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5

THE GOVERNMENT AND INFORMATION

Section A: Collecting Information

Case in Point:
Marshall v. Barlow's, Incorporated
436 U.S. 307 (1978)

In the mid-1970s, Mr. Bill Barlow owned and operated a small plumbing and air conditioning shop in Pocatello, Idaho. One day, an Occupational Safety and Health Administration (OSHA) inspector showed up at Barlow's shop and informed Barlow that he wanted to inspect Barlow's shop for violations of OSHA rules and regulations. Barlow asked whether OSHA had received complaints about working conditions in his shop. The inspector told Barlow that no complaints had been lodged but that Barlow's shop had simply "turned up" on the agency's list. The inspector again asked Barlow for permission to enter the back shop to conduct the inspection. As a member of the John Birch Society, Mr. Barlow believed that government, generally, and particularly a federal administrative agency, is forbidden by the Fourth Amendment of the Constitution from entering his business without a warrant. When Mr. Barlow inquired whether the OSHA inspector had a warrant, the inspector indicated that no warrant was required because Congress had authorized warrantless inspections of businesses to enforce OSHA rules and regulations.

Mr. Barlow refused to allow the OSHA inspector into the back shop, and, subsequently, the secretary of labor filed suit in Idaho Federal District Court to compel Barlow to admit the inspector. The court issued the order, and when an OSHA inspector showed up again at Barlow's shop armed with a court order but still without a warrant, Barlow again refused to allow the inspector into his shop. At this point, Mr. Barlow went to the Idaho Federal District Court to get an injunction preventing OSHA from searching his shop without a warrant. Barlow won his case at the district court, and the secretary of labor appealed.

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The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Notice that what the amendment forbids is unreasonable searches and seizures, but it does not define for us what an unreasonable search or seizure is. The task of deciding what constitutes an unreasonable search has fallen to the U.S. Supreme Court, and the Court has said that warrantless searches and seizures are unreasonable. This is what has come to be known as the warrant requirement: To meet the dictates of the Fourth Amendment, a search must be accompanied by a warrant. No sooner did the Court establish the warrant requirement than it began to create exceptions to it. Those exceptions are referred to as *exigent circumstances* and are generally created in those situations in which requiring a warrant would be impractical. For example, probable cause to stop an automobile may provide the legal authority to search the car without a warrant. Border searches, consent, plain view, and hot pursuit are some other situations in which the Court has created exceptions to the warrant requirement.

The question in the *Barlow* case is whether administrative searches that do not result in criminal charges are to be another exception to the warrant requirement. It would be helpful at this point to reflect on some history. One impetus for the Fourth Amendment was the hatred that businessmen of the former colonies held for the *general warrant,* a procedure that authorized officers of the king to conduct so-called fishing expeditions. That is, the British officer would search a business (or house) without any evidence of wrongdoing just to see whether colonists were complying with certain tax measures. That is why the Fourth Amendment is so specific at the point where it says, "no warrant shall issue."

The Court had decided cases on both sides of the question of whether administrative searches require a warrant. In 1967, the Court decided two cases that could support Mr. Barlow's position. In *Camara v. Municipal Court,* 387 U.S. 523 (1967), the Court said that a San Francisco public health inspector would need a warrant to inspect an apartment leased by Camara (the property was not supposed to be used as a personal dwelling, but allegedly it was). Similarly, the Court said the Seattle Fire Department would need a warrant to conduct an inspection of a warehouse during a routine canvass of businesses for compliance with the city fire code (*See v. Seattle,* 387 U.S. 541 [1967]).

In contrast, the Court said no warrant was required to inspect a firearms business (*United States v. Biswell,* 406 U.S. 311 [1972]) or a liquor establishment (*Colonnade Catering Corporation v. United States,* 397 U.S. 72 [1970]). The Court reasoned that these were "pervasively regulated businesses" that had been subject to "close governmental supervision and inspection" for a long period of time. Furthermore, both businesses had contracted with the federal government and hence fell under a 1936 Act[1] that authorizes warrantless inspections for compliance with minimum wage and hour provisions. Barlow's case was similar to *Biswell* and *Colonnade* in that a congressional act had authorized OSHA's warrantless searches.

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Questions

1. Given what you know of the ***Barlow*** case, how do you think the Supreme Court decided? Why?
2. Barlow owned a small business and had perhaps six or seven employees. How is it that his business fell under the jurisdiction of OSHA? Is every business in the United States subject to the federal government's jurisdiction here? Where is the line drawn?
3. Barlow used to speak in my classes when I taught in Pocatello, and he indicated that it cost $60,000 in legal fees to get his case to the Supreme Court (and he got to skip the Circuit Court of Appeals). Barlow did not have that kind of money. How do you suppose "little people" like Barlow get their cases to the Supreme Court?

GOVERNMENT'S NEED FOR INFORMATION

Toward the end of Chapter 3, the point was made that as the United States began to reject the ideology of negative freedom, limited government, and laissez-faire economics and embrace a newer ideology of positive freedom, positive government, and Keynesian economics, the government became increasingly more involved in distributive, redistributive, and regulatory policy. Distributive policies are those that attempt to encourage private activity, often using subsidies or tax incentives.[2] It is in the area of distributive policies that cozy triangles occur most frequently. Both the triangle that provides subsidies to tobacco growers and the triangle providing research funds to fight cancer are examples of distributive policies. The federal tax deduction for interest on a home mortgage and property tax is also an example of distributive policy.

As the name implies, *redistributive* policies attempt to "manipulate the allocation of wealth, property, rights, or some other value among social classes or racial groups in society."[3] A reduction in the rate at which capital gains are taxed would be redistributive from the bottom to the top, whereas programs such as Aid to Families with Dependent Children (AFDC), legal aid, food stamps, and affirmative action are examples of redistributive policies in the other direction.

Regulatory policies can attempt to regulate competition, primarily because of scarce resources (the licensing of businesses that use air waves and interstate common carriers), or they can regulate in the interest of protecting the public (consumer and environmental laws).

Whether a specific policy involves an agricultural subsidy, a tax incentive, the regulation of an industry, protection of the environment, or provision of an entitlement program, you can see that Congress needs to rely on the expertise of agencies. Those agencies need to collect and use information. The agencies need information to make the rules necessary to implement the policy, to assess the execution of the policy, and to ensure compliance with the policy. Gellhorn and Levin have stated the problem simply: "Good decisions require good data."[4]

Primarily, federal agencies (state and local agencies as well) acquire information in these three ways: (a) by requiring regulated parties to maintain records and make the

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records available for agency inspection or to submit periodic reports; (b) by subpoenaing information from businesses, individuals, or other parties; (c) by conducting physical inspections of businesses or property (as in the *Barlow* case).

Requiring Regulated Parties to Keep Records

Agencies acquire the power to compel information from private parties in two ways. First, occasionally, Congress will specify that power in legislation. The Fair Labor Standards Act, the federal minimum wage and hour law, requires those businesses that fall under the Act's jurisdiction (e.g., those involved in interstate commerce) to keep records relating to hourly pay and overtime. The Act further authorizes the secretary of labor (or designate) to enforce provisions of the Act by examining those records. Second, if a statute does not specifically require private parties to maintain records for agency inspection, that power can be inferred from the delegation of power. In that case, the agency will generally go through the public notice and comment procedure (see Chapter 7) to notify regulated parties that it will require them to keep certain information.

What constitutional problem do you think might arise when the government says, "We want you to keep records about *X,* and an agency will look at your records. If we find you are not in compliance with *X,* we will fine you." Potentially, the Fifth Amendment protects individuals from incriminating themselves where government has accused them of wrongdoing. During World War II, the Price Control Act established price controls on many crucial commodities. It required retailers to maintain sales records for inspection by the price control administrator. As suggested in the case that follows, Shapiro was suspected of selling goods at prices above the set level. The Price Control Administration requested his sales receipts, and he refused.

Shapiro v. United States
335 U.S. 1 (1948)

Chief Justice Vinson delivered the opinion of the Court, joined by Justices Black, Reed, Douglas, and Burton. Justices Frankfurter, Jackson, Rutledge, and Murphy dissented.

Petitioner was tried on charges of having made tie-in sales in violation of regulations under the Emergency Price Control. A plea in bar, claiming immunity from prosecution based on § 202(g) of the Act, was overruled by the trial judge; judgment of conviction followed and was affirmed on appeal, 159 F.2d 890. A contrary conclusion was reached by the district judge in *United States v. Hoffman,* 335 U.S. 77. Because this conflict involves an important question of statutory construction, these cases were brought here and heard together. Additional minor considerations involved in the Hoffman case are dealt with in a separate opinion. . . .

The petitioner, a wholesaler of fruit and produce, on September 29, 1944, was served with a *subpoena duces tecum* and *ad testificandum* issued, by the Price Administrator, under authority of the Emergency Price Control Act. The subpoena directed petitioner to appear before designated enforcement attorneys of the Office of Price Administration and to produce "all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1st, 1944, to September 28,

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1944." In compliance with the subpoena, petitioner appeared and, after being sworn, was requested to turn over the subpoenaed records. Petitioner's counsel inquired whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records." The presiding official stated that the "witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept." Petitioner thereupon produced the records, but claimed constitutional privilege. . . . The plea in bar alleged that the name of the purchaser in the transactions involved in the information appeared in the subpoenaed sales invoices and other similar documents. And it was alleged that the Office of Price Administration had used the name and other unspecified leads obtained from these documents to search out evidence of the violations, which had occurred in the preceding year.

The Circuit Court of Appeals ruled that the records which petitioner was compelled to produce were records required to be kept by a valid regulation under the Price Control Act; that thereby they became public documents, as to which no constitutional privilege against self-incrimination attaches; that accordingly the immunity of § 202(g) did not extend to the production of these records and the plea in bar was properly overruled by the trial court.

It should be observed at the outset that the decision in the instant case turns on the construction of a compulsory testimony-immunity provision which incorporates by reference the Compulsory Testimony Act of 1893. This provision, in conjunction with broad record-keeping requirements, has been included not merely in a temporary wartime measure, but also, in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government. . . . In adopting the language used in the earlier act, Congress "must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." That judicial construction is made up of the doctrines enunciated by this Court in spelling out the non-privileged status of records validly required by law to be kept, in *Wilson v. United States,* 221 U.S. 361, and the inapplicability of immunity provisions to non-privileged documents, in *Heike v. United States,* 227 U.S. 131. . . .

In view of the clear rationale in *Wilson,* taken together with the ruling in *Heike* as to how statutory immunity provisos should be construed, the conclusion seems inevitable that Congress must have intended the immunity proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar. Since he could assert no valid privilege as to the required records here in question, he was entitled to no immunity under the statute thus viewed. . . .

It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.

It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power. Accordingly, the principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." Even the dissenting Justices in the *Davis* case conceded that "there is an important

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difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects," a difference whose essence is that the latter papers, "once they have been legally obtained, are available as evidence." In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of subpoena, as authorized specifically by § 202(b) of the statute, it was "legally obtained" and hence "available as evidence."

The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.

In the view that we have taken of the case, we find it unnecessary to consider the additional contention by the government that, in any event, no immunity attaches to the production of the books by the petitioner because the connection between the books and the evidence produced at the trial was too tenuous to justify the claim.

For the foregoing reasons, the judgment of the Circuit Court of Appeals is affirmed.

Question

The Court resolves difficult issues by what is called a *balancing test;* that is, the Court will balance the interest of the parties to see which interest outweighs the other. That is what the Court did in this case. Can you articulate the two interests? Which interest won? Why?

The Court has decided many cases in the area of the Fifth Amendment's self-incrimination clause since 1948, although relatively few of them have involved administrative law. The Court has restricted the concept of self-incrimination so that it applies only to individuals and not to businesses. It applies only in cases in which criminal charges could result and hence does not apply in civil actions such as administrative law. Finally, self-incrimination applies only to oral testimony. It does not apply to physical evidence, such as records or test results. Therefore, the Court today rarely has occasion to apply the self-incrimination clause in this area of administrative law.

You will probably notice as you read administrative law cases that there is a propensity on behalf of the courts to show deference toward agency expertise. That deference is apparent in cases involving agency acquisition of information. If the courts do not interfere with congressional attempts to acquire information, why should the courts be any more prone to interfere with Congress' expert delegate (i.e., bureaucracy)? See, for example, *Superior Oil Company v. Federal Energy Regulatory Commission,* 563 F.2d. 191 (1977), and *In Re Federal Trade Commission Line of Business Report,* 595 F 2d 685 (D.C. Cir., 1978).

Administrative Subpoenas

Sometimes agencies need information that is readily available, sometimes they require specific types of information to be made available (as in the preceding cases), and sometimes

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they need additional information that a private party may be unwilling to surrender. In these latter situations, agencies have the power to subpoena the desired information. A subpoena is a court's order for a person to appear in court and testify or perhaps to bring documents. It differs from a warrant in that a subpoena can be challenged prior to execution, whereas a warrant can be challenged only after the fact. For example, if a court issued a subpoena to a physician, the doctor's lawyer might be able to challenge the subpoena on the grounds of privileged information (doctor/client privilege) and perhaps get the subpoena quashed. In the public administration context, a subpoena is an order by an agency to appear before the agency or, more typically, to bring certain documents to the agency. Another difference between a warrant and a subpoena is that the Fourth Amendment specifies that a warrant can be issued based only on probable cause. But what if an administrative agency wants to go on a "fishing expedition" with a subpoena? The two cases that follow address the question of the Fourth Amendment and administrative subpoenas. They are also interesting in that they represent the two different ideologies discussed in Chapter 1.

Federal Trade Commission v. American Tobacco Company 264 U.S. 298 (1924)

Justice Holmes delivered the opinion for a unanimous Court.

[1] These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the Act of September 26, 1914, and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda and correspondence for inspection and making copies. They were denied by the District Court. 283 Fed. 999. The resolution directs the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, etc. The act directs the Commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the Commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The Commission and the party concerned are both given a resort to the Circuit Court of Appeals. By section 6 the Commission shall have power (a) to gather information concerning, and to investigate the business, conduct, practices, and management of any corporation engaged in commerce, except banks and common carriers, and its relation to other corporations and individuals; (b) to require reports and answers under oath to specific questions furnishing the Commission such information as it may require on the above subjects; . . . (d) upon the direction of the President or either House of Congress to investigate and report the facts as to alleged violation of the Anti-Trust Acts. By section 9 for the purposes of this act the Commission shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against and shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. In case of disobedience an order may be obtained from a District Court. Upon application of the Attorney General the District Courts are given jurisdiction to issue writs of mandamus to require compliance with the act or any order of the commission made in pursuance thereof. The petitions are filed under this clause and the question is whether orders of the Commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the Commission charging the

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respondents severally with unfair competition by regulating the prices at which their commodities should be resold. . . . There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring, in the case of the American Tobacco Company, the exhibition during business hours when the Commission's agent requests it, of all letters and telegrams received by the Company from or sent by it to all of its jobber customers, between January 1, 1921, to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams, or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith v. Interstate Commerce Commission,* 245 U.S. 33. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission,* 211 U.S. 407, and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & Nashville R. R. Co.,* 236 U.S. 318. The question is a different one where the State granting the charter gives its Commission power to inspect. . . .

[3] The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. . . . We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.

Judgment affirmed.

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Oklahoma Press Publishing Company v. Walling 327 U.S. 186 (1946)

Justice Rutledge delivered the opinion of the Court. Justice Murphy dissented, and Justice Jackson did not participate.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of subpoenas *duces tecum* issued by him in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act. . . . The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

I

Coloring almost all of petitioners' position, as we understand them, is a primary misconception that the First Amendment knocks out any possible application of the Fair Labor Standards Act to the business of publishing and distributing newspapers. The argument has two prongs.

The broadside assertion that petitioners "could not be covered by the Act," for the reason that "application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment," is without merit. . . . If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce.

II

Other questions pertain to whether enforcement of the subpoenas as directed by the Circuit Courts of Appeals will violate any of petitioners' rights secured by the Fourth Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records, and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. Supporting this is an argument that Congress did not intend such use to be made of the delegated power, which rests in part upon asserted constitutional implications, but primarily upon the reports of legislative committees, particularly in the House of Representatives, made in passing upon appropriations for years subsequent to the Act's effective date. . . . The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records, or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them. . . . What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced

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by petitioners' First Amendment contentions. But beyond them it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim.

Section 11(a) expressly authorizes the Administrator to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." The subpoena power conferred by § 9 . . . is given in aid of this investigation and, in case of disobedience, the District Courts are called upon to enforce the subpoena through their contempt powers, without express condition requiring showing of coverage. . . . In view of these provisions, with which the Administrator's action was in exact compliance, this case presents an instance of "the most explicit language" which leaves no room for questioning Congress' intent. The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so. . . .

III

Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek. . . . Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . . The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. . . .

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11(a), the latter expressly, the former by necessary implication. It is not to be doubted that Congress

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could authorize investigation of these matters. In all these respects, the specifications more than meet the requirements long established by many precedents. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint.

Nor is there room for intimation that the Administrator has proceeded in these cases in any manner contrary to petitioners' fundamental rights or otherwise than strictly according to law. It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek.

No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make "appropriate defense."

Accordingly the judgments in both causes, No. 61 and No. 63, are affirmed.

Affirmed.

Justice Murphy, dissenting

It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of non-judicial subpoenas issued by administrative agents.

Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible.

Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.

Questions

1. What is your answer to the question whether administrative agencies may go on "fishing expeditions" with a subpoena?
2. Would the administrative state exist without this investigative tool? Is that good or bad? Why?

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According to Gellhorn, Byse, and Strauss, the test that the courts apply now when a party challenges an administrative subpoena is "whether the topic to which the inquiry pertains is a topic the official has been empowered to investigate."[5] In other words, the Court will ask whether the subject matter of the subpoena is subject matter the agency has the power to investigate. In the *Oklahoma Press* case, for example, the subject matter of the subpoena was employee records, and the secretary of labor is empowered under the Fair Labor Standards Act to investigate violations of wage and hour provisions; hence, the Court will enforce the subpoena. Provided that a subpoena seeks information in an area that the agency is empowered to investigate, that it does not request privileged information, and that it is sufficiently specific, the courts will generally enforce agency subpoenas.

