Order as authority for issuing an injunction against the newspaper. The Order gradually dropped out of the case when the government was unable to find legislative authority for it.

Under E.O. 10501 "defense information or material" could be classified if its "unauthorized disclosure . . . could be prejudicial to the defense interests of the nation."[13] This "could be prejudicial" standard is almost no standard at all; but the point is the Executive could use this test—or an even less precise one—as a substantive standard and then show procedural compliance with it to justify nondisclosure under the FOIA.

To the credit of the Nixon Administration, following its loss in the *Pentagon Papers* case it supplanted E.O. 10501 with Executive Order No. 11652 ("E.O. 11652")[14] effective June 1, 1972.[15] The standards of E.O. 11652 seem, superficially, more difficult to meet.

E.O. 11652 set up a three-tier system in which classification is authorized for documents meeting the criteria of (1) "Top Secret," (2) "Secret" or (3) "Confidential."[16] The minimum standard for classification is "Confidential." The Executive Order requires that for a document to be classified as "Confidential" it must first be determined that "its unauthorized disclosure could reasonably be expected to cause damage to the national security."[17] National security is defined within E.O. 11652 as relating to "national defense or foreign relations."[18]

The National Security Directive issued to implement E.O. 11652 provides:

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[12]Exec. Order No. 10501, 3 C.F.R. 919 (1949–1953 comp.).
[13]*Id.* at § 1(c), 3 C.F.R. at 980.
[14]Exec. Order No. 11652, 3 C.F.R. 339 (Supp. 1974), 50 U.S.C. § 401 (Supp. IV, 1974) (hereinafter "Executive Order No. 11652").
[15]*Id.* at § 15, 3 C.F.R. at 350.
[16]*Id.* at § 1(A)–(C), 3 C.F.R. at 339, 340.
[17]*Id.* at § 1(C), 3 C.F.R. at 340.
[18]*Id.* at § 1, 3 C.F.R. at 339.

> If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment.[19]

Therefore, the minimum standard for withholding information under the (b)(1) exemption, where classification is under E.O. 11652, would be that there is "[no] substantial doubt" that "unauthorized disclosure could reasonably be expected to cause damage to the [national defense or foreign relations]."

The combination of "[no] substantial doubt" and "could reasonably be expected" requires that the classifier, deemed an expert on national security, be rather certain that disclosure will result in the consequences specified in general terms within the Order. The standard does not look to the expectation or intent of the party seeking disclosure. Furthermore, the test contains a serious consequential requirement—"damage." "Disadvantage" or "prejudice" would not seem to satisfy this requirement. Finally, the "damage" must relate to "national security" (defined as matters of "national defense or foreign relations") rather than to a more general term such as "interests."

While E.O. 11652 is an improvement over E.O. 10501, it certainly does not solve many of the problems of classification. Much of what was published in the *Pentagon Papers* raised "substantial doubt" that its publication "could reasonably be expected to cause damage to" "foreign relations."

Broad as it is, the classification standard of E.O. 11652 is more tightly drawn than the expansive language found in S. 1. Accordingly, even if we concede for the moment that the Executive could withdraw E.O. 11652 and make it as expansive as it wished, a claim brought today (1976) under the FOIA would seem to entitle the claimant to information which it would be criminal to communicate under S. 1 (19a).

S. 1 PROHIBITIONS FROM DISCLOSURE

Section 1121—Espionage

The general provision of S. 1 on espionage is contained in Section 1121, which corresponds to 18 U.S.C. Sec. 793(a),(b) of the existing espionage statute. Under Section 1121 a person would be guilty of a felony,

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[19] NATIONAL SECURITY COUNCIL DIRECTIVE OF MAY 17, 1972, "Classification, Downgrading, Declassification and Safeguarding of National Security Information," 37 Fed. Reg. 10053, 10054 (May 17, 1972), 50 U.S.C. § 401 (Supp. IV, 1974).

