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CIA v. SIMS: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3

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The Freedom of Information Act (FOIA) has given rise to differences between Congress and the Supreme Court over the scope of the Act's statutory exemptions and the standard of judicial review. Enacted in 1966, the FOIA was intended to provide the public with broad access to the pursuits and policies of the national government. In passing the FOIA, however, Congress recognized that certain information would have to remain protected from the public view. Accordingly, it incorporated nine exemptions into the statute that agencies could invoke in denying release of particular categories of information. This initial version of the FOIA was seen as an improvement over the previous section of the Administrative Procedure Act (APA) relating to public access to government information. However,
congressional dissatisfaction with the restrictive manner in which agencies implemented the FOIA\(^{11}\) and the courts interpreted it\(^{12}\) resulted in substantial revisions in 1974\(^{13}\) and 1976.\(^{14}\) The amendments were intended to provide the courts with increased authority to review agency decisions withholding information pursuant to the Act's statutory exemptions.\(^{15}\)

One of the catalysts for congressional action in 1974 was the decision of the United States Supreme Court in \textit{EPA v. Mink}.\(^{16}\) In \textit{Mink}, the Court deferred to the executive branch and construed the FOIA's national security directly concerned except information held confidential for good cause found." The Senate report on the FOIA had criticized this section as being "of little or no value to the public in gaining access to records of the federal government." S. \textit{Rep.} No. 813, 89th Cong., 1st Sess. 5 (1965), \textit{reprinted in FOIA SOURCE BOOK, supra} note 5, at 40. The report went on to claim that the provision's impact had been the opposite, i.e., it was used as the basis to justify the nondisclosure of government information sought by the public. \textit{Id.} The FOIA substantially revised § 3(a) of the APA. For background material on the Administrative Procedure Act as amended by the FOIA and the Government in the Sunshine Act, see \textit{ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK} 545-668 (Office of the Chairman 1985).


15. \textit{See, e.g., H.R. Rep. No. 1380, 93d Cong., 1st Sess. 7-8 (1974), reprinted in \textit{JOINT SOURCE BOOK, supra} note 11, at 225-26 (endorsing active judicial review under the FOIA and permitting in camera inspection of agency documents for which an exemption has been invoked).}

exemption (exemption 1) broadly in favor of nondisclosure. Similarly, one of the primary reasons for the 1976 amendments to the Act was the Court's interpretation of the statutory exemption (exemption 3) in Administrator, FAA v. Robertson. In Robertson, the Court again deferred to an agency position that favored nondisclosure.

Despite such congressional actions to overrule the Court and strengthen the role of judicial review in the FOIA process, the Supreme Court recently rendered an opinion strongly reminiscent of its earlier decisions in Mink and Robertson. CIA v. Sims involved judicial interpretation of the scope of exemption 3 as amended in 1976. Specifically, it concerned whether section 102(d)(3) of the National Security Act of 1947, which authorizes the Director of the Central Intelligence Agency (CIA) to protect intelligence sources and methods from unauthorized disclosure, qualified as an exemption 3 statute. Additionally, the Court considered whether the individuals and institutions that provided certain information to the agency were "intelligence sources" within the meaning of the National Security Act for purposes of the FOIA exemption. The Court accepted the arguments advanced by the CIA and held that the exemption was properly invoked. It also ruled that the material sought by Sims was protected from release because it related to intelligence sources.

Sims had filed a FOIA request with the CIA for the grant proposals, contracts, and identities of institutions and researchers involved in the MKULTRA project. The existence of MKULTRA, a CIA-sponsored project that

17. 410 U.S. at 84.
20. 422 U.S. at 266-67.
21. See infra notes 115, 133, and accompanying text.
25. 105 S. Ct. at 1884. See supra note 23 and accompanying text. See also infra note 146 and accompanying text.
26. 105 S. Ct. at 1884. This Note will be concerned primarily with the question of whether the individuals involved in a certain research program were "intelligence sources" and their names thus exempt from release under the FOIA. It will not deal with the cross-petition filed by Sims relating to whether the CIA was required by the FOIA to release the institutional affiliations of those researchers whose names were exempt from disclosure as "intelligence sources." Id. at 1892-94.
27. Id. at 1890.
28. Id. at 1892.
29. Sims v. CIA, 642 F.2d 562, 565 (D.C. Cir. 1980). See also Brief for Respondents at 5-11, CIA v. Sims, 105 S. Ct. 1881 (1985) (discussing the facts of the case). Sims was joined in
dealt with various aspects of psychological and brainwashing techniques, became known during congressional investigations in the mid-1970's. In response to Sims' request, the agency released information relating to the grant proposals, contracts, and some of the institutions, but refused to reveal the identities of the researchers who participated. One of the reasons cited for the CIA's action was FOIA exemption 3.

Sims then filed suit in the United States District Court for the District of Columbia to force the release of the names withheld. The district court ordered disclosure of those individuals and institutions that it concluded were not "intelligence sources" under the National Security Act. The United States Court of Appeals for the District of Columbia Circuit, announcing a new definition of "intelligence sources," remanded the case for reconsideration. Applying the court of appeals' definition, the district court ordered the release of the names of some of the researchers and institu-

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30. See generally Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977). Originally it was believed that all of the records regarding the project had been destroyed, but subsequent to the investigation by a Senate select committee of abuses in the intelligence community, the CIA discovered the existence of the administrative records that became the subject of Sims' FOIA request. See also Final Report of the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess. 385-422, 471-72 (1976) (discussing the information available to Congress prior to the discovery of the administrative materials by the CIA).