The fact that an agency has issued a subpoena does not necessarily mean that requested documents will be immediately forthcoming. That is because, unlike court-issued subpoenas, administrative agencies rarely have any enforcement mechanism. If an individual ignored a court-issued subpoena and failed to appear before the court at the proper time, a bench warrant would likely be issued for the subject's arrest, and contempt of court proceedings would follow. Congress has made it a federal misdemeanor to fail to comply with a subpoena issued by the Securities and Exchange Commission (SEC), but that is the exception rather than the rule. More typically, if an agency issues a subpoena and the party refuses to comply, the agency must go to federal court to obtain a court order to comply with the subpoena. At such hearings, the courts apply the test cited earlier: "whether the topic to which the inquiry pertains is a topic the official has been empowered to investigate." Frequently, a court will issue the order for compliance with the subpoena, and if the party still refuses to comply, then the agency must go back to court and instigate contempt proceedings. The problem is that a court's decision to issue a judicial order requiring compliance with an agency subpoena is an appealable decision and can be appealed to the circuit court of appeals. It could be appealed further to the U.S. Supreme Court, as the *American Tobacco* and *Oklahoma Press* cases were. The point is that, given a good enough legal division, a business or corporation could tie up compliance with an agency subpoena for years, if it so chooses.

In 2003, Congress passed the Partial-Birth Abortion Ban Act, which imposes civil and criminal penalties on physicians who perform them (in facilities that receive federal funds). The term *partial birth* is defined in the statute. The Act was quickly challenged by doctors who perform such abortions. The essence of the complaint is that the Act makes no exceptions, for example, to save the life of the mother. Several of the plaintiff doctors were also planning to testify as experts about the medical necessity of the procedure to save the life of some of the mothers. Hoping to find some evidence to discredit the doctors' testimony, Attorney General John Ashcroft subpoenaed the medical records of women who had the procedure. These records were in the possession of various hospitals around the country, so the subpoenas were directed at the hospitals, all of whom balked at turning over the records. The attorney general went to court to obtain a court order to enforce the subpoenas. The results have been mixed in various jurisdictions. The original suit was filed in New York, and the District Court there issued an enforcement order in support of the subpoena.[6] However, district courts in Illinois and California have quashed the subpoenas. The Illinois decision was upheld by the Circuit Court.[7]

Conducting Physical Inspections

Physical inspection is an indispensable tool in an agency's arsenal for implementing laws and policies. There are fire inspections, housing code inspections, meat inspections,

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nuclear plant inspections, mine safety inspections, plant effluent inspections, defense plant inspections, AFDC inspections, bank inspections—the list is almost endless. To this point, we know that the Fifth Amendment's self-incrimination clause is not involved in those situations in which agencies require businesses to maintain certain records and, as a consequence of inspecting those records, may impose fines. We also know the Fourth Amendment is rarely involved where agencies issue subpoenas. The question that opened this chapter, and to which we now turn, is whether the Fourth Amendment is involved in administrative searches or physical inspections.

Marshall v. Barlow's, Incorporated 436 U.S. 307 (1978)

Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, and Powell. Justice Stevens dissented, joined by Justices Blackmun and Rehnquist.

Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA or Act) empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the Act. . . . On the morning of September 11, 1975, an OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho. The president and general manager, Ferrol G. "Bill" Barlow, was on hand; and the OSHA inspector, after showing his credentials, informed Mr. Barlow that he wished to conduct a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector answered no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business; Mr. Barlow's response was to inquire whether the inspector had a search warrant. The inspector had none. Thereupon, Mr. Barlow refused the inspector admission to the employee area of his business. He said he was relying on his rights as guaranteed by the Fourth Amendment of the United States Constitution. . . . Three months later, the Secretary petitioned the United States District Court for the District of Idaho to issue an order compelling Mr. Barlow to admit the inspector. The requested order was issued on December 30, 1975, and was presented to Mr. Barlow on January 5, 1976. Mr. Barlow again refused admission, and he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA. A three-judge court was convened. On December 30, 1976, it ruled in Mr. Barlow's favor. 424 F.Supp. 437. Concluding that *Camara v. Municipal Court,* 387 U.S. 523 (1967), and *See v. City of Seattle,* 387 U.S. 541 (1967), controlled this case, the court held that the Fourth Amendment required a warrant for the type of search involved here and that the statutory authorization for warrantless inspections was unconstitutional. An injunction against searches or inspections pursuant to § 8(a) was entered. The Secretary appealed, challenging the judgment, and we noted probable jurisdiction. . . .

[1] The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." The general warrant was a recurring point of contention

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in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."

Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence. . . .

This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In *Camara v. Municipal Court,* supra, 387 U.S., we held: "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." On the same day, we also ruled: "As we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." These same cases also held that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, *See v. City of Seattle,* would require a warrant to conduct the inspection sought in this case.

The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule. Invoking the Walsh-Healey Act of 1936, 41 U.S.C. § 35 et seq., the Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce. . . .

Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court,* 387 U.S., at 538. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given

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area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions. . . . Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes. We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained.

III

We hold that Barlow was entitled to a declaratory judgment, that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent. The judgment of the District Court is therefore affirmed. So ordered.

Justice Stevens, dissenting, joined by Justices Blackmun and Rehnquist.

I

The warrant requirement is linked "textually . . . to the probable-cause concept" in the warrant clause. The routine OSHA inspections are, by definition, not based on cause to believe there is a violation on the premises to be inspected. Hence, if the inspections were measured against the requirements of the Warrant Clause, they would be automatically and unequivocally unreasonable.

Because of the acknowledged importance and reasonableness of routine inspections in the enforcement of federal regulatory statutes such as OSHA, the Court recognizes that requiring full compliance with the Warrant Clause would invalidate all such inspection programs. Yet, rather than simply analyzing such programs under the "Reasonableness" Clause of the Fourth Amendment, the Court holds the OSHA program invalid under the Warrant Clause and then avoids a blanket prohibition on all routine regulatory inspections by relying on the notion that the "probable cause" requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of "searches" outweighs the intrusion on interests protected by the Fourth Amendment.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment. . . ."[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches. . . ."

Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness

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standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially developed, warrant-preference scheme.

Fidelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment. If the Court were correct in its view that such inspections, if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant"—to use Mr. Justice Clark's characteristically expressive term—without any true showing of particularized probable cause would not be sufficient to validate them. . . . Even if a warrant requirement does not "frustrate" the legislative purpose, the Court has no authority to impose an additional burden on the Secretary unless that burden is required to protect the employer's Fourth Amendment interests. The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause. But this purpose is not served by the newfangled inspection warrant.

What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform the employer that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him that the person demanding entry is an authorized inspector. An examination of these functions in the OSHA context reveals that the inspection warrant adds little to the protections already afforded by the statute and pertinent regulations, and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential. . . .

The pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. Thus, in *Biswell,* if Congress had authorized inspections of all commercial premises as a means of restricting the illegal traffic in firearms, the Court would have found the inspection program unreasonable; the power to inspect was upheld because it was tailored to the subject matter of Congress' proper exercise of regulatory power. Similarly, OSHA is directed at health and safety hazards in the workplace, and the inspection power granted the Secretary extends only to those areas where such hazards are likely to be found. Here, as well as in *Biswell,* businesses are required to be aware of and comply with regulations governing their business activities. In both situations, the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

The case before us involves an attempt to conduct a warrantless search of the working area of an electrical and plumbing contractor. The statute authorizes such an inspection during reasonable hours. The inspection is limited to those areas over which Congress has exercised its proper legislative authority. The area is also one to which employees have regular access without any suggestion that the work performed or the equipment used has any special claim to confidentiality. Congress has determined that industrial safety is an urgent federal interest requiring regulation and supervision, and further, that warrantless inspections are necessary

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to accomplish the safety goals of the legislation. While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power. . . . I respectfully dissent.

Questions

1. The state of the law prior to *Barlow* was that businesses were generally protected by the Fourth Amendment and that a warrant would be required to inspect a business unless that business was in a "pervasively regulated industry." Did the decision in *Barlow* change the state of the law?
2. Do administrative search warrants require probable cause?
3. What good does it do to require a warrant and then allow one to be issued without probable cause?

Although *Marshall v. Barlow's* is a famous administrative law case, it really set no new precedent and, in fact, followed the reasoning established in *See v. Seattle* and *Camara v. Municipal Court.* What makes the *Barlow* case unusual is the presence of a federal law authorizing warrantless searches and the fact that the Court declared that part of the law unconstitutional. Often, we assume that because judicial review exists, the Court frequently uses it to declare acts of Congress unconstitutional. The Court, however, has declared only 162 acts of Congress to be unconstitutional, although the Court has shown less deference to state legislatures (1,299 acts declared unconstitutional).[8]

As stated in the first question following the Barlow case, the state of the law, both before and after *Barlow,* was that warrantless administrative searches were unconstitutional except in heavily regulated (and licensed) industries. The problem is that not all situations will fit neatly into that dichotomy. For example, can a fire marshal search the scene of a burned business for evidence of arson without a warrant (*Michigan v. Tyler,* 436 U.S. 399 [1978])? Can a pollution control inspector enter business property—but not the building—and take an air sample to see if the business is in compliance with standards without a warrant (*Air Pollution Variance Board v. Western Alfalfa Corporation,* 416 U.S. 861 [1974])? Can a high school vice principal search a student's purse without a warrant (*New Jersey v. T.L.O.,* 469 U.S. 325 [1985])? Can the Environmental Protection Agency (EPA) fly over a business and use aerial photographs as a means of physical inspection without a warrant (*Dow Chemical Company v. United States,* 476 U.S. 227 [1986])? Can the Immigration and Naturalization Service (INS) conduct a "factory survey" without the warrant being specific (*INS v. Delgado,* 466 U.S. 210 [1984])? In a factory survey, INS agents block the exits of a business and walk through the plant, systematically asking questions of workers of Mexican descent about their presence in the United States and arresting those whom the agents suspect of being illegal aliens. Does the Constitution require the exclusion of admittedly illegally seized evidence by the INS at a deportation hearing (*INS v. Lopez-Mendoza,* 468 U.S. 1032 [1984])? Can a public school require drug testing through urinalysis of any student who wants to participate in sports (*Vernonia School District 47J v. Acton,* 515 U.S. 646 [1995])? Can a public hospital conduct drug

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tests on unsuspecting pregnant women and give some of them with positive results the following choice: face prosecution or enter a rehabilitation program (*Ferguson v. City of Charleston* (186 F 3d 469 [4th Cir. 1999])*?* The *Dow Chemical* and *Ferguson* cases appear at the end of this chapter.

The questions posed in the preceding cases do not readily fit into the "heavily regulated industry versus other businesses" dichotomy suggested by the Court's decisions. In the criminal area, one of the crucial variables regarding whether a warrant is required is the notion of an expectation of privacy. The more likely it is that the individual (or business) has a legitimate expectation of privacy, the more likely a warrant will be required. The automobile is an exception to the warrant requirement because the Court has said that individuals have less of an expectation of privacy in an auto than they do in their homes and businesses. In a 2001 case, the Supreme Court threw out a warrantless search by a Department of Interior agent who aimed a thermal-imaging device at a suspect's home. The device was used to measure heat within the home to provide evidence of a grow light. The Court said it was a search within the meaning of the Fourth Amendment, and the suspect had a reasonable expectation of privacy.[9] Pervasively regulated industries are exceptions to the warrant requirement because "certain industries have such a history of government oversight that *no reasonable expectation of privacy* could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms *(Biswell)* are industries of this type [italics added]."[10]

OSHA must obtain a warrant prior to inspecting Mr. Barlow's business, because, once past the public areas of Barlow's business, Mr. Barlow has a reasonable expectation of privacy in his back shop. The Court has said that an individual has a reasonable expectation of privacy in a public telephone booth, *Katz v. United States,* 389 U.S. 347 (1967), and in a footlocker, *United States v. Chadwick,* 433 U.S. 1 (1977). Given that, do you think Dow Chemical has a reasonable expectation of privacy from aerial inspections by the EPA? Do you believe the student, T.L.O., had a reasonable expectation of privacy in her purse? In all of the cases discussed above, the searches were reasonable according to the Court and hence constitutional. In the *Lopez-Mendoza* case, the search was unconstitutional, but evidence gained from it was admitted at the deportation hearing. The case that follows presents the interesting question of whether a welfare recipient has a reasonable expectation of privacy in her own home.

Wyman v. James
400 U.S. 309 (1971)

Justice Blackmun delivered the opinion of the Court, joined by Chief Justice Burger and Justices Black, Harlan, and Stewart. Justice White concurred in part, and dissents were filed by Justices Douglas and Marshall joined by Justice Brennan.

This appeal presents the issue whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC) may refuse a home visit by the caseworker without risking the termination of benefits. . . . The District Court majority held that a mother receiving AFDC relief may refuse, without forfeiting her right to that relief, the periodic home visit which the cited New York statutes and regulations prescribe as a condition for the continuance of assistance under the program. The

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beneficiary's thesis, and that of the District Court majority, is that home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary's Fourth and Fourteenth Amendment rights. . . . Plaintiff Barbara James is the mother of a son, Maurice, who was born in May 1967. They reside in New York City. Mrs. James first applied for AFDC assistance shortly before Maurice's birth. A caseworker made a visit to her apartment at that time without objection. The assistance was authorized.

Two years later, on May 8, 1969, a caseworker wrote Mrs. James that she would visit her home on May 14. Upon receipt of this advice, Mrs. James telephoned the worker that, although she was willing to supply information "reasonable and relevant" to her need for public assistance, any discussion was not to take place at her home. The worker told Mrs. James that she was required by law to visit in her home and that refusal to permit the visit would result in the termination of assistance. Permission was still denied.

On May 13 the City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance because of the visitation refusal. The notice advised the beneficiary of her right to a hearing before a review officer. The hearing was requested and was held on May 27. Mrs. James appeared with an attorney at that hearing. They continued to refuse permission for a worker to visit the James home, but again expressed willingness to cooperate and to permit visits elsewhere. The review officer ruled that the refusal was a proper ground for the termination of assistance. . . .

III

When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home: "The right of the people to be secure in their persons, houses, papers, and effects." This Court has characterized that right as "basic to a free society." *Wolf v. Colorado,* 338 U.S. 25 (1949); *Camara v. Municipal Court,* 387 U.S. 523 (1967). And over the years the Court consistently has been most protective of the privacy of the dwelling. In *Camara* Mr. Justice White … went on to observe, "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." He pointed out, too, that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior.

IV

This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

V

If, however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits,

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somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness.

There are a number of factors that compel us to conclude that the home visit proposed for Mrs. James is not unreasonable:

1. The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the child and, further, it is on the child who is dependent.

2. The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.

3. One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same.

4. The home visit, it is true, is not required by federal statute or regulation. But it has been noted that the visit is "the heart of welfare administration"; that it affords "a personal, rehabilitative orientation, unlike that of most federal programs"; and that the "more pronounced service orientation" effected by Congress with the 1956 amendments to the Social Security Act "gave redoubled importance to the practice of home visiting." Mrs. James, in fact, on this record presents no specific complaint of any unreasonable intrusion of her home and nothing that supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity. She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind. She alleges only, in general and nonspecific terms, that on previous visits and, on information and belief, on visitation at the home of other aid recipients, "questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Paradoxically, this same complaint could be made of a conference held elsewhere than in the home, and yet this is what is sought by Mrs. James. The same complaint could be made of the census taker's questions. What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind. We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs. And, of course, little children, such as Maurice James, are not yet registered in school. The visit is not one by police or uniformed authority. It is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's

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review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.

Camara v. Municipal Court, 387 U.S. 523 (1967), and its companion case, *See v. City of Seattle,* 387 U.S. 541 (1967), both by a divided Court, are not inconsistent with our result here. Those cases concerned, respectively, a refusal of entry to city housing inspectors checking for a violation of a building's occupancy permit, and a refusal of entry to a fire department representative interested in compliance with a city's fire code.

In each case a majority of this Court held that the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection. *Frank v. Maryland,* 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877 (1959), a case that reached an opposing result and that concerned a request by a health officer for entry in order to check the source of a rat infestation, was *pro tanto* overruled. Both *Frank* and *Camara* involved dwelling quarters. *See* had to do with a commercial warehouse.

But the facts of the three cases are significantly different from those before us. Each concerned a true search for violations. *Frank* was a criminal prosecution for the owner's refusal to permit entry. So, too, was *See*. *Camara* had to do with a writ of prohibition sought to prevent an already pending criminal prosecution. The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed.

In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted.

VII

Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early morning mass raid upon homes of welfare recipients is not unknown. See *Parrish v. Civil Service Comm.,* 425 P.2d 223 (1967); Reich*, Midnight Welfare Searches and the Social Security Act,* 72 Yale L.J. 1347 (1963). But that is not this case. Facts of that kind present another case for another day.

We therefore conclude that the home visitation as structured by the New York statutes and regulations is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment. Reversed and remanded with directions to enter a judgment of dismissal.

It is so ordered.

Reversed and remanded with directions.

Questions

1. Do you believe that Mrs. James had a reasonable expectation of privacy?
2. Do you believe that, by accepting "welfare," one should forfeit his or her expectation of privacy?
3. Does James's expectation of privacy have anything to do with the disposition of the case? Why?

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The Court has several options open to it when it hears a case involving administrative searches and physical inspections. The Court can find that no warrant is required because a heavily regulated industry is involved, as in *Donovan v. Dewey,* 452 U.S. 594 (1981), which upheld the warrantless inspection of a stone quarry, and *New York v. Burger,* 482 U.S. 691 (1987), which upheld the warrantless search of a junkyard. The Court can find, as it did in the *Wyman* case, that the inspection is not a search, or, if it is, it is a reasonable search. This is the result reached in the *Dow Chemical Co.* case, the search of the student's purse, the case of the pollution control inspector who sampled the air on the property of the alfalfa company, and the two drug-testing cases. This is also what the Court said about factory surveys by the INS. Finally, the Court can find a reasonable expectation of privacy and require a warrant as it did in the *Barlow* case. Most of the Court's recent physical inspection cases, however, allow warrantless searches rather than following the *Barlow* precedent.