> . . . if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he:
> (1) communicates such information to a foreign power;
> (2) obtains or collects such information knowing that it may be communicated to a foreign power. . . .[20]

The amended version alters this definition in one minor respect, substituting "could" for "may."[21]

"National defense information," as defined in section 1128(f), includes a laundry list of information categories.[22] Some categories are rather broad catchalls, such as information relating to "military capability of the United States or of an associate nation," "military planning," "military communications," "military installations," "military weaponry" and "conduct of foreign relations affecting the national defense."[23] Others describe areas that have traditionally been the subject of great secrecy, such as "cryptographic information."[24] The broadest category of information, deleted in the amended version, includes "in time of war, *any other matter* involving the security of the United States that might be useful to the enemy." (emphasis added)[25] This category clearly extends beyond military matters. Aside

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[20] S. 1, *supra* note 2, § 1121(a).
[21] S. 1, *as amended*, *supra* note 2, § 1121(a).
[22] *Id.* § 1128(f):
'national defense information' includes information, other than information that has previously been made available to the public pursuant to authority of Congress or by the lawful act of a public servant, that relates to:
(1) military capability of the United States or of an associate nation;
(2) military planning or operations of the United States;
(3) military communications of the United States;
(4) military installations of the United States;
(5) military weaponry, weapons development, or weapons research of the United States;
(6) intelligence operations, activities, plans, estimates, analyses, sources, or methods, of the United States;
(7) intelligence with regard to a foreign power;
(8) communications intelligence information or cryptographic information;
(9) restricted data; as defined in section 11 of the Atomic Energy Act of 1954, *amended* (42 U.S.C. 2014); or
(10) in time of war, any other matter involving the security of the United States that might be useful to the enemy;
S. 1, *as amended*, would delete "with regard to" in subsection (7) and substitute "concerning." In subsection (9) it would delete all language after the words "restricted data." It would finally delete (10) in its entirety. S. 1, *as amended*, *supra* note 2.
[23] S. 1, *supra* note 2, § 1128(f)(1)–(5).
[24] *Id.* at § 1128(f)(8).
[25] *Id.* at § 1128(f)(10).

from the wartime category, no other category of section 1128(f) refers to the consequence of disclosure on national security.

It is important to note that S. 1 imposes penalties on the communication of national defense information (as above defined) regardless of whether the information has been classified. The FOIA at least assumes the government has made a successful effort to classify such information. Beyond that, each of the sections of S. 1 has a broader ambit than the operative regulation currently incorporated by the FOIA, namely E.O. 11652.

Section 1121 clearly has a broader sweep than E.O. 11652. Assuming section 1128(f) is satisfied, the government would have to show that the information "may" (original) or "could" (amended) "be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power." Certainly the "may [or could] be used to" test of section 1121 is less difficult to meet than the "[no] substantial doubt" that release "could reasonably be expected to" test applicable to E.O. 11652. Secondly, "prejudice of the safety or interest of the United States, or to the advantage of a foreign power" in section 1121 is much broader than "cause damage to the [national defense or foreign relations]" applicable to (b)(1) through E.O. 11652. Moreover, the requirement of "damage" in E.O. 11652 seems to require a greater showing than "prejudice" in section 1121 of S. 1. Finally, "safety and interest" in section 1121 are more general terms than "national defense or foreign relations" applicable to (b)(1), even though the latter terms are frequently defined quite broadly.[26]

In extending the reach of the existing espionage statutes, section 1121 casts a huge net. Sections 793(a) and (b) of the Espionage Act require that the gatherer or transmitter of information have "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of a foreign nation. . . ."[27] S. 1 substitutes "knowing" for "intent or reason to believe." In its original version S. 1 substitutes "may be used" for "is to be used";

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[26]In Gorin v. United States, 312 U.S. 19 (1941), the Supreme Court in interpreting Sections 793(b) and 794(a) of the Espionage Act, adopted the government's definition of "national defense" as follows:

> . . . 'a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' [312 U.S. at 28]

It has been asserted, however, that this broad definition is only constitutional if the scienter requirement within the Espionage Act is read as requiring "bad faith." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COMMUNICATIONS LAW, "Report on the Espionage and Secrecy Provisions of the Proposed New Federal Criminal Code" (1976).

[27]18 U.S.C. §§ 793(a), (b); 794(a) (1970).

and in the amended version "could" replaces "may."[28] Section 1121 also substitutes "prejudice to the safety or interest of the United States" for the term "injury of the United States." Clearly, each substitution broadens the definition of punishable acts.