The law of administrative searches may seem confusing because there is no way to tell whether the Court will apply the *Barlow* jurisprudence or the *Wyman-T.L.O.-Dow Chemical* analysis. It may be helpful to return to the case-in-point and recall that what the Fourth Amendment prohibits is *unreasonable* searches and seizures. Today, it looks like search and seizure cases fall into two broad categories: First, there are cases involving individualized suspicion relative to law enforcement. For these cases, the warrant requirement is the law. That is, as a general rule, a warrant is required for a search to be *reasonable.* However, there are some 12 or so exceptions to the warrant requirement and within those exceptions, warrantless searches are *reasonable.* Second, there is another world of searches and seizures that are often suspicionless and do not have as their goal solving or preventing crime. Most administrative searches fit into this category. Indeed, of all the cases you have been exposed to so far, the only search resulting from suspicion was the search of the student, T.L.O.'s purse.

The first variable to look at in analyzing search and seizure is the expectation of privacy. Where the expectation of privacy is high, a warrant (administrative, not criminal) will likely be required. See *Barlow.* Where there is less of an expectation of privacy, a warrant is less likely. Dow Chemical, for example had no expectation of privacy in the "open field." Ms. James may have had an expectation of privacy in her home, but remember, there was no search of her home. She refused to allow social workers to "inspect" her home so she lost her entitlement under the law.

The second variable to examine is whether the object of the search is a business in a heavily regulated industry. If so, no warrant will be required. Finally, there is another subcategory of suspicionless searches, and these fall under a doctrine called the *special needs doctrine.* As the name suggests, these warrantless searches and seizures are justified by the "special needs" of society beyond the normal need for law enforcement. This line of cases is best exemplified by, but not limited to, urine tests for drug use. When government attempts to justify a warrantless search based on special needs, a reviewing court will examine the specific context of the search and apply a balancing test. The court will balance the privacy interests of the individual against the public interest that created the special need. The Supreme Court has insisted that special needs searches will be allowed only in a limited (special) set of circumstances. Furthermore, the invasion of privacy must be minimal. Finally, if the important governmental interest advanced for the intrusion would be placed in jeopardy by requiring individualized suspicion (and hence a warrant), then these warrantless searches will be *reasonable.*[11] To see how this test applies, the Court's urine drug-testing cases are instructive. The Court has addressed the issue of

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warrantless, suspicionless, forced drug tests through urinalysis in six cases. In *National Treasury Employees Union v. Von Raab,* certain customs officials were required to provide urine samples for testing. The Court found that the balance tipped in favor of society's special needs for those customs agents directly involved in drug interdiction and for those agents who are required to carry firearms. The balance tipped in favor of the individuals' privacy, however, for customs officials forced to produce urine samples because they handle "classified" material. For the classified material employees, the agency was not able to justify the special need. Justice Scalia dissented as to the decision regarding the other two categories of employees because the agency had not demonstrated that drug use by its employees had been a problem. The *Von Raab case* appears below.

On the same day the Supreme Court sanctioned the urine searches for the two categories of customs employees, it also approved of urine sample searches for certain railroad employees following train wrecks. The Federal Railroad Administration convinced the Court that drug and alcohol use was a major factor in train accidents. The danger to public safety justified the special need.[12]

In 1995, the Court allowed a school district to require urine-sample drug tests of students who wanted to participate in sports. There was evidence of a significant drug problem in the high school and evidence that athletes were a source of the problem before the Court. The intrusion, while perhaps significant, was voluntary in the sense that students could choose to participate in sports (and hence submit to drug testing) or not. The balance tipped in favor of the public interest that created the special need.[13] The Court reached the same decision in a 2002 case where a school district imposed urine tests on all students who wanted to participate in any extracurricular activity.[14]

Moving from the playground to the ballot box, the State of Georgia passed a law requiring candidates for political office to submit to a drug test before their name could appear on the ballot. In *Chandler v. Miller* 520 U.S.305 (1997), the law was challenged by three Libertarian Party candidates. Because there was no evidence of problems in Georgia caused by drug-using politicians, the state was left to defend the policy as a "symbolic commitment to the struggle against drug abuse." The Court found that justification lacking to support a special need. The balance tipped in favor of individual privacy.

In 2001, the Supreme Court heard the case of *Ferguson v. City of Charlestown.* The case involves a public hospital that started screening the urine of pregnant women who met certain criteria associated with cocaine use during pregnancy. Although the women were, of course, aware that they were supplying urine for lab tests, they were not aware that their urine was being screened for cocaine use. At first, if a test showed positive, women were arrested; later, the policy was amended so that the women were given a choice: if they did not "voluntarily" enter a drug treatment program, the evidence of cocaine use would be turned over to prosecutors. In the later case, the women would be charged with delivering a controlled substance to a minor under the age of 18 (cocaine to the fetus). Several women whose urine was tested and some who were arrested are the plaintiffs in this case, and they are alleging a violation of their Fourth Amendment rights. They also allege a violation under civil rights laws because the policy impacts most heavily on women of color. Among the criteria that cause a urine sample to be tested for cocaine is late or inconsistent prenatal care, or early termination thereof. The plaintiffs allege that these criteria are more symptomatic of poverty than of drug use. The trial court found in favor of the hospital by finding that the women had given implied consent to the search. The Circuit Court affirmed, finding that the balance tipped in favor of protecting newborn infants under the special needs doctrine. There was evidence of significant increases in infant mortality and

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birth defects caused by women who ingested cocaine during pregnancy. In a six to three decision, the Court said that this was not a suspicionless search under the special needs doctrine. Rather, it was a suspicion-focused search for the general purpose of law enforcement. Unless there is a recognized exception to the warrant requirement in these searches, they violate the Fourth Amendment. The Court found that the plaintiffs did not consent (implicit or otherwise) to these searches, so the searches require a warrant. The women plaintiffs won. This case appears at the end of this chapter.

The Court has even applied the special needs doctrine to a law enforcement warrantless search and seizure.[15] This kind of analysis could justify the search of T.L.O.'s purse by the vice principal. Look for the Court to apply the special needs balancing approach to an increasing number of warrantless administrative searches. The *Von Raab* case is the precedent-setting special needs case and is reproduced below.

National Treasury Employees Union v. Von Raab
489 U.S. 656 (1989)

Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Blackmun, and O'Connor. Justice Marshall filed a dissent, joined by Justice Brennan, and Justice Scalia dissented with Justice Stevens.

We granted *certiorari* to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.

I

The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws. An important responsibility of the Service is the interdiction and seizure of contraband, including illegal drugs. Ibid. In 1987 alone, Customs agents seized drugs with a retail value of nearly $9 billion. In the routine discharge of their duties, many Customs employees have direct contact with those who traffic in drugs for profit. Drug import operations, often directed by sophisticated criminal syndicates, may be effected by violence or its threat. As a necessary response, many Customs operatives carry and use firearms in connection with their official duties.

In December 1985, respondent, the Commissioner of Customs, established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within the Service. After extensive research and consultation with experts in the field, the task force concluded "that drug screening through urinalysis is technologically reliable, valid and accurate." Citing this conclusion, the Commissioner announced his intention to require drug tests of employees who applied for, or occupied, certain positions within the Service. The Commissioner stated his belief that "Customs is largely drug-free," but noted also that "unfortunately no segment of society is immune from the threat of illegal drug use." Drug interdiction has become the agency's primary enforcement mission, and the Commissioner stressed that "there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs." In May 1986, the Commissioner announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an

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activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of customs agents. The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free."

The third criterion is a requirement for the incumbent to handle "classified" material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. After an employee qualifies for a position covered by the Customs testing program, the Service advises him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory. . . .

Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service. Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

Petitioners, a union of federal employees and a union official, commenced this suit in the United States District Court for the Eastern District of Louisiana on behalf of current Customs Service employees who seek covered positions. Petitioners alleged that the Custom Service drug-testing program violated, *inter alia,* the Fourth Amendment. The District Court agreed. 649 F.Supp. 380 (1986). The court acknowledged "the legitimate governmental interest in a drug-free work place and work force," but concluded that "the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy." The court enjoined the drug-testing program, and ordered the Customs Service not to require drug tests of any applicants for covered positions.

A divided panel of the United States Court of Appeals for the Fifth Circuit vacated the injunction. 816 F.2d 170 (1987). We now affirm so much of the judgment of the Court of Appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms. We vacate the judgment to the extent it upheld the testing of applicants for positions requiring the incumbent to handle classified materials, and remand for further proceedings.

It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government's concern for safe rail transportation at issue in *Railway Labor Executives,* present a special need that may justify departure from the ordinary warrant and probable-cause requirements.

Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate

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between the citizen and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." But in the present context, "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . . , and doubtless are well known to covered employees." Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject "to the discretion of the official in the field." The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate."

We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders. . . .

III

Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. We do not decide whether testing those who apply for promotion to positions where they would handle "classified" information is reasonable because we find the record inadequate for this purpose.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Justice Scalia, dissenting. Justice Stevens joined with Justice Scalia in dissenting.

The issue in this case is not whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to detect such drug use. The Government asserts it can demand that employees perform "an excretory function traditionally shielded by great privacy," *Skinner v. Railway Labor Executives' Assn.,* 489 U.S., at 626, while "a monitor of the same sex . . . remains close at hand to listen for the normal sounds," and that the excretion thus produced be turned over to the Government for chemical analysis. The Court agrees that this constitutes a search for purposes of the Fourth Amendment—and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity. Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment. See *Bell v. Wolfish,* 441 U.S. 520, 558–560 (1979). Today, in *Skinner,* we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been "reasonable," the answer depends largely upon the social necessity that prompts the search. What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, there is no indication whatever that these incidents were related to drug use by Service employees. Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. The Commissioner of Customs himself has stated that he "believe[s] that Customs is largely drug-free," that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program," and that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." The test results have fulfilled those hopes and expectations. According to the Service's counsel, out of 3,600 employees tested, no more than 5 tested positive for drugs.

The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example, see *Rushton v. Nebraska Public Power District,* 844 F.2d 562 (CA8 1988). But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. In *Skinner, Bell, T.L.O.,* and *Martinez-Fuerte,* we took pains to establish the existence of special need for the search or

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seizure—a need based not upon the existence of a "pervasive social problem" combined with speculation as to the effect of that problem in the field at issue, but rather upon well known or well demonstrated evils in that field, with well known or well demonstrated consequences.

There is irony in the Government's citation, in support of its position, of Justice Brandeis' statement in *Olmstead v. United States,* 277 U.S. 438, 485 (1928) that "[f]or good or for ill, [our Government] teaches the whole people by its example." Brandeis was there dissenting from the Court's admission of evidence obtained through an unlawful Government wiretap. He was not praising the Government's example of vigor and enthusiasm in combatting crime, but condemning its example that "the end justifies the means," 277 U.S., at 485. An even more apt quotation from that famous Brandeis dissent would have been the following: "[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

I respectfully dissent.

Before the discussion moves to what government does with the information after obtaining it, the student should be aware that agencies are not necessarily limited to the three methods discussed earlier (requiring the regulated to keep certain records, subpoena, and physical inspection). For example, you may have read in the newspaper that Sears got caught by the California Department of Consumer Affairs bilking auto repair customers. This information was obtained through a "sting" operation, in which the agency took cars in top mechanical condition to Sears Auto Centers, where investigators were overcharged an average of $223 per car.[16]

Section B: Agencies as Repositories of Information

The collection, housing, and release of information by government are important and significant aspects of the administrative state.

> The way we think about information [has] changed during the past 20 years. Government information in the 1980s has become a tangible commodity with a dollar value. "Information Management" is being defined as a multi-faceted process involving the collection, processing, storage, transmission and use of information.[17]

As an undergraduate student in the early 1960s, I was continually frustrated because government conducted its business in secret and the citizenry knew only what government

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wanted them to know. For the most part, that has changed. It has changed because of the Freedom of Information Act (FOIA, 1966), The Privacy Act (1974), and the Open Meeting Act (1976). The FOIA[18] requires agencies to release information in their possession if another party has requested such information, unless the information is protected by an exemption under the Act. The Privacy Act,[19] better known as the Buckley Amendment, provides for an individual to access his or her records that are in an agency's possession. It allows the citizen to correct such records, and it provides the individual with a remedy of money damages in the event of unauthorized release of such information by an agency. The government, in the Sunshine Act or Open Meetings Act,[20] requires those agencies headed by a "collegial body" to notify the public and conduct "official agency business" in public. Again, there are exceptions.

Several federal laws focus on information. Just the ones you have been exposed to so far in this text are: FOIA, Privacy Act, Emergency Planning and Community Right to Know Act, the Paperwork Reduction Act, the Radon Research Act, and the Data Quality Act. You have read about agency action that focused on information: the hazardous communication standard and the classification of dioxin and secondhand smoke as known carcinogens. Finally, computers and the Internet are significantly impacting agencies and how they do business.[21] Today, there is a concept called E-Government. E-Government has a statutory basis in two laws: the E-Government Act of 2002[22] and the 1996 amendments to the FOIA called the Electronic Freedom of Information Act Amendments.[23] The latter moves toward Internet publication of releasable data whereas the former requires all federal agencies to create Websites and make current agency activity (procedures, policies, or proposed rules) available to the public. Not only is the agency more transparent, but agencies are required to maintain the capability to communicate and interact with citizens regarding agency business. The E-Government legislation delegates to the Office of Management and Budget (OMB) the power to oversee agency implementation of E-Government. Along with the Office of Information and Regulatory Affairs (OIRA), there is an Office of E-Government within OMB.[24]

In Chapter 2, there was a discussion of attempts by the White House to gain control over agency release of emergency information. The theory is that if an agency issued a warning based on bad science or misinformation, the business or industry affected could be permanently damaged. In the *Tozzi* case from the last chapter, the Court discussed the costs to a manufacturer of dioxin that resulted from the simple listing of a substance as a known carcinogen. When a case of Mad Cow Disease broke out in Canada eight months before the outbreak in America, the primary reaction of American officials was to close the U.S. border to Canadian cattle and to reassure the American public that our supply of beef was safe. Meat packers pressured the government to reopen the borders quickly as the increased supply of cattle from Canada reduced the price they would have to pay American cattlemen and save the industry $455 million a year.[25]

A business or individual damaged by government release of information has little legal recourse.[26] You will read in Chapter 10 about *sovereign immunity,* a concept that forbids lawsuits against government unless government consents. It has not consented to be sued over release of information. It has consented to be sued for its torts (a legal wrong done to a person or their property), but release of information, whether intentionally or by mistake, is generally not a tort (especially where the information is truthful). From Chapter 4, you learned that conflicts over information contained in government reports may not always be reviewable under the Administrative Procedure Act. There may be a recourse for release of information concerning an individual under the Privacy Act, but businesses are not covered.

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By now, most states have legislation that protects against unauthorized release of information as well as laws assuring access to information in its possession, so that people who work for government agencies at any level should be familiar with administrative law regarding information. At the federal level, neither the Privacy Act nor the Sunshine Act has spawned much litigation (for an example, see *Common Cause v. NRC,* 674 F.2d 921 [D.C. Cir. 1982]), but the FOIA has been litigated a lot.

THE FREEDOM OF INFORMATION ACT

The FOIA is presented in Appendix A of this book (Section 522 of the Administrative Procedure Act), and you should read it now. According to Professor Lotte E. Feinberg,

> The FOIA uneasily rests on four broad, often incompatible premises. . . . [that] an informed electorate is essential to safeguard democracy; publicity is one of the best protections against the potential for official misconduct; privacy is a fundamental right and corresponds with a need to restrict government's intrusions into peoples lives; and secrecy is endemic to bureaucracy and perhaps facilitates organizational efficiency.[27]

In 1999, the public submitted 1,965,919 FOIA requests, and agencies processed 1,939,668 requests.[28] The FBI occasionally must call agents in from the field to help meet statutory deadlines in processing FOIA requests.

The key to understanding the litigation surrounding FOIA requests is to understand the exemptions. Although there are nine exemptions under FOIA, this discussion will concentrate on those that are most difficult to understand and that have spawned considerable litigation. Those exemptions are No. 4, the trade secrets and commercial information exemption; No. 5, the evidentiary privilege exemption; and Nos. 6 and 7, which contain language that forbids release of information that would constitute an unwarranted invasion of privacy. You will notice from your reading of the FOIA that the language favors release of information by the agency. The requester need only reasonably describe the material, and the agency is given only 10 days to identify the material and make an initial decision to either release or withhold (although an extension for an additional 10 days is possible). If the agency decision is to withhold, the requester must be informed of the reason and of the right to appeal the withholding decision to the head of the agency. The agency must identify by name the bureaucrat who made the decision to withhold. If the requester appeals to the head of the agency, that official must make a decision within 20 days. If the requester decides to appeal the agency head's decision to the federal courts, such suits are to be placed in the federal courts' expedited calendar, and the government has only 30 days to answer the requester's complaint. Attorney fees may be reimbursed for requesters who "substantially prevail" in the courts. If the agency does provide the requested material, the agency may not charge a fee that exceeds the direct costs of search and duplication. Finally, where an agency determines that some portions of a document are exempt and not releasable, the Act requires that the agency block out the exempted material and release the rest.[29] Most of the language in the FOIA, exacting agency action within specific time frames, was added by amendments in 1974 and 1976 because Congress found "foot dragging by the federal bureaucracy and difficulties in convincing the 'secrecy minded bureaucrat that public records are public property.'"[30]

Although the Act may sound clear in this description, the interpretation of it becomes political. The language in the statute changes only when Congress amends or modifies it,

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but the Attorney General's office is given administrative control over its enforcement within each agency.[31] Specifically, the Department of Justice is given the statutory responsibility to defend agencies when they withhold requested information and then get sued. Hence, attorneys general for different administrations manipulate the threshold for agencies to withhold requested information by manipulating the standard above which it will or will not defend an agency's refusal to release information. The Reagan Administration adopted a low threshold so that agencies could feel comfortable denying release of requested information as long as the agency had "a substantial legal basis" for the denial.[32] Anytime an agency denied requested information, the Department of Justice would defend it if the agency had a substantial legal basis for its decision. The Clinton Administration raised the standard to make it more difficult for agencies to withhold requested information. Attorney General Janet Reno adopted a "foreseeable harm" standard so the Department would only defend an agency's decision to withhold information "in those cases where the agency reasonably could foresee that disclosure would be harmful to an interest protected by an exemption."[33] The Bush 43 administration has reverted to the Reagan standard, saying it will defend any decision to withhold information unless it lacks a sound legal basis.

In creating the Department of Homeland Security, Congress created another exception to the FOIA by adding a subsection of the Homeland Security Act that has become known as the Critical Infrastructure Information Act. The Act exempts from release under FOIA information submitted to the government regarding the security of critical infrastructure and protected systems. This exemption applies only to records or information submitted to the Department of Homeland Security.[34]

Section b, Number 4, of the FOIA reads as follows: "(b) This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential." This means that if an agency possesses information that an individual has requested and the information constitutes a trade secret, the agency can—if it chooses—withhold the information. If it is not a trade secret but is commercial or financial information obtained from an individual or a business or corporation (i.e., not obtained from another government agency) and if the information is either privileged (attorney/client) or confidential, the agency can withhold. Most of this is not difficult to recognize. We can recognize a trade secret (usually). We do recognize commercial or financial information, and we know whether it has come from a business, individual, or corporation. The business, individual, or corporation will inform us if the information is clothed with a legally recognized privilege. The question of whether the information sought is confidential is the problem, and the case you are about to read defines the term *confidential.*

National Parks and Conservation Association v. Morton
498 F.2d 765 (1974)

The opinion is by Circuit Judge Tamm.

Appellant brought this action under the Freedom of Information Act, 5 U.S.C. 552 (1970), seeking to enjoin officials of the Department of the Interior from refusing to permit inspection and copying of certain agency records concerning concessions operated in the national parks. The district court granted summary judgment for the defendant on the ground that the information sought is exempt from disclosure under section 552(b)(4) of the Act which states: (b) This section does not apply to matters that are . . . (4) trade secrets and

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commercial or financial information obtained from a person and privileged or confidential. . . . In order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. Since the parties agree that the matter in question is financial information obtained from a person and that it is not privileged, the only issue on appeal is whether the information is "confidential" within the meaning of the exemption.

I

Unfortunately, the statute contains no definition of the word "confidential." In the past, our decisions concerning this exemption have been guided by the following passage from the Senate Report. . . . This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. . . . Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is "confidential" for purposes of section 552(b)(4). A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption. Our first task, therefore, is to ascertain the ends which Congress sought to attain in enacting the exemption for "commercial or financial" information. In general, the various exemptions included in the statute serve two interests—that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy. The Senate Report acknowledges both of these legislative goals: . . .

The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired. This concern finds expression in the legislative history as well as the case law. . . . Apart from encouraging cooperation with the Government by persons having information useful to officials, section 552(b)(4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication. The need for such protection was raised several times during hearings. . . .

In each of these instances it was suggested that an exemption for "trade secrets" would avert the danger that valuable business information would be made public by agencies which had obtained it pursuant to statute or regulation. A representative of the Department of Justice endorsed this idea at length: A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public, and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions. Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

A particularly significant aspect of the latter statement is its recognition of a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

II

The financial information sought by appellant consists of audits conducted upon the books of companies operating concessions in national parks, annual financial statements filed by the concessionaires with the National Park Service, and other financial information. The district court concluded that this information was of the kind "that would not generally be made available for public perusal." While we discern no error in this finding, we do not think that, by itself, it supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

On the record before us the Government has no apparent interest in preventing disclosure of the matter in question. Some, if not all, of the information is supplied to the Park Service pursuant to statute. Whether supplied pursuant to statute, regulation, or some less formal mandate, however, it is clear that disclosure of this material to the Park Service is a mandatory condition of the concessionaires' right to operate in national parks. Since the concessionaires are required to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.

As we have already explained, however, section 552(b)(4) may be applicable even though the Government itself has no interest in keeping the information secret. The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position. Appellant argues that such a showing cannot be made in this case because the concessionaires are monopolists, protected from competition during the term of their contracts and enjoying a statutory preference over other bidders at renewal time. In other words, appellant argues that disclosure cannot impair the concessionaires' competitive position because they have no competition. While this argument is very compelling, we are reluctant to accept it without first providing appellee the opportunity to develop a fuller record in the district court. It might be shown, for example, that disclosure of information about concession activities will injure the concessioner's competitive position in a nonconcession enterprise. In that case disclosure would be improper. This matter is therefore remanded to the district court for the purpose of determining whether public disclosure of the information in question poses the likelihood of substantial harm to the competitive positions of the parties from whom it has been obtained. If the district court finds in the affirmative, then the information is "confidential" within the meaning of section 552(b)(4) and exempt from disclosure. If only some parts of the information are confidential, the district court may prevent inappropriate disclosures by excising from otherwise disclosable documents any matters which are confidential in the sense that the word has been construed in this opinion.

The judgment of the district court is reversed and this matter is remanded for further proceedings consistent with this opinion.

So ordered.

Question

The court provides a two-pronged test for the confidentiality of requested material. First material is confidential when the person (or business) from whom it was obtained would not ordinarily release it to the public. Second, withholding of information must fit the legislative purpose for the exemption. In the preceding case, the court lists two legislative purposes for Exemption 4. Can you identify them?

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Table 5.1 Decision Tree: Freedom of Information Act Exemption 4

1. Is the material a trade secret?
   YES = withhold
   NO = Go to #2

2. Is the material financial or commercial information?
   YES = Go to #3
   NO = It is not covered by this exemption; release unless covered by another exemption.

3. Was the material obtained from an individual or business?
   YES = Go to #4
   NO = If it was obtained from another agency, look to Exemption 5, but it is releasable under Exemption 4.

4. Is it privileged information (attorney/client)?
   YES = withhold
   NO = go to #5

5. Is the material confidential?
   A. Is it the kind of information that the person who gave it to the agency would not want released to the public?
      YES = potentially confidential, proceed to B
      NO = not confidential; release
   B. If the information were withheld, would that be consistent with the legislative purpose behind the exemption?
      B-1. Would release impair the government's ability to obtain information in the future?
         YES = probably confidential, withhold
         NO = Do not release the information yet; proceed to B-2.
      B-2. Would release of the information harm the competitive position of the individual or business that provided it?
         YES = confidential; withhold
         NO = Even if the material is not the kind that the provider would release to the public, if both B-1 and B-2 are negative, then the material is releasable because to withhold would not be consistent with the reasons Congress created the exemption.

As you are confronted with situations in which commercial or financial information is sought and an agency must decide whether to release or withhold, it may help you to follow the decision tree in Table 5.1.

The case you are about to read next, *Chrysler v. Brown,* addresses the question of what happens when an agency possesses information that it clearly could withhold under Exemption 4 but chooses to release it anyway. This is a difficult and confusing case, but you will understand it better if you follow the decision tree and try to answer the following questions: (a) Why does the agency want to release exemptible information? The agency argues that it has to do so, but by what authority? (b) The Trade Secrets Act[35] makes it a crime for bureaucrats to release certain information that comes to them during the course of employment. Why cannot Chrysler use this law to stop the agency in this case from releasing information?

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Chrysler v. Brown
441 U.S. 281 (1979)

Justice Rehnquist delivered the opinion for a unanimous Court, with Justice Marshall concurring.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power.

The Freedom of Information Act (hereinafter FOIA) was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corp. (hereinafter Chrysler) seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905.

I

As a party to numerous Government contracts, Chrysler is required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations that benefit from Government contracts provide equal employment opportunity regardless of race or sex. The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations which require Government contractors to furnish reports and other information about their affirmative-action programs and the general composition of their work forces. . . .

Regulations promulgated by the Secretary of Labor provide for public disclosure of information from records of the OFCCP and its compliance agencies. Those regulations state that notwithstanding exemption from mandatory disclosure under the FOIA, 5 U.S.C. § 552, "records obtained or generated pursuant to Executive Order 11246 (as amended) . . . shall be made available for inspection and copying . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law" . . .

It is the voluntary disclosure contemplated by this regulation, over and above that mandated by the FOIA, which is the *gravamen* of Chrysler's complaint in this case.

This controversy began on May 14, 1975, when the DLA [Defense Logistics Agency] informed Chrysler that third parties had made an FOIA request for disclosure of the 1974 AAP [affirmative action program] for Chrysler's Newark, Del., assembly plant and an October 1974 CIR [complaint investigation report] for the same facility. Nine days later, Chrysler objected to release of the requested information, relying on OFCCP's disclosure regulations and on exemptions to the FOIA. Chrysler also requested a copy of the CIR, since it had never seen it. DLA responded the following week that it had determined that the requested material was subject to disclosure under the FOIA and

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the OFCCP disclosure rules, and that both documents would be released five days later.

On the day the documents were to be released Chrysler filed a complaint in the United States District Court for Delaware seeking to enjoin release of the Newark documents. The District Court granted a temporary restraining order barring disclosure of the Newark documents and requiring that DLA give five days' notice to Chrysler before releasing any similar documents. Pursuant to this order, Chrysler was informed on July 1, 1975, that DLA had received a similar request for information about Chrysler's Hamtramck, Mich., plant. Chrysler amended its complaint and obtained a restraining order with regard to the Hamtramck disclosure as well.

Chrysler made three arguments in support of its prayer for an injunction: that disclosure was barred by the FOIA; that it was inconsistent with 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e), and 44 U.S.C. § 3508, which for ease of reference will be referred to as the "confidentiality statutes"; and finally that disclosure was an abuse of agency discretion insofar as it conflicted with OFCCP rules. The District Court held that it had jurisdiction to subject the disclosure decision to review under the Administrative Procedure Act (APA). It conducted a trial *de novo* on all of Chrysler's claims; both sides presented extensive expert testimony during August 1975.

On April 20, 1976, the District Court issued its opinion. It held that certain of the requested information, the "manning" tables, fell within Exemption 4 of the FOIA. The District Court reasoned from this holding that the tables may or must be withheld, depending on applicable agency regulations, and that here a governing regulation required that the information be withheld. Pursuant to 5 U.S.C. § 301, the enabling statute which gives federal department heads control over department records, the Secretary of Labor has promulgated a regulation, 29 CFR § 70.21(a) (1978), stating that no officer or employee of the Department is to violate 18 U.S.C. § 1905. That section imposes criminal sanctions on Government employees who make unauthorized disclosure of certain classes of information submitted to a Government agency, including trade secrets and confidential statistical data. In essence, the District Court read § 1905 as not merely a prohibition of unauthorized disclosure of sensitive information by Government employees, but as a restriction on official agency actions taken pursuant to promulgated regulations. Both sides appealed, and the Court of Appeals for the Third Circuit vacated the District Court's judgment. Because of a conflict in the Circuits and the general importance of these "reverse-FOIA" cases, we granted *certiorari,* and now vacate the judgment of the Third Circuit and remand for further proceedings.

II

[1] We have decided a number of FOIA cases in the last few years. Although we have not had to face squarely the question whether the FOIA *ex proprio vigore* forbids governmental agencies from disclosing certain classes of information to the public, we have in the course of at least one opinion intimated an answer. We have, moreover, consistently recognized that the basic objective of the Act is disclosure. In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4: "(b) [FOIA] does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ." Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic, or history of the Act. The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and

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sets out specific modes of disclosure for certain classes of information.

Subsection (b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure. . . .

We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure. We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides: "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905. . . .

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other. A "substantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. But in *Morton v. Ruiz,* 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule—or a "legislative-type rule"—as one "affecting individual rights and obligations." This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. . . . Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature

consideration of rules of general application." The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the respondents in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.

But in order for such regulations to have the "force and effect of law," it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress. For purposes of this case, it is not necessary to decide whether Executive Order 11246 as amended is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.

The pertinent inquiry is whether under any of the arguable statutory grants of authority the OFCCP disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority. We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here. There is also a procedural defect in the OFCCP disclosure regulations which precludes courts from affording them the force and effect of law. That defect is a lack of strict compliance with the APA. Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rule-making and an opportunity to comment before a substantive rule is promulgated. When the Secretary of Labor published the regulations pertinent in this case, he stated: "As the changes made by this document relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C. 553. We need not decide whether these regulations are properly characterized as "'interpretative rules.'"

It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. An interpretative regulation or general statement of agency policy cannot be the "authoriz[ation] by law" required by § 1905. We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In *Cort v. Ash,* 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute, and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in *Cort* present here. As our review of the legislative history of § 1905—or lack of same—might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA. . . .

IV

Therefore, we conclude that DLA's decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person "adversely affected or aggrieved" within the meaning of

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§ 10(a). . . . For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). De novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905.

Since the decision regarding this substantive issue—the scope of § 1905—will necessarily have some effect on the proper form of judicial review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

Question

What did the Court decide about whether an agency may release otherwise exempt information?

Two events took place in 1987 that modify the Court's decision in *Chrysler v. Brown.* First, a D.C. Circuit Court interpreted the Trade Secrets Act to require agencies to withhold material that qualifies for a No. 4 exemption.[36] Second, President Reagan issued an executive order that requires agencies to notify a provider when an agency is considering a request to release material that qualifies for exemption. It requires the agency to permit the provider to present arguments to the agency.

Exemption 5 states: "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This means that those materials that a party suing the agency would not be able to obtain through the discovery process are exempt. The discovery process is simply an "exchange of information between sides in a lawsuit.[37] This process can be formal, controlled by an administrative law judge, or it can be less formal communication between attorneys. In any case, not all information requested by the other side in a lawsuit needs to be released. For example, some information is protected as privileged (attorney/client), and a prosecutor is not obligated to turn over to the defense information that is not material to the case (information that could influence the outcome). In terms of the FOIA, Congress apparently intended to exempt under No. 5 two kinds of privileged material. First, attorney/client work product is exempted, and second, those materials clothed with executive privilege can be withheld.

The notion of executive privilege is addressed in three other FOIA exemptions, No. 1, No. 7, and the Critical Infrastructure Information Act. Exemption 1 exempts classified material, especially in the area of defense or foreign policy. Exemption 7 is referred to as the "law enforcement exemption" and could be used, for example, to protect the identity of an informant. The Critical Infrastructure Information Act, discussed above, exempts critical infrastructure information given to the Department of Homeland Security. The executive privilege contemplated in Exemption 5 is what I will call "decisional executive

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privilege," in that it is meant to preserve the integrity of the decision-making process. The concept is addressed in the case you are about to read, but it is aimed at ensuring that a decision maker is presented with all options and full information before a decision is made. More accurately, executive privilege in this context means to ensure that an option, piece of advice, or information is not withheld from the decision maker's consideration out of fear that the advice will be held up to public ridicule at a later date.

National Labor Relations Board v. Sears, Roebuck & Company 421 U.S. 132 (1975)

Justice White delivered the opinion for a unanimous Court, with Chief Justice Burger concurring and Justice Powell not participating.

The National Labor Relations Board (the Board) and its General Counsel seek to set aside an order of the United States District Court directing disclosure to respondent, Sears, Roebuck & Co. (Sears), pursuant to the Freedom of Information Act, of certain memoranda, known as "Advice Memoranda" and "Appeals Memoranda," and related documents generated by the Office of the General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints.

The Act's background and its principal objectives are described in *EPA v. Mink,* 410 U.S. 73 (1973), and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. . . . The Act expressly states, however, that the disclosure obligation "does not apply" to those documents described in the nine enumerated exempt categories listed in § 552(b). . . .

Sears claims, and the courts below ruled, that the memoranda sought are expressions of legal and policy decisions already adopted by the agency and constitute "final opinions" and "instructions to staff that affect a member of the public," both categories being expressly disclosable under § 552(a)(2) of the Act, pursuant to its purposes to prevent the creation of "secret law." In any event, Sears claims, the memoranda are nonexempt "identifiable records" which must be disclosed under § 552(a)(3). The General Counsel, on the other hand, claims that the memoranda sought here are not final opinions under § 552(a)(2) and that even if they are "identifiable records" otherwise disclosable under § 552(a)(3), they are exempt under § 552(b), principally as "intra-agency" communications under § 552(b)(5) (Exemption 5), made in the course of formulating agency decisions on legal and policy matters.

II

This case arose in the following context. By letter dated July 14, 1971, Sears requested that the General Counsel disclose to it pursuant to the Act all Advice and Appeals Memoranda issued within the previous five years on the subjects of "the propriety of withdrawals by employers or unions from multi-employer bargaining, disputes as to commencement date of negotiations, or conflicting interpretations in any other context of the Board's Retail Associates rule." The letter also sought the subject-matter index or digest of Advice and Appeals Memoranda. The letter urged disclosure on the theory that the Advice and Appeals Memoranda are the only source of agency "law" on some issues. By letter dated July 23, 1971, the General Counsel declined Sears' disclosure request in full. The

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letter stated that Advice Memoranda are simply "guides for a Regional Director" and are not final; that they are exempt from disclosure under 5 U.S.C. § 552(b)(5) as "intra-agency memoranda" which reflect the thought processes of the General Counsel's staff; and that they are exempt pursuant to 5 U.S.C. § 552(b)(7) as part of the "investigative process." The letter said that Appeals Memoranda were not indexed by subject matter and, therefore, the General Counsel was "unable" to comply with Sears' request. In further explanation of his decision, with respect to Appeals Memoranda, the General Counsel wrote to Sears on August 4, 1971, and stated that Appeals Memoranda which ordered the filing of a complaint were not "final opinions." The letter further stated that those Appeals Memoranda which were "final opinions, i.e., those in which an appeal was denied" and which directed that no complaint be filed, numbered several thousand, and that in the General Counsel's view they had no precedential significance. Accordingly, if disclosable at all, they were disclosable under 5 U.S.C. § 552(a)(3) relating to "identifiable records." The General Counsel then said that Sears had failed adequately to identify the material sought and that he could not justify the expenditure of time necessary for the agency to identify them. . . .

On August 4, 1971, Sears filed a complaint pursuant to the Act seeking a declaration that the General Counsel's refusal to disclose the Advice and Appeals Memoranda and indices thereof requested by Sears violated the Act, and an injunction enjoining continued violations of the Act. On August 24, 1971, the current General Counsel took office. In order to give him time to develop his own disclosure policy, the filing of his answer was postponed until February 3, 1972. The answer denied that the Act required disclosure of any of the documents sought but referred to a letter of the same date in which the General Counsel informed Sears that he would make available the index to Advice Memoranda and also all Advice and Appeals Memoranda in cases which had been closed—either because litigation before the Board had been completed or because a decision not to file a complaint had become final. He stated, however, that he would not disclose the memoranda in open cases; that he would, in any event, delete names of witnesses and "security sensitive" matter from the memoranda he did disclose; and that he did not consider the General Counsel's Office bound to pursue this new policy "in all instances" in the future.