The drafters of S. 1 insist that the scienter requirement in section 1121 merely codifies the Supreme Court's interpretation of the scienter requirement of section 793(b), as enunciated in *Gorin v. United States*.[29] The language of the *Gorin* decision, however, contradicts this contention. Justice Reed, speaking for a unanimous Court, concluded that section 793(b) requires those prosecuted to have acted in "bad faith."[30] Section 1121 goes far beyond punishing only those who demonstrate "bad faith." For example it would appear to reach a reporter who collects national defense information knowing it is to be used for publication in a newspaper obtainable by a foreign power when such information "may" (or "could") be used to the prejudice of United States interests or to foreign advantage. The reporter would be punishable under section 1121 even though his purpose, and that of the newspaper, might well be of the highest order: informing American citizens about the military actions of their government.

This alarming result is due both to the more inclusive scienter requirement of section 1121 and to the S. 1 drafters' interpretation of the word "communicates." "Communicates" as it is used in S. 1 includes publication.[31] As it is used in the Espionage Act provisions corresponding to section 1121, however, "communicates" does not include publication. As Justice Douglas concluded in *New York Times Company v. United States*,[32] "Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."[33] Justice Douglas based this conclusion on the specific inclusion of the word "publishes" in sections 794(b), 797 and 798 of the Espionage Act.[34] Two of these provisions,

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[28] STAFF OF SENATE COMM. ON THE JUDICIARY, 93d CONG., 2d SESS., REPORT ON THE CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, vol. II (Comm. Print 1974) at 225. (hereinafter "COMMITTEE REPORT").

[29] 312 U.S. 19 (1941).

[30] *Id.* at 28.

[31] The COMMITTEE REPORT noted that "communicates" ". . . includes the general dissemination of such information through publication." COMMITTEE REPORT *supra* note 28, at 227 n. 16. *See generally Id.* at 226–228.

[32] 403 U.S. 713 (1971).

[33] *Id.* at 721.

[34] *Id.*:

§ 794 (b) applies to 'Whoever in time of war, with intent that the same shall be

sections 794(b) and 798 include both "publishes" and "communicates." The Espionage Act analogs to section 1121, sections 793(a) and (b), do not include the word "publishes." Proper statutory interpretation would dictate the conclusion that these sections do not reach publication.[35]

Section 1122—Communicating National Defense Information

Section 1122 of S. 1[36] prohibits the communication of "national defense information" to unauthorized persons.[37] It contains the same scienter requirement as section 1121, with the amended version again substituting "could" for "may."[38] Unlike section 1121 it does not require even the possibility that the information be conveyed directly or indirectly to a foreign power.

Since the scienter requirement of section 1122 is the same as that of section 1121, communication of the same substantial area of information theoretically obtainable under FOIA would also be punishable under section 1122. Section 1122 would prove even more far reaching than section 1121, since communication need only be made to an unauthorized person rather than a foreign power. A government official who, with no intent to injure American interests, gave "national defense information" to a person he knew to be unauthorized could be punished if he knew of the possibility of "prejudice" to

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communicated to the enemy, collects, records, *publishes* or communicates . . . [the disposition of armed forces].'

Section 797 applies to whoever 'reproduces, *publishes*, sells or gives away' photographs of defense installations.

Section 798 relating to cryptography applies to whoever: 'communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*' the described materials. (Emphasis added).

[35]Justice Douglas concluded that Section 793 does not reach publication. *Id.*

[36]S. 1, *supra* note 2, § 1122(a):

Disclosing National Defense Information.

(a) Offense—A person is guilty of an offense if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he communicates such information to a person who he knows is not authorized to receive it.

S. 1, *as amended*, *supra* note 2 would delete "may" and substitute in its place "could."

[37]An "authorized" person is defined as one who has:

. . . authority to have access to, to receive, to possess, or to control [classified or national defense] information as a result of the provisions of a statute or an Executive Order, or a regulation or rule issued pursuant thereto;

S. 1, *supra* note 2, § 1128 (a).

[38]*See* note 36, *supra*.

United States interests. The receiver could be a TV reporter, a Congressman without authorization or just a friend. He need not have any ability to prejudice United States interests or promote those of a foreign nation. The standard relates solely to the potential impact of disclosure.