Not wholly satisfied with the voluntary disclosures offered and made by the General Counsel, Sears moved for summary judgement and the General Counsel did likewise. Sears thus continued to seek memoranda in open cases. Moreover, Sears objected to the deletions in the memoranda in closed cases and asserted that many Appeals Memoranda were unintelligible because they incorporated by reference documents which were not themselves disclosed and also referred to "the circumstances of the case" which were not set out and about which Sears was ignorant. The General Counsel contended that all of the documents were exempt from disclosure as "intra-agency" memoranda within the coverage of 5 U.S.C. § 552(b)(5); and that the documents incorporated by reference were exempt from disclosure as "investigatory files" pursuant to 5 U.S.C. § 552(b) (7). The parties also did not agree as to the function of an Advice Memorandum. Sears claimed that Advice Memoranda are binding on Regional Directors. The General Counsel claimed that they are not, noting the fact that the Regional Director himself has the delegated power to issue a complaint. The District Court granted Sears' motion for summary judgment and denied that of the General Counsel. . . .

III

It is clear, and the General Counsel concedes, that Appeals and Advice Memoranda are at the least "identifiable records" which must be disclosed on demand, unless they fall within one of the Act's exempt categories. It is also clear that, if the memoranda do fall within one of the Act's exempt categories, our inquiry is at an end, for the Act "does not apply" to such documents. Thus our inquiry, strictly speaking, must be into the scope of the exemptions which the General Counsel claims to be applicable—principally Exemption 5 relating to "intra-agency

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memorandums." The General Counsel also concedes, however, and we hold for the reasons set forth below, that Exemption 5 does not apply to any document which falls within the meaning of the phrase "final opinion . . . made in the adjudication of cases." The General Counsel argues, therefore, as he must, that no Advice or Appeals Memorandum is a final opinion made in the adjudication of a case and that all are "intra-agency" memoranda within the coverage of Exemption 5. He bases this argument in large measure on what he claims to be his lack of adjudicative authority. It is true that the General Counsel lacks any authority finally to adjudicate an unfair labor practice claim in favor of the claimant; but he does possess the authority to adjudicate such a claim against the claimant through his power to decline to file a complaint with the Board. We hold for reasons more fully set forth below that those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are "final opinions" made in the adjudication of a case and fall outside the scope of Exemption 5; but that those Advice and Appeals Memoranda which explain decisions by the General Counsel to file a complaint and commence litigation before the Board are not "final opinions" made in the adjudication of a case and do fall within the scope of Exemption 5. . . .

A

The parties are in apparent agreement that Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency. Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation, and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein, it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context. The privileges claimed by petitioners to be relevant to this case are (i) the "generally . . . recognized" privilege for "confidential intra-agency advisory opinions . . . ," disclosure of which "would be injurious to the consultative functions of government . . ." (sometimes referred to as "executive privilege"), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants. . . .

(i)

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of government agencies," and focus on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." *United States v. Nixon,* 418 U.S. 683 (1974).

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision-maker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and

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the ingredients of the decision-making process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not. This distinction is supported not only by the lesser injury to the decision-making process flowing from disclosure of post-decisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5. . . . Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."

(ii)

It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. The Senate Report states that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties," and the case law clearly makes the attorney's work-product rule of *Hickman v. Taylor,* 329 U.S. 495, applicable to Government attorneys in litigation. Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.

B

Applying these principles to the memoranda sought by Sears, it becomes clear that Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party; but that Exemption 5 does protect from disclosure those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the Board.

(i)

Under the procedures employed by the General Counsel, Advice and Appeals Memoranda are communicated to the Regional Director after the General Counsel, through his Advice and Appeals Branches, has decided whether or not to issue a complaint; and represent an explanation to the Regional Director of a legal or policy decision already adopted by the General Counsel. In the case of decisions not to file a complaint, the memoranda effect as "final" a "disposition," as an administrative decision can—representing, as it does, an unreviewable rejection of the charge filed by the private party. Disclosure of these memoranda would not intrude on predecisional processes, and protecting them would not improve the quality of agency decisions, since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make—he is bound to dismiss the charge. Moreover, the General Counsel's decisions not to file complaints together with the Advice and Appeals Memoranda explaining them, are precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret.

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(ii)

Advice and Appeals Memoranda which direct the filing of a complaint, on the other hand, fall within the coverage of Exemption 5. The filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case. The case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board. The Memoranda will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice. Since the Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product. At the same time, the public's interest in disclosure is substantially reduced by the fact, as pointed out by the ABA [American Bar Association] Committee, see supra, at 1519, that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the "law" with respect to these cases will ultimately be made not by the General Counsel but by the Board or the courts.

We recognize that an Advice or Appeals Memorandum directing the filing of a complaint—although representing only a decision that a legal issue is sufficiently in doubt to warrant determination by another body—has many of the characteristics of the documents described in 5 U.S.C. § 552(a)(2). Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum does explain a decision already reached by the General Counsel which has real operative effect—it permits litigation before the Board; and we have indicated a reluctance to construe Exemption 5 to protect such documents. We do so in this case only because the decision-maker—the General Counsel—must become a litigating party to the case with respect to which he has made his decision. The attorney's work-product policies which Congress clearly incorporated into Exemption 5 thus come into play and lead us to hold that the Advice and Appeals Memoranda directing the filing of a complaint are exempt whether or not they are, as the District Court held, "instructions to staff that affect a member of the public." The probability that an agency employee will be inhibited from freely advising a decision-maker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below.

Thus, we hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld on the ground that it falls within the coverage of some exemption other than Exemption 5.

Question

1. The purpose of the FOIA was to benefit the public. What was the purpose of Sears's FOIA request? should the FOIA be used by lawyers as a supplement or substitute for normal discovery tools in suits with an agency?
2. It is clear from this case that not all attorney-client, interagency, or intra-agency communications will fall under Exemption 5. Can you describe which are exempt and which are not? Can you explain why?

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Table 5.2 Freedom of Information Act Exemption 5 Dichotomy: Does the information predate the decision? Was the information relied on to make the decision?

	Predecisional	*Post Decisional*
Relied on for decision	Release: Public has a right to know	Release: Not privileged
Not relied on for decision	Do not release: Privileged and covered by Exemption 5	Release: Not privileged

Students often find the question of whether material is exempt as privileged under Exemption 5 to be confusing. Bear in mind that the exemption was meant to maintain the integrity of the decision-making process. That means that a decision maker should have as much information as possible prior to making a decision. If advisors must fear that options proffered to the decision maker will show up in next week's newspaper, then they will be less likely to offer options or information. Consequently, any information that the decision maker obtains after the decision was made is releasable because to withhold it will not protect the decision-making process. It is only information in the hands of the decision maker before the decision is made that is potentially exempt from release. If the information is relied on to make the decision, then the public (requester) has a right to the information because it forms the basis of public policy. Only predecisional information, which was not used to make the decision, is exempt from release under the FOIA Exemption 5. That is because to withhold such information from public scrutiny will protect the decision-making process. You may find Table 5.2 helpful in interpreting Exemption 5 questions.

Shortly after assuming the presidency, President George W. Bush created the National Energy Policy Development Group (NEPDG) to advise him and make recommendations for a national energy policy. He put Vice President Cheney in charge of the group, which was composed of bureaucrats and various federal agency employees (full and part time). After the NEPDG issued its report to the president, the vice president was sued because it was alleged that energy lobbyists and the heads of large energy corporations (most notoriously, Kenneth Lay of Enron) took an active part in the NEPDG meetings. The plaintiffs were seeking records of the meetings. This is not a FOIA case, but it has all of the elements of what we have referred to as decisional executive privilege, which FOIA Exemption 5 protects. A statute called the Federal Advisory Committee Act imposes open meetings and reporting requirements on committees formed to advise government, but it contains what courts refer to as the de facto membership doctrine. That is, the Act has an exemption that excludes advisory committees from the open meetings and reporting requirements, when the advisory committee is composed of full- and part-time federal employees. In this case, if lobbyists and energy CEOs participated in the meetings, then NEPDG does not qualify for the exemption from open meetings and open records, and the plaintiffs should be able to access the records of the meetings. The narrow issue is whether lobbyists and CEOs participated in the meetings, but the president fought release of any of the information. The district court issued a narrow discovery order to give the plaintiffs an opportunity to try to prove that nongovernment employees took part in the meetings. In a round-about way, the court of appeals upheld the order (more appropriately refused to quash it), and the Supreme Court sent it back to the court of appeals. Although there is no final disposition in the case yet, it is included at the end of this chapter because of the discussion of executive privilege and the fact that this will ultimately become a famous case.

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Recall that Exemption 5 has two requirements. First, the material sought has to be inter- or intra-agency communications, and second, it must be privileged (not available to a party suing the agency). The cases above deal with the second requirement or what courts call the deliberative process privilege. There is less case law on what is or is not an "inter/intra agency communication." In a recent case, the Supreme Court had to decide whether communications between a Native American tribe, the Bureau of Indian Affairs, and the Bureau of Reclamation were interagency memos within the meaning of Exemption 5.[38] As the definition of "inter-agency/intra-agency" means within the agency or between agencies and Native American tribes are not federal agencies, you might think the resolution of this is simple. The agencies were in possession of the tribe's communications because the Bureau of Reclamation was in the process of developing a water use plan for the Klamath River Basin and the Bureau of Indian Affairs was involved in water rights litigation in the area (although it was not representing the tribe). An association of water users who depend on Klamath water requested the tribal communications from the agencies under FOIA, and the agencies refused to release under Exemption 5. The issue regarding whether private communications with an agency can be "inter-agency" is complicated by the fact that the Supreme Court has clothed some consulting communications with Exemption 5. Hence, the question here dealt with whether the tribal communications were of the same nature as consulting communications that received the exemption by precedent. The Supreme Court decided that the tribal communications were not the same as consulting communications and should be released under FOIA. The Court reasoned that consulting communications are "as if" they came from the agency or another government entity, whereas the tribal communications reflect the tribe's interest and not that of the agencies or government.

Finally, Exemption 6 is somewhat self-explanatory. It provides for exemptions of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Obviously, this exemption was meant to protect against the release of personal information that an agency might possess. The problem is that the language specifies that it is "clearly unwarranted" invasions of privacy that the exemption covers and that presumably it does not protect against incidental invasions of privacy. Because there is no statutory definition of "invasion of privacy," the Court, as it does with special needs warrantless searches and seizures, engages in a balancing test to determine whether the information is exempt or releasable. Although the case that follows is an Exemption 7 case, that exemption contains similar invasion of privacy language to Exemption 6. The balancing test the Court performs is cited as precedent in current invasion of privacy cases.

United States Department of Justice v. Reporters Committee for Freedom of the Press 489 U.S. 749 (1989)

Justice Stevens delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Marshall, O'Connor, Scalia, and Kennedy joined. Justice Blackmun filed an opinion concurring in the judgment, in which Justice Brennan.

The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of such a file to a third party "could reasonably be expected to constitute an

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unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (7) (C).

I

In 1924 Congress appropriated funds to enable the Department of Justice (Department) to establish a program to collect and preserve fingerprints and other criminal identification records. 43 Stat. 217. That statute authorized the Department to exchange such information with "officials of States, cities and other institutions." Ibid. Six years later Congress created the FBI's identification division, and gave it responsibility for "acquiring, collecting, classifying, and preserving criminal identification and other crime records and the exchanging of said criminal identification records with the duly authorized officials of governmental agencies, of States, cities, and penal institutions." Ch. 455, 46 Stat. 554 (codified at 5 U.S.C. § 340 (1934 ed.)); see 28 U.S.C. § 534(a)(4) (providing for exchange of rap-sheet information among "authorized officials of the Federal Government, the States, cities, and penal and other institutions"). Rap sheets compiled pursuant to such authority contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject. Normally a rap sheet is preserved until its subject attains age 80. Because of the volume of rap sheets, they are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names.

The local, state, and federal law enforcement agencies throughout the Nation that exchange rap-sheet data with the FBI do so on a voluntary basis. The principal use of the information is to assist in the detection and prosecution of offenders; it is also used by courts and corrections officials in connection with sentencing and parole decisions. As a matter of executive policy, the Department has generally treated rap sheets as confidential and, with certain exceptions, has restricted their use to governmental purposes. Consistent with the Department's basic policy of treating these records as confidential, Congress in 1957 amended the basic statute to provide that the FBI's exchange of rap-sheet information with any other agency is subject to cancellation "if dissemination is made outside the receiving departments or related agencies." see 28 U.S.C. § 534(b).

As a matter of Department policy, the FBI has made two exceptions to its general practice of prohibiting unofficial access to rap sheets. First, it allows the subject of a rap sheet to obtain a copy, see 28 CFR §§ 16.30–16.34 (1988); and second, it occasionally allows rap sheets to be used in the preparation of press releases and publicity designed to assist in the apprehension of wanted persons or fugitives. See § 20.33(a)(4).

In addition, on three separate occasions Congress has expressly authorized the release of rap sheets for other limited purposes. In 1972 it provided for such release to officials of federally chartered or insured banking institutions and "if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing. . . ." 86 Stat. 1115. In 1975, in an amendment to the Securities Exchange Act of 1934, Congress permitted the Attorney General to release rap sheets to self-regulatory organizations in the securities industry. See 15 U.S.C. § 78q(f)(2). And finally, in 1986 Congress authorized release of criminal-history information to licensees or applicants before the Nuclear Regulatory Commission. See 42 U.S.C. § 2169(a). These three targeted enactments—all adopted after the FOIA was passed in 1966—are consistent with the view that Congress understood and did not disapprove the FBI's general policy of treating rap sheets as nonpublic documents.

Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited. Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. . . .

The statute known as the FOIA is actually a part of the Administrative Procedure Act (APA).

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Section 3 of the APA as enacted in 1946 gave agencies broad discretion concerning the publication of governmental records. In 1966 Congress amended that section to implement a general philosophy of full agency disclosure. . . . If an agency improperly withholds any documents, the district court has jurisdiction to order their production. Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden "on the agency to sustain its action" and directs the district courts to "determine the matter de novo."

Congress exempted nine categories of documents from the FOIA's broad disclosure requirements. Three of those exemptions are arguably relevant to this case. Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. § 552(b)(3).

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). Exemption 7(C) excludes records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C).

Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.

III

This case arises out of requests made by a CBS news correspondent and the Reporters Committee for Freedom of the Press (respondents) for information concerning the criminal records of four members of the Medico family. The Pennsylvania Crime Commission had identified the family's company, Medico Industries, as a legitimate business dominated by organized crime figures. Moreover, the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.

The FOIA requests sought disclosure of any arrests, indictments, acquittals, convictions, and sentences of any of the four Medicos. Although the FBI originally denied the requests, it provided the requested data concerning three of the Medicos after their deaths. In their complaint in the District Court, respondents sought the rap sheet for the fourth, Charles Medico (Medico), insofar as it contained "matters of public record."

The parties filed cross-motions for summary judgment. Respondents urged that any information regarding "a record of bribery, embezzlement or other financial crime" would potentially be a matter of special public interest. In answer to that argument, the Department advised respondents and the District Court that it had no record of any financial crimes concerning Medico, but the Department continued to refuse to confirm or deny whether it had any information concerning nonfinancial crimes. Thus, the issue was narrowed to Medico's nonfinancial-crime history insofar as it is a matter of public record.

The District Court granted the Department's motion for summary judgment. . . . The Court of Appeals reversed. 816 F. 2d 730 (1987). It held that an individual's privacy interest in criminal-history information that is a matter of public record was minimal at best. Noting the absence of any statutory standards by which to judge the public interest in disclosure, the Court of Appeals concluded that it should be bound by the state and local determinations that such information should be made available to the general public. . . .

The Court of Appeals denied rehearing *en banc,* with four judges dissenting. Because of

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the potential effect of the Court of Appeals' opinion on values of personal privacy, we granted *certiorari*. 485 U.S. 1005 (1988). We now reverse.

IV

Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the "practical obscurity" of the rap sheets against the public interest in their release.

The preliminary question is whether Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended Exemption 7(C) to protect. As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 598-600 (1977). Here, the former interest, "in avoiding disclosure of personal matters," is implicated. Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico's privacy interest in avoiding disclosure of a federal compilation of these events approaches zero. We reject respondents' cramped notion of personal privacy. . . .

According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Indeed, if the summaries were "freely available," there would be no reason to invoke the FOIA to obtain access to the information they contain. Granted, in many contexts the fact that information is not freely available is no reason to exempt that information from a statute generally requiring its dissemination.

But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

This conclusion is supported by the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information.

That is, Congress has authorized rap-sheet dissemination to banks, local licensing officials, the securities industry, the nuclear-power industry, and other law enforcement agencies. Further, the FBI has permitted such disclosure to the subject of the rap sheet and, more generally, to assist in the apprehension of wanted persons or fugitives. Finally, the FBI's exchange of rap-sheet information "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 U.S.C. § 534(b). This careful and limited pattern of authorized rap-sheet disclosure fits the dictionary definition of privacy as involving a restriction of information "to the use of a particular person or group or class of persons." Moreover, although perhaps not specific enough to constitute a statutory exemption under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), these statutes and regulations, taken as a whole, evidence a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within. . . .

Also supporting our conclusion that a strong privacy interest inheres in the nondisclosure of compiled computerized information is the Privacy Act of 1974, codified at 5 U.S.C. § 552a. The Privacy Act was passed largely out of

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concern over "the impact of computer data banks on individual privacy." H.R. Rep. No. 93–1416, p. 7 (1974). The Privacy Act provides generally that "[n]o agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Although the Privacy Act contains a variety of exceptions to this rule, including an exemption for information required to be disclosed under the FOIA, see 5 U.S.C. § 552a(b)(2), Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer. . . .

V

Exemption 7(C), by its terms, permits an agency to withhold a document only when revelation "could reasonably be expected to constitute an unwarranted invasion of personal privacy." We must next address what factors might warrant an invasion of the interest described in Part IV, supra.

Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party's access to that report, *United States Department of Justice v. Julian,* 486 U.S. 1, 13-14 (1988), and although the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer. As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149 (1975); see *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 221 (1978); *FBI v. Abramson,* 456 U.S. 615 (1982). As Professor Davis explained: "The Act's sole concern is with what must be made public or not made public."

Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose,* 425 U.S., at 372, rather than on the particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." *EPA v. Mink,* 410 U.S. 73, 80 (1973). In his dissent in that case, Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commager:

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. (quoting from *The New York Review of Books,* Oct. 5, 1972, p. 7)

This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" *Department of Air Force v. Rose,* 425 U.S., at 360-361, indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own

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conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any government agency or official.

The point is illustrated by our decision in *Rose,* supra. As discussed earlier, we held that the FOIA required the United States Air Force to honor a request for *in camera* submission of disciplinary-hearing summaries maintained in the Academy's Honors and Ethics Code reading files. The summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. All parties, however, agreed that the files should be redacted by deleting information that would identify the particular cadets to whom the summaries related. The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a "clearly unwarranted" invasion of individual privacy. If, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in *Rose* would have been inapplicable. In fact, we explicitly recognized that "the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny."

Respondents argue that there is a twofold public interest in learning about Medico's past arrests or convictions: He allegedly had improper dealings with a corrupt Congressman, and he is an officer of a corporation with defense contracts. But if Medico has, in fact, been arrested or convicted of certain crimes, that information would neither aggravate nor mitigate his allegedly improper relationship with the Congressman; more specifically, it would tell us nothing directly about the character of the Congressman's behavior. Nor would it tell us anything about the conduct of the Department of Defense (DOD) in awarding one or more contracts to the Medico Company. Arguably a FOIA request to the DOD for records relating to those contracts, or for documents describing the agency's procedures, if any, for determining whether officers of a prospective contractor have criminal records, would constitute an appropriate request for "official information." Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen. . . .

Finally, we note that Congress has provided that the standard fees for production of documents under the FOIA shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a) (4) (A)(iii) (1982 ed., Supp. V). Although such a provision obviously implies that there will be requests that do not meet such a "public interest" standard, we think it relevant to today's inquiry regarding the public interest in release of rap sheets on private citizens that Congress once again expressed the core purpose of the FOIA as "contribute[ing] significantly to public understanding of the operations or activities of the government." . . .

Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a

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compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.

Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided.

Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." The judgment of the Court of Appeals is reversed.

It is so ordered.

Questions

1. What are the two variables that get balanced?
2. The Court says that the reason for the FOIA is so that the citizenry will know what their government is up to. How does this concept enter into the balancing test?

The balancing test for FOIA exemptions relating to invasion of privacy is very similar to the balancing test for special needs warrantless searches and seizures. What gets weighed in the balancing test under FOIA is the individual privacy interest against the public interest in release of private information. In the *Reporter's Committee* case above, the court found a protected privacy interest in the rap sheet that was primarily a matter of public record. Having found a significant privacy interest, the next question was whether the public interest requires invasion of that privacy by release of the rap sheet. What is the public interest in the media's getting hold of Medico's rap sheet? The media says it is in the public interest to know when the "boss" of a crime family has government defense contracts. The Court, however, says that the public interest to be weighed in the balancing test relates to the reason behind the FOIA. The reason behind a requester's request is irrelevant. The purpose of the FOIA is to let citizens learn "what their government is up to." That means the release of information in the public interest is information that would shed light on the agency's performance of its statutory duties. Since release of Medico's rap sheet would not shed light on FBI procedures nor will it help us to assess the defense contracting procedure, release of it would not be in the public interest.

In *Department of Defense v. Federal Labor Relations Authority,* 510 U.S. 487 (1994), a labor union trying to organize federal workers requested the names, work stations, home addresses and other personal information on the civilian employees in the Defense Department. The department released some of the information but withheld the home addresses. The unions filed an unfair labor practice charge against the Department of Defense with the Federal Labor Relations Authority, which ordered the department to produce the addresses. The Court found protected privacy interests in the home addresses and said the public interest would not be served by release of the information. Release of the home information will not help us or the requester assess the performance of the Defense Department and hence is not in the public interest. Furthermore, the Court found that the addresses were protected under the Privacy Act and not releasable under FOIA.

During the late 1980s, American policy toward Haitian nationals who were caught attempting illegal entry into the United States was to return them to Haiti. The Unites States and Haiti had an agreement that we would not grant political asylum and would return them home if Haiti would not persecute them upon return. In an attempt to assess whether Haiti was living up to its end of the agreement, the State Department went to Haiti and interviewed some of the returnees. An American attorney who represented a group of Haitian nationals who sought political asylum in the United States requested the names of the interviewees and other information from the State Department. The agency released nearly all of the information requested, including the findings of the survey, but it blanked out the names of the people it interviewed. In *United States Department of State v. Ray,* 502 U.S. 164 (1991), the Court's decision was consistent with the cases you are familiar with so far. The Court said release of the personal information would not contribute to the public interest of assessing the State Department's performance of its duties.

For more cases in this area of administrative law, see *National Archives and Records Administration v. Favish (2004),* which appears at the end of this chapter; *Bibbles v. Oregon Natural Desert Association,* 519 U.S. 355 (1997); *United States Department of Justice v. Landano 508 U.S. 165 (1993);* and *Department of the Air Force v. Rose,* 425 U.S. 325 (1976).

We have mentioned elsewhere the concept of unintended or second-order consequences. The FOIA has spawned not only considerable litigation but unintended consequences as well. For example, it can be argued that the foot-dragging in compliance with FOIA requests referred to earlier was not so much evidence of recalcitrance on the part of bureaucrats refusing to comply with the law as it was reflective of a bureaucracy inundated by requests and without the personnel to process them.[39] Estimates are that the federal government receives more than 300,000 FOIA requests each year, that more than 90 percent are granted by the agencies, and that the cost of compliance is upward of $250 million annually.[40] The most common type of request comes from a business attempting to gain an edge on its competition.[41] Furthermore, there is evidence that whereas regulated businesses and parties once turned over information to agencies on request without reservation, those same businesses now resist subpoenas out of fear that the information in agency possession will be turned over to FOIA requesters.[42] Indeed, it appears as though the SEC has found a way around this information problem. SEC staff, rather than asking regulated parties to send information to the agency, are traveling to the regulated businesses to examine information.[43] This way, the information is never in the possession of the agency. Justice Scalia argues that the costs of compliance with the strict deadlines of the FOIA do not outweigh the benefits to society.[44]

This is one of those difficult democratic questions. There appears to be little argument that the American polity is more open now than it was before the FOIA. There also appears to be general agreement that the demands placed on the bureaucracy by the FOIA far exceed early estimates. Compliance is costly.

SUMMARY

Acquisition of Information

1. Generally, there is no violation of the Fifth Amendment's self-incrimination clause whereby an agency requires a regulated business to maintain certain records, the agency inspects those records, and, as a result, the agency imposes sanctions on the regulated business.

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2. Agencies do not need probable cause to issue subpoenas for information. Indeed, the courts will allow a "fishing expedition" via the administrative subpoena.
3. When the sufficiency of an agency subpoena is challenged in court, the test is simply whether the topic under inquiry is a topic that the agency is empowered to investigate.
4. Cases involving physical inspections or searches by agencies fall into two broad categories: those that require a warrant and those that do not.
   a. Those that require a warrant are situations where there is a high expectation of privacy in the place searched.
   b. Those that do not require a warrant fall into three categories
      (1) Businesses that are in heavily regulated industries can be searched without a warrant.
      (2) Where there is a reduced expectation of privacy, warrantless searches may be reasonable.
      (3) The special needs doctrine says that warrantless, suspicionless searches and seizures are reasonable depending on the outcome of a balancing test weighing the privacy interests of the individual against the public interest that justifies the special need.

Agency Release of Information Under the Freedom of Information Act

1. The language of the FOIA compels release of information under normal circumstances. There are nine situations in which an agency may withhold information.
2. Although it was not always the case, today, if an agency can withhold information (especially commercial or financial information), it should.
3. Exemption 4 allows the following kind of information to be withheld:
   a. trade secrets
   b. commercial or financial information if (a) it was obtained from a person or business, (b) it is privileged (attorney/client), or (c) it is confidential
4. Commercial or financial information is confidential under the following circumstances:
   a. This information would not normally be released to the public by the individual or business that provided it.
   b. To withhold this information would be consistent with the legislative purposes of the exemption if (a) release would impair the government's ability to obtain such information in the future and (b) release of the information would harm the competitive edge of the provider.
5. Exemption 5 protects privileged information such as attorney/client and executive privilege. To qualify for Exemption 5, the material sought must predate the decision, and it must not have been relied on to make the decision.

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6. Exemptions 6 and 7(c) protect citizens from release of information an agency might possess that would constitute a clearly unwarranted invasion of privacy. A balancing test determines whether an invasion of privacy would be "clearly unwarranted." The privacy interest of the individual is weighed against the public interest. The public interest means the citizens' right to know what government is up to. Generally information will fall under the public interest if it helps us assess the agency's performance of its duties.

END-OF-CHAPTER CASES

Dow Chemical Company v. United States 476 U.S. 227 (1986)

Chief Justice Burger delivered the opinion of the Court, in which Justices White, Rehnquist, Stevens, and O'Connor joined, and in Part III of which Justices Brennan, Marshall, Blackmun, and Powell joined. Justice Powell filed an opinion concurring in part and dissenting in part, in which Justices Brennan, Marshall, and Blackmun joined.

We granted certiorari to review the holding of the Court of Appeals (a) that the Environmental Protection Agency's aerial observation of petitioner's plant complex did not exceed EPA's statutory investigatory authority, and (b) that EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the Fourth Amendment.

I

Petitioner Dow Chemical Co. operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two powerplants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the Fourth Amendment and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the ground that EPA had no authority to take aerial photographs and that doing so was a search violating the Fourth Amendment. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. The Court of Appeals then held that EPA clearly acted within its statutory powers even absent express authorization for aerial surveillance, concluding that the delegation of general

investigative authority to EPA, similar to that of other law enforcement agencies, was sufficient to support the use of aerial photography. Dow claims first that EPA has no authority to use aerial photography to implement its statutory authority for "site inspection" under § 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a); second, Dow claims EPA's use of aerial photography was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field," and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment. . . .

III

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters relating to clean air and water standards. When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. Environmental standards such as clean air and clean water cannot be enforced only in libraries and laboratories, helpful as those institutions may be. . . . We hold that the use of aerial observation and photography is within EPA's statutory authority. . . . We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights under the Fourth Amendment. In making this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem. We pointed out in *Donovan v. Dewey,* 452 U.S. 594 (1981), that the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." We emphasized that unlike a homeowner's interest in his dwelling, "[t]he interest of the owner of commercial property is not one in being free from any inspections." And with regard to regulatory inspections, we have held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall v. Barlow's, Inc.,* 436 U.S., at 315.

Oliver recognized that in the open field context, "the public and police lawfully may survey lands from the air." 466 U.S., at 179. Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as ½ inch in diameter.

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to

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the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.

We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras. We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.

Affirmed.

Ferguson v. City Of Charleston
532 U.S. 67 (2001)

Justice Stevens delivered the opinion of the Court, in which Justice O'Connor, Souter, Ginsburg, and Breyer joined. Justice Kennedy filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined as to Part II.

In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

I

In the fall of 1988, staff members at the public hospital operated in the city of Charleston by the Medical University of South Carolina (MUSC) became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment. In response to this perceived increase, as of April 1989, MUSC began to order drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine. If a patient tested positive, she was then referred by MUSC staff to the county substance abuse commission for counseling and treatment. However, despite the referrals, the incidence of cocaine use among the patients at MUSC did not appear to change.

Some four months later, Nurse Shirley Brown, the case manager for the MUSC obstetrics department, heard a news broadcast reporting that the police in Greenville, South Carolina, were arresting pregnant users of cocaine on the theory that such use harmed the fetus and was therefore child abuse. Nurse Brown discussed the story with MUSC's general counsel, Joseph C. Good, Jr., who then contacted Charleston Solicitor Charles Condon in order to offer MUSC's cooperation in prosecuting mothers whose children tested positive for drugs at birth.

After receiving Good's letter, Solicitor Condon took the first steps in developing the policy at issue in this case. He organized the initial meetings, decided who would participate, and issued the invitations, in which he described his plan to prosecute women who tested positive for cocaine while pregnant. The task force that Condon formed included representatives of MUSC, the police, the County Substance Abuse

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Commission and the Department of Social Services. Their deliberations led to MUSC's adoption of a 12-page document entitled "POLICY M-7," dealing with the subject of "Management of Drug Abuse During Pregnancy."

The first three pages of Policy M-7 set forth the procedure to be followed by the hospital staff to "identify/assist pregnant patients suspected of drug abuse." The first section, entitled the Identification of Drug Abusers," provided that a patient should be tested for cocaine through a urine drug screen if she met one or more of nine criteria *[the following are the nine criteria taken from footnote #4 from the opinion of the Court]:*

"1. No prenatal care

"2. Late prenatal care after 24 weeks gestation

"3. Incomplete prenatal care

"4. Abruptio placentae

"5. Intrauterine fetal death

"6. Preterm labor 'of no obvious cause'

"7. IUGR [intrauterine growth retardation] 'of no obvious cause'

"8. Previously known drug or alcohol abuse

"9. Unexplained congenital anomalies."

It also stated that a chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings. The policy also provided for education and referral to a substance abuse clinic for patients who tested positive. Most important, it added the threat of law enforcement intervention that "provided the necessary 'leverage' to make the policy effective." That threat was, as respondents candidly acknowledge, essential to the program's success in getting women into treatment and keeping them there.

The threat of law enforcement involvement was set forth in two protocols, the first dealing with the identification of drug use during pregnancy, and the second with identification of drug use after labor. Under the latter protocol, the police were to be notified without delay and the patient promptly arrested. Under the former, after the initial positive drug test, the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor. In 1990, however, the policy was modified at the behest of the solicitor's office to give the patient who tested positive during labor, like the patient who tested positive during a prenatal care visit, an opportunity to avoid arrest by consenting to substance abuse treatment.

The policy also prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18—in this case, the fetus. If she delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child. Under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect." Other than the provisions describing the substance abuse treatment to be offered to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.

II

Petitioners are 10 women who received obstetrical care at MUSC and who were arrested after testing positive for cocaine. Four of them were arrested during the initial implementation of the policy; they were not offered the opportunity to receive drug treatment as an alternative to arrest. The others were arrested after the policy was modified in 1990; they either failed to comply with the terms of the drug treatment program or tested positive for a second time. Respondents include the city of Charleston, law enforcement officials who helped develop and enforce the policy, and representatives of MUSC.

Petitioners' complaint challenged the validity of the policy under various theories, including

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the claim that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches. Respondents advanced two principal defenses to the constitutional claim: (1) that, as a matter of fact, petitioners had consented to the searches; and (2) that, as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes. The District Court rejected the second defense because the searches in question "were not done by the medical university for independent purposes. [Instead,] the police came in and there was an agreement reached that the positive screens would be shared with the police." Accordingly, the District Court submitted the factual defense to the jury with instructions that required a verdict in favor of petitioners unless the jury found consent. The jury found for respondents.

Petitioners appealed, arguing that the evidence was not sufficient to support the jury's consent finding. The Court of Appeals for the Fourth Circuit affirmed, but without reaching the question of consent. 186 F.3d 469 (1999). Disagreeing with the District Court, the majority of the appellate panel held that the searches were reasonable as a matter of law under our line of cases recognizing that "special needs" may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.

We granted certiorari, 528 U.S. 1187 (2000), to review the appellate court's holding on the "special needs" issue. Because we do not reach the question of the sufficiency of the evidence with respect to consent, we necessarily assume for purposes of our decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients. We conclude that the judgment should be reversed and the case remanded for a decision on the consent issue.

III

Because MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment. *New Jersey v. T. L. O.,* 469 U.S. 325, 335-337 (1985). Moreover, the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 617 (1989). Neither the District Court nor the Court of Appeals concluded that any of the nine criteria used to identify the women to be searched provided either probable cause to believe that they were using cocaine, or even the basis for a reasonable suspicion of such use. Rather, the District Court and the Court of Appeals viewed the case as one involving MUSC's right to conduct searches without warrants or probable cause. Furthermore, given the posture in which the case comes to us, we must assume for purposes of our decision that the tests were performed without the informed consent of the patients.

Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller,* 520 U.S. 305, 309 (1997). In three of those cases, we sustained drug tests for railway employees involved in train accidents, *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989), and for high school students participating in interscholastic sports, *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, (1995). In the fourth case, we struck down such testing for candidates for designated state offices as unreasonable. *Chandler v. Miller,* 520 U.S. 305 (1997).

In each of those cases, we employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program. As an initial matter, we note that the invasion of privacy in this case is far more substantial than in those cases. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there

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were protections against the dissemination of the results to third parties. The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. . . . In none of our prior cases was there any intrusion upon that kind of expectation. The critical difference between those four drug-testing cases and this one, however, lies in the nature of the "special need" asserted as justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. This point was emphasized both in the majority opinions sustaining the programs in the first three cases, as well as in the dissent in the *Chandler* case. In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here. . . .

Respondents argue in essence that their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one. In *Chandler,* however, we did not simply accept the State's invocation of a "special need." Instead, we carried out a "close review" of the scheme at issue before concluding that the need in question was not "special," as that term has been defined in our cases. 520 U.S. at 322. In this case, a review of the M-7 policy plainly reveals that the purpose actually served by the MUSC searches "is ultimately indistinguishable from the general interest in crime control."

In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose. In this case, as Judge Blake put it in her dissent below, "it . . . is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers. . . ." 186 F.3d at 484. Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction.

Moreover, throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy. Police and prosecutors decided who would receive the reports of positive drug screens and what information would be included with those reports. Law enforcement officials also helped determine the procedures to be followed when performing the screens. In the course of the policy's administration, they had access to Nurse Brown's medical files on the women who tested positive, routinely attended the substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress. Police took pains to coordinate the timing and circumstances of the arrests with MUSC staff, and, in particular, Nurse Brown.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader

social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the "special needs" balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require. *Miranda v. Arizona,* 384 U.S. 436.

As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy. The stark and unique fact that characterizes this case is that Policy M-7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy. See, e.g., *Chandler,* 520 U.S. at 308; *Skinner,* 498 U.S. at 619.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Scalia dissenting, joined by Chief Justice Rehnquist and Justice Thomas as to Part II.

There is always an unappealing aspect to the use of doctors and nurses, ministers of mercy, to obtain incriminating evidence against the supposed objects of their ministration—although here, it is correctly pointed out, the doctors and nurses were ministering not just to the mothers but also to the children whom their cooperation with the police was meant to protect. But whatever may be the correct social judgment concerning the desirability of what occurred here, that is not the issue in the present case. The Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process—which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or permit the police action at issue here. The question before us is a narrower one: whether, whatever the desirability of this police conduct, it violates the Fourth Amendment's prohibition of unreasonable searches and seizures. In my view, it plainly does not.