Section 1122 extends the scope of the corresponding sections in the Espionage Act, sections 793(d) and (e), in much the same way that section 1121 extends sections 793(a) and (b). Thus publication is included within the reach of section 1122, although it is not within the Espionage Act provisions.[39] A newspaper reporter or publisher could be held criminally liable under section 1122. Section 1122 also uses "prejudice" rather than "injury of the United States" as contained in the Espionage Act.

Section 1123—Mishandling National Defense Information

Section 1123 of S. 1 makes unlawful the "mishandling" of "national defense information." A person is guilty of a criminal offense under this section if, in either authorized or unauthorized possession of "national defense information," he causes its "loss, theft, destruction or its communication to one not authorized to receive it" or fails to report such event to the appropriate agency.[40]

Section 1123 provides the sharpest potential conflict between S. 1 and the FOIA. In stark contrast to the current (b)(1) exemption standard, this section contains no reference to the result of disclosure on American interests. An individual need not intend any "damage" or even "prejudice" to the United States in his "mishandling" of the information. He need not be aware of the probability or even the possibility of any ill result to the United States from his action or inaction. And the government would not have to establish that any injury or prejudice would or even could result from the proscribed "mishandling." The section merely requires proof that a defendant knowingly[41] did or failed to do certain acts in relation to "national defense information." For example the author of a magazine article containing information on United States "military capability" leaked

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[39] *See* notes 31–35, *supra*, and accompanying text.

[40] S. 1, *supra* note 2, § 1123(a).

[41] Section 1123 does not contain a state of mind element. S. 1 provides that where no state of mind requirement is specified, ". . . the particular state of mind that must be proved with respect to: (1) conduct is 'knowing' "; S. 1, *supra* note 2, § 303(b)(1).

to him by a government official could be prosecuted under this section without regard to the impact of such publication on United States defense or foreign policy. The government official could also be prosecuted under section 1123.

Because of the complete absence of a potential impact requirement, section 1123 encompasses a much broader area than the (b)(1) exemption. Of all the S. 1 provisions it would create the greatest area of information which could theoretically be obtained through the FOIA but in relation to which certain conduct could be punished.

Section 1123 is but another example of the S. 1 extension of existing espionage laws. Section 1123 eliminates the scienter requirement contained within the analagous Espionage Act provisions, sections 793(d) and (e). Sections 793(d) and (e) require that the defendant "has reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation."[42] Section 1123 has no such requirement. Furthermore, section 1123 through its use of the word "communication" includes publication as a proscribed means, while the Espionage Act sections do not reach publication.[43]

Sections 1123, 1122 and 1121, it is important to note, do not cover the communication of classified information as such. Classified information is treated separately in section 1124.

Section 1124—Leaking Classified Information

Section 1124 makes it a crime for present or former government employees and others to leak classified information. Section 1124 states that it is a felony for any person "in authorized possession or control of classified information," or who has "obtained such information as a result of" federal employment, to communicate "such information to a person who is not authorized to receive it."[44]

The original and amended versions of S. 1, however, differ quite substantially as to the effect of improper classification upon prosecution under Section 1124. The original version provides for prosecution without regard to the legality of the classification of the information at issue. It would only permit the accused to raise unlawful classification as an affirmative defense.[45] In contrast to the (b)(1) exemp-

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[42] 18 U.S.C. § 793(d), (e) (1970).
[43] *See* notes 31–35 *supra*, and accompanying text.
[44] S. 1, *supra* note 2, § 1124(a).
[45] *Id.* at § 1124(d)(2)(C).

tion, where the agency has the burden of establishing lawful classification, the original version of section 1124 places the burden on the individual to establish unlawful classification. And the original version would only permit this defense if the defendant: 1) had, prior to disclosure, exhausted administrative procedures to declassify the information; 2) did not communicate the information to an agent of a foreign nation; and 3) did not receive any consideration in exchange for the information.[46]

In practice the conditions precedent and the weight of the burden on the defendant would probably render the affirmative defense meaningless. It is unlikely that a defendant will have exhausted the requisite administrative procedures. In the case of the press such exhaustion would, in most circumstances, render the information stale upon disclosure. Even assuming that this condition is satisfied, judicial reluctance to seriously scrutinize the propriety of classification,[47] even where the government has the burden of proof, augurs little hope of the defendant sustaining the burden of proof. Thus the original version of section 1124, because of the serious limitations on the use of the affirmative defense and the reversal of the burden of proof, proscribes conduct involving information theoretically obtainable under FOIA.