I

The first step in Fourth Amendment analysis is to identify the search or seizure at issue. What petitioners, the Court, and to a lesser extent the concurrence really object to is not the urine testing, but the hospital's reporting of positive drug-test results to police. But the latter is obviously not a search. At most it may be a "derivative use of the product of a past unlawful search," which, of course, "works no new Fourth Amendment

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wrong" and "presents a question, not of rights, but of remedies." *United States v. Calandra,* 414 U.S. 338, 354 (1974). There is only one act that could conceivably be regarded as a search of petitioners in the present case: the taking of the urine sample. I suppose the testing of that urine for traces of unlawful drugs could be considered a search of sorts, but the Fourth Amendment protects only against searches of citizens' "persons, houses, papers, and effects"; and it is entirely unrealistic to regard urine as one of the "effects" (i.e., part of the property) of the person who has passed and abandoned it. *California v. Greenwood,* 486 U.S. 35 (1988) (garbage left at curb is not property protected by the Fourth Amendment). Some would argue, I suppose, that testing of the urine is prohibited by some generalized privacy right "emanating" from the "penumbras" of the Constitution (a question that is not before us); but it is not even arguable that the testing of urine that has been lawfully obtained is a Fourth Amendment search. (I may add that, even if it were, the factors legitimizing the taking of the sample, which I discuss below, would likewise legitimize the testing of it.)

It is rudimentary Fourth Amendment law that a search which has been consented to is not unreasonable. There is no contention in the present case that the urine samples were extracted forcibly. The only conceivable bases for saying that they were obtained without consent are the contentions (1) that the consent was coerced by the patients' need for medical treatment, (2) that the consent was uninformed because the patients were not told that the tests would include testing for drugs, and (3) that the consent was uninformed because the patients were not told that the results of the tests would be provided to the police. (When the court below said that it was reserving the factual issue of consent, see 186 F.3d 469, 476 [CA4 1999] it was referring at most to these three—and perhaps just to the last two.)

Under our established Fourth Amendment law, the last two contentions would not suffice, even without reference to the special-needs doctrine. The Court's analogizing of this case to *Miranda v. Arizona,* 384 U.S. 436 (1966), and its claim that "standards of knowing waiver" apply, are flatly contradicted by our jurisprudence, which shows that using lawfully (but deceivingly) obtained material for purposes other than those represented, and giving that material or information derived from it to the police, is not unconstitutional. . . .

Until today, we have never held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain. Without so much as discussing the point, the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate. Today's holding would be remarkable enough if the confidential relationship violated by the police conduct were at least one protected by state law. It would be surprising to learn, for example, that in a State which recognizes a spousal evidentiary privilege the police cannot use evidence obtained from a cooperating husband or wife. But today's holding goes even beyond that, since there does not exist any physician-patient privilege in South Carolina. See, e.g., *Peagler v. Atlantic Coast R. R. Co.,* 101 S.E.2d 821 (1958). Since the Court declines even to discuss the issue, it leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from "trusted" sources. Presumably the lines will be drawn in the case-by-case development of a whole new branch of Fourth Amendment jurisprudence, taking yet another social judgment (which confidential relationships ought not be invaded by the police) out of democratic control, and confiding it to the uncontrolled judgment of this Court—uncontrolled because there is no common-law precedent to guide it. I would adhere to our established law, which says that information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search.

I think it clear, therefore, that there is no basis for saying that obtaining of the urine sample was unconstitutional. The special-needs doctrine is thus quite irrelevant, since it

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operates only to validate searches and seizures that are otherwise unlawful. In the ensuing discussion, however, I shall assume (contrary to legal precedent) that the taking of the urine sample was (either because of the patients' necessitous circumstances, or because of failure to disclose that the urine would be tested for drugs, or because of failure to disclose that the results of the test would be given to the police) coerced. Indeed, I shall even assume (contrary to common sense) that the testing of the urine constituted an unconsented search of the patients' effects. On those assumptions, the special-needs doctrine would become relevant; and, properly applied, would validate what was done here.

The conclusion of the Court that the special-needs doctrine is inapplicable rests upon its contention that respondents "undertook to obtain [drug] evidence from their patients" not for any medical purpose, but "for the specific purpose of incriminating those patients." In other words, the purported medical rationale was merely a pretext; there was no special need. See *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 621 (1989). This contention contradicts the District Court's finding of fact that the goal of the testing policy "was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child." This finding is binding upon us unless clearly erroneous, see Fed. Rule Civ. Proc. 52(a). Not only do I find it supportable; I think any other finding would have to be overturned. . . .

In sum, there can be no basis for the Court's purported ability to "distinguish this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that . . . is subject to reporting requirements," unless it is this: That the addition of a law-enforcement- related purpose to a legitimate medical purpose destroys applicability of the "special-needs" doctrine. But that is quite impossible, since the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches by law enforcement officials who, of course, ordinarily have a law enforcement objective. Thus, in *Griffin v. Wisconsin,* 483 U.S. 868 (1987), a probation officer received a tip from a detective that petitioner, a felon on parole, possessed a firearm. Accompanied by police, he conducted a warrantless search of petitioner's home. The weapon was found and used as evidence in the probationer's trial for unlawful possession of a firearm. Affirming denial of a motion to suppress, we concluded that the "special need" of assuring compliance with terms of release justified a warrantless search of petitioner's home. . . .

As I indicated at the outset, it is not the function of this Court—at least not in Fourth Amendment cases—to weigh petitioners' privacy interest against the State's interest in meeting the crisis of "crack babies" that developed in the late 1980's. I cannot refrain from observing, however, that the outcome of a wise weighing of those interests is by no means clear. The initial goal of the doctors and nurses who conducted cocaine-testing in this case was to refer pregnant drug addicts to treatment centers, and to prepare for necessary treatment of their possibly affected children. When the doctors and nurses agreed to the program providing test results to the police, they did so because (in addition to the fact that child abuse was required by law to be reported) they wanted to use the sanction of arrest as a strong incentive for their addicted patients to undertake drug-addiction treatment. And the police themselves used it for that benign purpose, as is shown by the fact that only 30 of 253 women testing positive for cocaine were ever arrested, and only 2 of those prosecuted. It would not be unreasonable to conclude that today's judgment, authorizing the assessment of damages against the county solicitor and individual doctors and nurses who participated in the program, proves once again that no good deed goes unpunished.

But as far as the Fourth Amendment is concerned: There was no unconsented search in this case. And if there was, it would have been validated by the special-needs doctrine. For these reasons, I respectfully dissent.

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National Archives And Records Administration, v. Favish 124 S. Ct. 1570 (2004)

Justice Kennedy delivered the opinion for a unanimous Court.

This case requires us to interpret the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA does not apply if the requested data fall within one or more exemptions. Exemption 7(C) excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." . . .

In *Department of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, we considered the scope of Exemption 7(C) and held that release of the document at issue would be a prohibited invasion of the personal privacy of the person to whom the document referred. The principal document involved was the criminal record, or rap sheet, of the person who himself objected to the disclosure. Here, the information pertains to an official investigation into the circumstances surrounding an apparent suicide. The initial question is whether the exemption extends to the decedent's family when the family objects to the release of photographs showing the condition of the body at the scene of death. If we find the decedent's family does have a personal privacy interest recognized by the statute, we must then consider whether that privacy claim is outweighed by the public interest in disclosure.

I

Vincent Foster, Jr., deputy counsel to President Clinton, was found dead in Fort Marcy Park, located just outside Washington, D. C. The United States Park Police conducted the initial investigation and took color photographs of the death scene, including 10 pictures of Foster's body. The investigation concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion. Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical. Favish is now a respondent in this proceeding. In an earlier proceeding, Favish was the associate counsel for Accuracy in Media (AIM), which applied under FOIA for Foster's death-scene photographs. After the National Park Service, which then maintained custody of the pictures, resisted disclosure, Favish filed suit on behalf of AIM in the District Court for the District of Columbia to compel production. The District Court granted summary judgment against AIM. The Court of Appeals for the District of Columbia unanimously affirmed. *Accuracy in Media, Inc. v. National Park Serv.,* 194 F.3d 120 (1999).

Still convinced that the Government's investigations were "'grossly incomplete and untrustworthy,'" Favish filed the present FOIA request in his own name, seeking, among other things, 11 pictures, 1 showing Foster's eyeglasses and 10 depicting various parts of Foster's body. Like the National Park Service, the Office of Independent Counsel (OIC) refused the request under Exemption 7(C).

Again, Favish sued to compel production, this time in the United States District Court for the Central District of California. . . . On the merits, the court granted partial summary judgment to OIC. With the exception of the picture showing Foster's eyeglasses, the court upheld OIC's claim of exemption. Relying on the so-called Vaughn index provided by the Government—a narrative description of the withheld photos, see *Vaughn v. Rosen*, 84 F.2d 820 (CADC 1973)—the court held, first, that Foster's surviving family members enjoy personal privacy interests that could be infringed by disclosure of the photographs. It then found, with respect to the asserted public interest, that "[Favish] has not sufficiently explained how

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disclosure of these photographs will advance his investigation into Foster's death." Any purported public interest in disclosure, moreover, "is lessened because of the exhaustive investigation that has already occurred regarding Foster's death." Balancing the competing interests, the court concluded that "the privacy interests of the Foster family members outweigh the public interest in disclosure."

On the first appeal to the Court of Appeals for the Ninth Circuit, the majority reversed and remanded, . . .217 F.3d 1168 (2000). . . .

The Court of Appeals, however, agreed with the District Court that the exemption recognizes the Foster family members' right to personal privacy. . . . Nevertheless, the majority held that the District Court erred in balancing the relevant interests based only on the Vaughn index. . . . It remanded the case to the District Court to examine the photos in camera and, "consistent with [the Court of Appeals'] opinion," "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release."

On remand, the District Court ordered release of the following five photographs:

> "The photograph identified as '3—VF's [Vincent Foster's] body looking down from top of berm' must be released, as the photograph is not so explicit as to overcome the public interest.
>
> "The photograph entitled '5—VF's body—focusing on Rt. side of shoulder arm' is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.
>
> "The photograph entitled '1—Right hand showing gun & thumb in guard' is discoverable as it may be probative of the public's right to know.
>
> "The photograph entitled '4—VF's body focusing on right side and arm' is discoverable.
>
> "The photograph entitled '5—VF's body—focus on top of head thru heavy foliage' is discoverable."

On the second appeal to the same panel, the majority, affirmed in part. Without providing any explanation, it upheld the release of all the pictures, "except that photo 3—VF's body looking down from top of berm is to be withheld."

We granted OIC's petition for a writ of *certiorari* to resolve a conflict in the Courts of Appeals over the proper interpretation of Exemption 7(C). The only documents at issue in this case are the four photographs the Court of Appeals ordered released in its 2002 unpublished opinion. We reverse.

The OIC terminated its operations on March 23, 2004, and transferred all records—including the photographs that are the subject of Favish's FOIA request—to the National Archives and Records Administration. The National Archives and Records Administration has been substituted as petitioner in the caption of this case. As all the actions relevant to our disposition of the case took place before March 23, 2004, we continue to refer to petitioner as OIC in this opinion.

II

It is common ground among the parties that the death-scene photographs in OIC's possession are "records or information compiled for law enforcement purposes" as that phrase is used in Exemption 7(C). This leads to the question whether disclosure of the four photographs "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Favish contends the family has no personal privacy interest covered by Exemption 7(C). His argument rests on the proposition that the information is only about the decedent, not his family. FOIA's right to personal privacy, in his view, means only "the right to control information about oneself." . . .

In a sworn declaration filed with the District Court, Foster's sister, Sheila Foster Anthony, stated that the family had been harassed by, and deluged with requests from, "[p]olitical and commercial opportunists" who sought to profit from Foster's suicide. In particular, she was "horrified and devastated by [a] photograph [already] leaked to the press." "Every time I see

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it," Sheila Foster Anthony wrote, "I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life." She opposed the disclosure of the disputed pictures because "I fear that the release of additional photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage." "[R]leasing any photographs," Sheila Foster Anthony continued, "would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family."

As we shall explain below, we think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions. This does not mean that the family is in the same position as the individual who is the subject of the disclosure. We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes. . . .

Our ruling that the personal privacy protected by Exemption 7(C) extends to family members who object to the disclosure of graphic details surrounding their relative's death does not end the case. Although this privacy interest is within the terms of the exemption, the statute directs nondisclosure only where the information "could reasonably be expected to constitute an unwarranted invasion" of the family's personal privacy. The term "unwarranted" requires us to balance the family's privacy interest against the public interest in disclosure. See *Reporters Committee,* 489 U.S. 749, at 762.

FOIA is often explained as a means for citizens to know "what the Government is up to." This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it. In the case of Exemption 7(C), the statute requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the state. The statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure. To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable.

Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

We do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure. On the other hand, there must be some stability with respect to both the specific category of personal privacy

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interests protected by the statute and the specific category of public interests that could outweigh the privacy claim. Otherwise, courts will be left to balance in an ad hoc manner with little or no real guidance. In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy Exemption 7(C)'s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties. . . .

We hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. In *United States Dep't of State v. Ray,* 502 U.S. 164 (1991), we held there is a presumption of legitimacy accorded to the Government's official conduct. The presumption perhaps is less a rule of evidence than a general working principle. However the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it. "In the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties." ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). Given FOIA's prodisclosure purpose, however, the less stringent standard we adopt today is more faithful to the statutory scheme. Only when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records. Allegations of government misconduct are "easy to allege and hard to disprove," so courts must insist on a meaningful evidentiary showing. It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion. As we have noted, the balancing exercise in some other case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the nexus required between the requested documents and the purported public interest served by disclosure. We need not do so here, however. Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play.

The Court of Appeals erred in its interpretation of Exemption 7(C). . . . The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to grant OIC's motion for summary judgment with respect to the four photographs in dispute.

It is so ordered.

Cheney, Vice President of the United States v. United States District Court for the District of Columbia
124 S. Ct. 2576 (2004)

Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, and Breyer joined, and in which Justices Scalia and Thomas joined as to Parts I, II, III, and IV. Justice Stevens filed a concurring opinion. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justice Scalia joined. Justice Ginsburg filed a dissenting opinion, in which Justice Souter joined.

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The United States District Court for the District of Columbia entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President. This case requires us to consider the circumstances under which a court of appeals may exercise its power to issue a writ of *mandamus* to modify or dissolve the orders when, by virtue of their overbreadth, enforcement might interfere with the officials in the discharge of their duties and impinge upon the President's constitutional prerogatives.

I

A few days after assuming office, President George W. Bush issued a memorandum establishing the National Energy Policy Development Group (NEPDG or Group). The Group was directed to "develop . . . a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." The President assigned a number of agency heads and assistants—all employees of the Federal Government—to serve as members of the committee. He authorized the Vice President, as chairman of the Group, to invite "other officers of the Federal Government" to participate "as appropriate." Five months later, the NEPDG issued a final report and, according to the Government, terminated all operations.

Following publication of the report, respondents Judicial Watch and the Sierra Club filed these separate actions, which were later consolidated in the District Court. Respondents alleged the NEPDG had failed to comply with the procedural and disclosure requirements of the Federal Advisory Committee Act (FACA or Act), 5 U.S.C. App. § 2, p. 1.

FACA was enacted to monitor the "numerous committees, boards, commissions, councils, and similar groups [that] have been established to advise officers and agencies in the executive branch of the Federal Government," and to prevent the "wasteful expenditure of public funds" that may result from their proliferation. Subject to specific exemptions, FACA imposes a variety of open-meeting and disclosure requirements on groups that meet the definition of an "advisory committee." As relevant here, an "advisory committee" means "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is—" (B) "established or utilized by the President, except that [the definition] excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." . . .

Respondents do not dispute the President appointed only Federal Government officials to the NEPDG. They agree that the NEPDG, as established by the President in his memorandum, was "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." The complaint alleges, however, that "non-federal employees," including "private lobbyists," "regularly attended and fully participated in non-public meetings." Relying on *Association of American Physicians & Surgeons, Inc. v. Clinton,* 997 F.2d 898 (CADC 1993) respondents contend that the regular participation of the non-Government individuals made them de facto members of the committee. According to the complaint, their "involvement and role are functionally indistinguishable from those of the other [formal] members." As a result, respondents argue, the NEPDG cannot benefit from the Act's exemption under subsection B and is subject to FACA's requirements.

Vice President Cheney, the NEPDG, the Government officials who served on the committee, and the alleged de facto members were named as defendants. The suit seeks declaratory relief and an injunction requiring them to produce all materials allegedly subject to FACA's requirements.

All defendants moved to dismiss. The District Court granted the motion in part and denied it in part. The court acknowledged FACA does not create a private cause of action. On this basis, it dismissed respondents' claims against the non-Government defendants. Because the

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NEPDG had been dissolved, it could not be sued as a defendant; and the claims against it were dismissed as well. The District Court held, however, that FACA's substantive requirements could be enforced against the Vice President and other Government participants on the NEPDG under the Mandamus Act, 28 U.S.C. § 1361, and against the agency defendants under the Administrative Procedure Act (APA), 5 U.S.C. § 706. The District Court recognized the disclosure duty must be clear and nondiscretionary for mandamus to issue, and there must be, among other things, "final agency actions" for the APA to apply. According to the District Court, it was premature to decide these questions. It held only that respondents had alleged sufficient facts to keep the Vice President and the other defendants in the case.

The District Court deferred ruling on the Government's contention that to disregard the exemption and apply FACA to the NEPDG would violate principles of separation of powers and interfere with the constitutional prerogatives of the President and the Vice President. Instead, the court allowed respondents to conduct a "tightly-reined" discovery to ascertain the NEPDG's structure and membership, and thus to determine whether the de facto membership doctrine applies. *Judicial Watch, Inc. v. National Energy Policy Dev. Group,* 219 F. Supp.2d 20, 54 (DC 2002). While acknowledging that discovery itself might raise serious constitutional questions, the District Court explained that the Government could assert executive privilege to protect sensitive materials from disclosure. In the District Court's view, these "issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government." The District Court adopted this approach in an attempt to avoid constitutional questions, noting that if, after discovery, respondents have no evidentiary support for the allegations about the regular participation by lobbyists and industry executives on the NEPDG, the Government can prevail on statutory grounds. Furthermore, the District Court explained, even were it appropriate to address constitutional issues, some factual development is necessary to determine the extent of the alleged intrusion into the Executive's constitutional authority. The court denied in part the motion to dismiss and ordered respondents to submit a discovery plan.

In due course the District Court approved respondents' discovery plan, entered a series of orders allowing discovery to proceed (reproducing orders entered on Sept. 9, Oct. 17, and Nov. 1, 2002), and denied the Government's motion for certification under 28 U.S.C. § 1292(b) with respect to the discovery orders. Petitioners sought a writ of mandamus in the Court of Appeals to vacate the discovery orders, to direct the District Court to rule on the basis of the administrative record, and to dismiss the Vice President from the suit. The Vice President also filed a notice of appeal from the same orders.

A divided panel of the Court of Appeals dismissed the petition for a writ of mandamus and the Vice President's attempted interlocutory appeal. *In re Cheney,* 334 F.3d 1096 (CADC 2003). With respect to mandamus, the majority declined to issue the writ on the ground that alternative avenues of relief remained available. Citing *United States v. Nixon,* 418 U.S. 683, the majority held that petitioners, to guard against intrusion into the President's prerogatives, must first assert privilege. Under its reading of *Nixon,* moreover, privilege claims must be made "with particularity.'" In the majority's view, if the District Court sustains the privilege, petitioners will be able to obtain all the relief they seek. If the District Court rejects the claim of executive privilege and creates "an imminent risk of disclosure of allegedly protected presidential communications," "mandamus might well be appropriate to avoid letting 'the cat . . . out of the bag.'" "But so long as the separation of powers conflict that petitioners anticipate remains hypothetical," the panel held, "we have no authority to exercise the extraordinary remedy of mandamus." The majority acknowledged the scope of respondents' requests is overly broad, because it seeks far more than the "limited items" to which respondents would be entitled if "the district court ultimately determines that the NEPDG is subject to FACA." ("The requests to produce also go well beyond FACA's requirements"); ("[Respondents'] discovery also goes

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well beyond what they need to prove"). It nonetheless agreed with the District Court that petitioners "'shall bear the burden'" of invoking executive privilege and filing objections to the discovery orders with "'detailed precision.'"

For similar reasons, the majority rejected the Vice President's interlocutory appeal. In *United States v. Nixon,* the Court held that the President could appeal an interlocutory subpoena order without having "to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review." The majority, however, found the case inapplicable because Vice President Cheney, unlike then-President Nixon, had not yet asserted privilege. In the majority's view, the Vice President was not forced to choose between disclosure and suffering contempt for failure to obey a court order. The majority held that to require the Vice President to assert privilege does not create the unnecessary confrontation between two branches of Government described in *Nixon*. . . .

We granted certiorari. We now vacate the judgment of the Court of Appeals and remand the case for further proceedings to reconsider the Government's mandamus petition. . . .

III

We now come to the central issue in the case—whether the Court of Appeals was correct to conclude it "had no authority to exercise the extraordinary remedy of mandamus," on the ground that the Government could protect its rights by asserting executive privilege in the District Court.

The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey,* 332 U.S. 258, 259-260 (1947).

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" "only exceptional circumstances amounting to a judicial 'usurpation of power,'" or a "clear abuse of discretion, will justify the invocation of this extraordinary remedy."

As the writ is one of "the most potent weapons in the judicial arsenal," three conditions must be satisfied before it may issue. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,"—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."' Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrassing the executive arm of the Government," or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations."

Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations. Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. It is well established that "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' . . As *United States v. Nixon* explained, these principles do not mean that the `President is above the law.'" Rather, they simply acknowledge that the public interest

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requires that a coequal branch of Government "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice," and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.

These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities. . . .

IV

The Court of Appeals dismissed these separation-of-powers concerns. Relying on *United States v. Nixon,* it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice President and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision." In its view, this result was required by *Nixon's* rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." If *Nixon* refused to recognize broad claims of confidentiality where the President had asserted executive privilege, the majority reasoned, *Nixon* must have rejected, a fortiori, petitioners' claim of discovery immunity where the privilege has not even been invoked. According to the majority, because the Executive Branch can invoke executive privilege to maintain the separation of powers, mandamus relief is premature.

This analysis, however, overlooks fundamental differences in the two cases. *Nixon* cannot bear the weight the Court of Appeals puts upon it. First, unlike this case, which concerns respondents' requests for information for use in a civil suit, *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communications and the "constitutional need for production of relevant evidence in a criminal proceeding." The Court's decision was explicit that it was "not . . . concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation. . . . We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

. . . The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As recognized in *Nixon,* the right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions." . . .

A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President. The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated. This Court has held, on more than one occasion, that "the high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery," *Clinton,* 520 U.S. 681, at 707,, and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it, *Nixon v. Fitzgerald,* 457 U.S. 731, at 753, Respondents' reliance on cases that do not involve senior members of the Executive Branch, see, e.g., *Kerr v. United States Dist. Court for Northern Dist. of Cal.,* 426 U.S. 394 (1976), is altogether misplaced.

Even when compared against *United States v. Nixon's* criminal subpoenas, which did

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involve the President, the civil discovery here militates against respondents' position. The observation in *Nixon* that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. . . .

In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas. In *United States v. Poindexter,* 727 F. Supp. 1501 (1989), defendant Poindexter, on trial for criminal charges, sought to have the District Court enforce subpoena orders against President Reagan to obtain allegedly exculpatory materials. The Executive considered the subpoenas "unreasonable and oppressive." Rejecting defendant's argument that the Executive must first assert executive privilege to narrow the subpoenas, the District Court agreed with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents." The court decided to narrow, on its own, the scope of the subpoenas to allow the Executive "to consider whether to invoke executive privilege with respect to . . . a smaller number of documents following the narrowing of the subpoenas." This is but one example of the choices available to the District Court and the Court of Appeals in this case.

As we discussed at the outset, under principles of mandamus jurisdiction, the Court of Appeals may exercise its power to issue the writ only upon a finding of "exceptional circumstances amounting to a judicial 'usurpation of power,'" or "a clear abuse of discretion," As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties. This is especially so here because the District Court's analysis of whether mandamus relief is appropriate should itself be constrained by principles similar to those we have outlined, supra, that limit the Court of Appeals' use of the remedy. The panel majority, however, failed to ask this question. Instead, it labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections.

V

In the absence of overriding concerns, . . . we decline petitioners' invitation to direct the Court of Appeals to issue the writ against the District Court. Moreover, this is not a case where, after having considered the issues, the Court of Appeals abused its discretion by failing to issue the writ. Instead, the Court of Appeals, relying on its mistaken reading of *United States v. Nixon,* prematurely terminated its inquiry after the Government refused to assert privilege and did so without even reaching the weighty separation-of-powers objections raised in the case, much less exercised its discretion to determine whether "the writ is appropriate under the circumstances." Because the issuance of the writ is a matter vested in the discretion of the court to which the petition is made, and because this Court is not presented with an original writ of mandamus, we leave to the Court of Appeals to address the parties' arguments with respect to the challenge to APS and the discovery orders. Other matters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the de facto membership doctrine.

The judgment of the Court of Appeals for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Justice Ginsburg, with whom Justice Souter joins, dissenting.

The Government, in seeking a writ of mandamus from the Court of Appeals for the District of Columbia, and on brief to this Court, urged that this case should be resolved without any discovery. In vacating the judgment of the Court of Appeals, however, this Court remands for consideration whether mandamus is appropriate due to the overbreadth of the District Court's discovery orders. But, as the Court of Appeals observed, it appeared that the Government "never asked the district court to narrow discovery." *In re Cheney,* 334 F.3d 1096, 1106 (CADC 2003). Given the Government's decision to resist all discovery, mandamus relief based on the exorbitance of the discovery orders is at least "premature," I would therefore affirm the judgment of the Court of Appeals denying the writ, and allow the District Court, in the first instance, to pursue its expressed intention "tightly [to] rein [in] discovery," should the Government so request.

A

The discovery at issue here was sought in a civil action filed by respondents Judicial Watch, Inc., and Sierra Club. To gain information concerning the membership and operations of an energy-policy task force, the National Energy Policy Development Group (NEPDG), respondents filed suit under the Federal Advisory Committee Act (FACA); respondents named among the defendants the Vice President and senior Executive Branch officials. After granting in part and denying in part the Government's motions to dismiss, the District Court approved respondents' extensive discovery plan, which included detailed and far-ranging interrogatories and sweeping requests for production of documents. In a later order, the District Court directed the Government to "produce non-privileged documents and a privilege log."

The discovery plan drawn by Judicial Watch and Sierra Club was indeed "unbounded in scope." Initial approval of that plan by the District Court, however, was not given in stunning disregard of separation-of-powers concerns. In the order itself, the District Court invited "detailed and precise objections" to any of the discovery requests, and instructed the Government to "identify and explain . . . invocations of privilege with particularity." To avoid duplication, the District Court provided that the Government could identify "documents or information [responsive to the discovery requests] that [it] had already released to [Judicial Watch or the Sierra Club] in different fora." Anticipating further proceedings concerning discovery, the District Court suggested that the Government could "submit [any privileged documents] under seal for the court's consideration," or that "the court [could] appoint the equivalent of a Special Master, maybe a retired judge," to review allegedly privileged documents.

The Government did not file specific objections; nor did it supply particulars to support assertions of privilege. Instead, the Government urged the District Court to rule that Judicial Watch and the Sierra Club could have no discovery at all ("the government position is that . . . no discovery is appropriate. As far as we can tell, petitioners never asked the district court to narrow discovery to those matters [respondents] need to support their allegation that FACA applies to the NEPDG."). In the Government's view, "the resolution of the case had to flow from the administrative record" sans discovery. Without taking up the District Court's suggestion of that court's readiness to rein in discovery, the Government, on behalf of the Vice President, moved, unsuccessfully, for a protective order and for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). At the District Court's hearing on the Government's motion for a stay pending interlocutory appeal, the Government argued that "the injury is submitting to discovery in the absence of a compelling showing of need by the [respondents].

Despite the absence from this "flurry of activity," ante, of any Government motion contesting the terms of the discovery plan or proposing a scaled-down substitute plan, this Court states that the Government "did in fact object to the scope of discovery and asked the District Court to narrow it in some way," In

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support of this statement, the Court points to the Government's objections to the proposed discovery plan, its response to the interrogatories and production requests, and its contention that discovery would be unduly burdensome. . . .

The Government's bottom line was firmly and consistently that "review, limited to the administrative record, should frame the resolution of this case." That administrative record would "consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to . . . Judicial Watch's request for permission to attend NEPDG meetings"; it would not include anything respondents could gain through discovery. Indeed, the Government acknowledged before the District Court that its litigation strategy involved opposition to the discovery plan as a whole in lieu of focused objections. (Government stated, "We did not choose to offer written objections to [the discovery plan]. . . .").

Further sounding the Government's leitmotif, in a hearing on the proposed discovery plan, the District Court stated that the Government "didn't file objections" to rein in discovery "because [in the Government's view] no discovery is appropriate." Without endeavoring to correct any misunderstanding on the District Court's part, the Government underscored its resistance to any and all discovery (asserting that respondents are "not entitled to discovery to supplement [the administrative record]"). And in its motion for a protective order, the Government similarly declared its unqualified opposition to discovery. ("[Petitioners] respectfully request that the Court enter a protective order relieving them of any obligation to respond to [respondents'] discovery [requests]." see 334 F.3d at 1106. . . .

Denied § 1292(b) certification by the District Court, the Government sought a writ of mandamus from the Court of Appeals. In its mandamus petition, the Government asked the appellate court to "vacate the discovery orders issued by the district court, direct the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct that the Vice President be dismissed as a defendant." In support of those requests, the Government again argued that the case should be adjudicated without discovery: "The Constitution and principles of comity preclude discovery of the President or Vice President, especially without a demonstration of compelling and focused countervailing interest."

The Court of Appeals acknowledged that the discovery plan presented by respondents and approved by the District Court "goes well beyond what [respondents] need." The appellate court nevertheless denied the mandamus petition, concluding that the Government's separation-of-powers concern "remained hypothetical." Far from ordering immediate "disclosure of communications between senior executive branch officials and those with information relevant to advice that was being formulated for the President," the Court of Appeals observed, the District Court had directed the Government initially to produce only "non-privileged documents and a privilege log." . . .

Throughout this litigation, the Government has declined to move for reduction of the District Court's discovery order to accommodate separation-of-powers concerns. The Court now remands this case so the Court of Appeals can consider whether a mandamus writ should issue ordering the District Court to "explore other avenues, short of forcing the Executive to invoke privilege," and, in particular, to "narrow, on its own, the scope of [discovery]." Nothing in the District Court's orders or the Court of Appeals' opinion, however, suggests that either of those courts would refuse reasonably to accommodate separation-of-powers concerns. When parties seeking a mandamus writ decline to avail themselves of opportunities to obtain relief from the District Court, a writ of mandamus ordering the same relief—i.e., here, reined-in discovery– is surely a doubtful proposition. . . .

Review by mandamus at this stage of the proceedings would be at least comprehensible as a means to test the Government's position that no discovery is appropriate in this litigation. ("Petitioners' separation-of-powers arguments are . . . in the nature of a claim of immunity from discovery."). But in remanding

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for consideration of discovery-tailoring measures, the Court apparently rejects that no-discovery position. Otherwise, a remand based on the overbreadth of the discovery requests would make no sense. Nothing in the record, however, intimates lower-court refusal to reduce discovery. Indeed, the appeals court has already suggested tailored discovery that would avoid "effectively prejudging the merits of respondents' claim" (respondents "need only documents referring to the involvement of non-federal officials. A few interrogatories or depositions might have determined . . . whether any non-Government employees voted on NEPDG recommendations or drafted portions of the committee's report"). In accord with the Court of Appeals, I am "confident that [were it moved to do so] the district court here [would] protect petitioners' legitimate interests and keep discovery within appropriate limits." I would therefore affirm the judgment of the Court of Appeals.

Notes

1. Walsh-Healey Act of 1936, 41 U.S.C. 35.
2. The material on types of policies comes from Randall Ripley and Grace Franklin, *Congress, the Bureaucracy, and Public Policy,* 4th ed. (Chicago: Dorsey Press, 1987), 21–28.
3. Ibid., 25.
4. Ernest Gellhorn and Ronald M. Levin, *Administrative Law and Process: In a Nutshell,* 3d ed. (St. Paul, MN: West, 1990), 124.
5. Walter Gellhorn, Clark Byse, and Peter Strauss, *Administrative Law: Cases and Comments,* 7th ed. (Meniola, NY: Foundation Press, 1979), 556.
6. *National Abortion Federation v. Ashcroft* 2004 U.S. Dist. LEXIS 4530 (March 19 2004).
7. *Northwestern Memorial Hospital v. Ashcroft* 362 F.3d. 923 (Seventh Cir. 2004).
8. Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2001–2002 Ed.*(Washington,D.C.:Congressional quarterly Press, 2001), p. 288.
9. *Kyllo v. United States* 533 U.S. 27 (2001).
10. *Marshall v. Barlow's, Incorporated,* 436 U.S. 307, 313 (1978).
11. *National Treasury Employees Union V. Von Raab* 489 U.S. 656,665(1989).
12. *Skinner V. Railway Labor Executives' Association* 489 U.S. 602 (1989).
13. *Vernonia School District 47J V. Acton* 515 U.S. 646 (1995).
14. *Bd. of Ed.of Independent School District #92 of Pottowatomie C. v. Earls* 536 U.S. 822 (2002).
15. *Griffin V. Wisconsin* 483 U.S. 868 (1987). The *Griffin* case involved a parole revocation but the Court also used the special needs doctrine to justify the suspicionless, warrantless searches in auto check points for drunk drivers.
16. Denise Gellene, "Sears Auto Shops Come Under Fire," *Topeka Capital-Journal,* 6 November 1992, 3A.
17. Lotte E. Feinberg, "Managing the Freedom of Information Act and Federal Information Policy," *Public Administration Review* 46 (1986): 615.
18. 5 U.S.C. 551–59.
19. 5 U.S.C. 552a.
20. 5 U.S.C. 552b.
21. For an excellent analysis on the subject of government and information, see. Conrad, "information Disclosures by Government" Ibid., Note #57, (Chapter 2).
22. 44 USCS Sec.3501. See Also Conrad, Ibid., p.527 and Jaime Klima, "The E-Government Act:Promotion of E-Quality of exaggeration of the Digital Divide?" 2003 *Duke Law and Technology Review* 9 (2003).
23. 5 USCS Sec.552. See Also Conrad, Ibid.
24. 44 USCS Sec.3602.
25. Jim Barnett and Tom Deyzel, "U.S. Balked at Mad Cow Safeguards," *The Oregonian,* (Jan.18, 2004) p.A-1, (Sunday Sunrise Ed.). If you enjoy eating beef, read this article with caution. It discusses the fight over banning "downers," (a cow that cannot walk) from meatpacking plants in America.
26. The material on legal recourse for government release of information comes from, Conrad, Ibid., note #22, p.532–34.
27. Feinberg, "Managing the Freedom of Information Act," 615.
28. Kristen Uhl, "The Freedom of Informatuion Act Post 9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection and Homeland Security," 53 *American University Law Review* 261 (Oct. 2003).

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29. The procedure described is contained in the act, but the condensed description comes from Gellhorn, Byse, and Strauss, *Administrative Law,* 583–84.

30. Ibid., 582.

31. The material on the Attorney General and FOIA comes from Uhl, Ibid.,(Note #28).

32. Ibid., p. 271.

33. Ibid., p. 272–4.

34. Ibid., p. 274–82.

35. 18 U.S.C. sec. 1905.

36. Gellhorn and Levin, *Administrative Law and Process,* 156.

37. Daniel Oran, *Oran's Dictionary of the Law* (St. Paul, MN: West, 1983), 133.

38. *Department of Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association* 532 U.S. 1 (2001).

39. Gellhorn, Byse, and Strauss, *Administrative Law,* 582–83. See also Robert L. Saloschin, "The FOIA—A Government Perspective," *Public Administration Review* 35 (1975): 10.

40. Arthur E. Bonfield and Michael Asimow, *State and Federal Administrative Law* (St. Paul, MN: West, 1989), 538.

41. Ibid.

42. Gellhorn, Byse, and Strauss, *Administrative Law,* 585.

43. Ibid.

44. Antonin Scalia, "The Freedom of Information Act Has No Clothes," *Regulation,* March/April 1982, 14.