Section 1124, as amended, seems to conform more closely to the (b)(1) exemption. It establishes as a bar to prosecution the fact that "the information was not lawfully subject to classification at the time of the offense."[48] Mirroring the FOIA procedures, it permits the court to examine the information *in camera* to determine whether the information was "lawfully subject to classification." Although the amended bill does not mention burden of proof, the government would seem to be required to sustain the burden in order for the bar to prosecution to fall. Yet despite these similarities there remains an important gap between section 1124, as amended, and the (b)(1) exemption. The standard in amended section 1124 is easier for the government to meet than its (b)(1) counterpart. The former pertains only to the subject matter of the information; the latter, through its requirement of "in fact properly classified," applies both to the substance of the material and to the procedures used in its classification.

Even assuming the requirements of amended section 1124 and (b)(1) were identical, serious doubts would still remain as to the

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[46]*Id.* at § 1124(d)(2)(A), (B).

[47]*See* notes 65–92 *infra*, and accompanying text.

[48]S. 1, *as amended*, *supra* note 2, § 1124(c)(1).

equity of using the same standard for imposing criminal penalties as for permitting disclosure. Existing penal provisions, including those of the Espionage Act, reflect this concern by limiting criminal sanctions to the most restricted classified information and the most suspect use of classified information.[49]

Practically then, we are faced with the fact that almost immediately after Congress amended the FOIA in October 1974 to broaden its scope, there was introduced into Congress a bill, S. 1, that has a completely contrary policy thrust. Even more startling than that, S. 1 seems to have an even narrower approach to national security information than regulations on classification adopted by the Nixon Administration, an administration hardly known for its liberal approach to national security matters.

THE FOURTH CIRCUIT'S ANALYSIS OF THE FOIA

The foregoing analysis, however, does not take into consideration the contribution the courts, or at least one court, have made to this problem. In *Alfred A. Knopf, Inc. v. Colby*,[50] the Court of Appeals for the Fourth Circuit may have rationalized the inconsistencies in E.O. 11652, the (b)(1) exemption and S. 1 by reading E.O. 11652 so broadly and (b)(1) so narrowly that the government ends up with great freedom to classify under E.O. 11652 and hardly any obligation to disclose under the FOIA.

In *Knopf*, a former CIA employee, Marchetti, sought an order to permit publication of certain classified matter which he had been previously enjoined from publishing under his contract with the CIA.[51] At the trial, Marchetti persuaded the trial judge that all but

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[49]Under existing law, 18 U.S.C. § 798 (1970) makes it an offense to communicate "to an unauthorized person" classified information relating to a narrowly defined category of "communications intelligence"; 42 U.S.C. § 2277 (1970) makes it an offense to communicate "Restricted Data" which is defined in 42 U.S.C. § 2014(y) (1970) as concerning only "atomic weapons" or "special nuclear material"; and 50 U.S.C. § 783(b) (1970) makes it an offense to communicate classified information to an "agent or representative of any foreign government or member of any Communist organization."

[50]509 F.2d 1362 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), *affirming in part, vacating in part* and *remanding* Civ. No. 540–73–A (E.D. Va. March 29, 1974).

[51]*Knopf* was a sequel to United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), which upheld an injunction, based on a secrecy agreement, prohibiting the public disclosure of classified information obtained by Marchetti during the course of his employment with the C.I.A. and ordering Marchetti to submit, in advance, to the C.I.A. for its approval, material which he planned to publish. Marchetti and his co-author, John D. Marks, submitted to the C.I.A., pursuant to the injunction,

26 of 168 items which the CIA sought to suppress could be published, since there had been no conscious decision by the CIA to classify the other 142 items. Although the action was not brought under the FOIA, the appellate court thought it appropriate to be guided by the (b)(1) exemption. The court reasoned that since another private action could be commenced against the CIA under the FOIA, seeking disclosure of the same information Marchetti sought to publish, the court might as well deal with the standards of FOIA in reaching a decision on Marchetti's claim.

The Fourth Circuit's response to the (b)(1) exemption was discouraging if one assumes the purpose of the exemption is to encourage disclosure. It held that the lower court had imposed on the government a "far too stringent" burden of proof to establish classification.[52] The court took note that under the amended FOIA "the deletion items should be suppressed only if they are found to be classified and classifiable under the Executive Order."[53] This standard seems to disregard the (b)(1) language which requires that information in fact "be properly classified pursuant to such Executive Order."[54]

On the question of classification procedure the court ignored E.O. 11652 and looked to the earlier E.O. 10501. It excused the inability of the government witnesses to determine, for most of the documents, the identity of the classifier or date of classification, on the ground that E.O. 10501 did not require such information.[55] The court thus failed to evaluate the method of classification under the procedural guidelines of E.O. 11652 which require the date of preparation and classification, the office of origin, and, to the extent practical, the demarcation of classified and non-classified portions. Instead the court held that there was "a presumption of regularity in the performance by a public official of his public duty."[56]

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the book they planned to publish, entitled THE C.I.A. AND THE CULT OF INTELLIGENCE. The C.I.A. informed the authors that 339 specific deletions of material containing classified information would have to be made, if the book were to be published. Marchetti and Marks then instituted an action in district court, joining as a plaintiff Alfred A. Knopf, Inc., a publisher with whom they had previously contracted for publication of the book, challenging the validity of the deletions. The C.I.A., by the time of the action, had reduced the number of required deletions to 168. Civ. No. 540–73–A (E.D. Va. March 29, 1974) at 1–2.

52 509 F.2d at 1370.

53 *Id.* at 1367.

54 5 U.S.C. § 552(b)(1) (Supp. IV, 1974), *amending* 5 U.S.C. § 552(b)(1) (1970).

55 509 F.2d at 1365.

56 *Id.* at 1368.

With such a presumption all that had to be proved was that the documents were in fact marked with a classified stamp, not what went through the minds of those who did the stamping or those who supervised such persons. In one swift stroke, then, the Fourth Circuit read out of (b)(1) the procedural requirement that documents be classified in accordance with the substantive standards.

Following its unusual treatment of the procedural issues, the court examined the substantive nature of the information purportedly classified. In this analysis, however, the court claimed to utilize the substantive standards of E.O. 11652 as its yardstick.[57] In fact, it used a much lower level of scrutiny. The court concluded that the deletions contained information classifiable under E.O. 11652 since:

> . . . the information in at least some of them does relate to scientific and technological developments *useful if not vital to national security.*[58] (emphasis added)

The court's "useful . . . to national security" standard clearly does not conform to the minimum substantive standard for classification under E.O. 11652. The latter standard requires that there be "[no] substantial doubt" that "unauthorized disclosure could reasonably be expected to cause damage to the national security."[59]

The Fourth Circuit remanded the issue of the classification of the 142 deletions to the district court.[60] It held that the district court, in reconsideration, must require the government to show:

> . . . no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp.[61]

We have already seen how "national defense information" as defined in S. 1 leads to a restrictive policy of communication and speech. The phrase "useful . . . to national security," the Fourth Circuit's standard for restricting communication, speaks for itself as being the most inclusive definition possible for limiting access to information. It is at least as restrictive as S. 1 and probably more so.

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[57] *Id.*

[58] *Id.*

[59] Executive Order No. 11652, *supra* note 14. *See* notes 17–19, and accompanying text.

[60] 509 F.2d at 1370.

[61] *Id.* at 1368.

CONCLUSION

And so we have come full circle. Congress amended the FOIA to permit more disclosure of classified information, depending on the Executive to provide a reasonable standard of disclosure. Legislation was introduced to penalize communication of information disclosable under the FOIA amendment but the Executive retained a regulation broader than the proposed legislation. At least one court has now limited the application of the executive regulation, narrowing it to the limits of the proposed legislation and in the process rendering the FOIA amendments a dead letter. Lewis Carroll, no doubt, would feel at home in this mad world of classified words.

But perhaps the problem in all of this is not in the Executive, the courts or the legislature. It is in our inability as a society to articulate what we want kept secret by the government and what we want to know. If we could limit classification to a few narrow categories such as troop movements, cryptographic codes, photographs of defense installations and weapon systems and perhaps only those categories, the problems of disclosure, communication and access to government documents would all solve themselves. Such a solution might be preferable to the present system of intertwining regulations and statutes and certainly would be better than the espionage legislation proposed in S. 1.