31. Sims v. CIA, 479 F. Supp. 84-85 (D.D.C. 1979). The agency made an effort to contact all of the institutions involved and disclosed the names of those that did not object. It did not make a parallel effort to contact the individual researchers who had taken part in the program. See 105 S. Ct. at 1885 n.7, 1893 n.22.

32. 479 F. Supp. at 85.

33. Id. The CIA also cited the privacy exemption (exemption 6) as a reason for refusing to disclose the identity of the researchers. See 5 U.S.C. § 552(b)(6) (1982 & Supp. I 1983). By the time the case reached the Supreme Court, the agency had abandoned its privacy claim in favor of exclusive reliance upon its exemption 3 arguments. 105 S. Ct. at 1885 n.6. The CIA declined to invoke the national security exemption (exemption 1) in denying release of the material. See 5 U.S.C. § 552(b)(1). In his concurring opinion in Sims, Justice Marshall criticized the agency and the Court for ignoring the relevancy of exemption 1 to the documents at issue. 105 S. Ct. at 1895, 1897-98 (Marshall, J., concurring in the result). See also infra notes 46, 169-73, and accompanying text.

34. 479 F. Supp. at 84.

35. Id. at 87-88.

36. 642 F.2d 562 (D.C. Cir. 1980). The court of appeals defined an "intelligence source" as a "person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." Id. at 571.

37. Id. at 563.
tions, but declined to do so for those who had requested and been promised confidentiality by the CIA and those whose other work for the agency might reveal sensitive foreign intelligence operations. On appeal, the D.C. Circuit reversed that part of the lower court’s opinion relating to the “need-for-confidence” portion of its definition. The court of appeals rejected the view that an individual’s request for confidentiality was sufficient to satisfy its formulation of “intelligence source.” Judge Bork dissented from this aspect of the court’s decision.

The United States Supreme Court unanimously agreed that the definition of “intelligence source” formulated by the court of appeals was unsatisfactory. Further, seven of the justices sided with Judge Bork’s view that the National Security Act afforded the Director of the CIA wide discretion to protect sources without regard to the need for secrecy. Justices Marshall and Brennan, however, argued that such a broad reading of the statute could not be supported by its language or legislative history. In a concurrence that reads more like a dissent, Justice Marshall attacked the Court for ignoring the more rigorous judicial review required by the national security exemption, and for wreaking havoc with the overall congressional scheme

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39. Id.
40. 709 F.2d 95, 97, 101 (D.C. Cir. 1983).
41. Id. at 99. The court of appeals was also concerned that automatically permitting the agency to invoke exemption 3 to prevent disclosure of the identities of particular informants because they requested confidentiality might result in “collusion” between the CIA and the source. Id. at 99 n.7.
42. Id. at 101 (Bork, J., concurring in part and dissenting in part). Judge Bork argued that a promise of secrecy to an informant should be enough to qualify him as an “intelligence source” and thus protect his identity. Otherwise, sources would be hesitant in the future to cooperate with U.S. intelligence agencies. Id. at 102. Judge Bork also took issue with the court’s formulation of “intelligence source” and suggested that the broad language of § 102(d)(3) of the National Security Act did not mean that the agency could protect sources only if secrecy was required in order to obtain the information. Id. at 103. He concluded that the statute “authorizes the nondisclosure of a source of information whenever disclosure might lead to discovery of what subjects were of interest to the CIA.” Id. The Supreme Court majority in Sims reacted favorably to his arguments. 105 S. Ct. at 1886 n.8, 1892.
43. 105 S. Ct. at 1890-91, 1894.
44. Id. at 1890, 1892. See supra note 42.
45. Id. at 1894 (Marshall, J., concurring in the result).
46. Id. at 1895-96. Both the district court and the court of appeals had discussed the availability of the national security exemption in protecting “intelligence sources,” but the agency declined to invoke it. See 479 F. Supp. at 88 (“Nothing in the Court’s ruling . . . is intended to foreclose . . . new classification of the lists and resort to section (b)(1) in order to protect any commitment to anonymity made by [the CIA] to any institution or researchers”). See also Sims, 709 F.2d at 99 (“[I]f revelation of the identity of a source of information would in any way impair national security, the agency can easily justify withholding his name by invoking exemption 1 of the Act”).
giving the judiciary an active role in limiting the discretion of agencies to
deny the release of government information requested under the FOIA.47

This Note will examine Mink48 and Robertson,49 two early interpretations
of the FOIA by the Supreme Court. In these cases, the Court followed a
policy of deference to agency interpretations of exemptions 1 and 3. It will
then analyze the congressional reaction to these decisions and discuss briefly
the legislative histories of the FOIA amendments enacted in 197450 and
1976.51 The Note will then examine the Court’s majority52 and concurring53
opinions in Sims in light of congressional efforts to strengthen the hand of
the judiciary in reviewing agency decisions to withhold information under
exemptions 1 and 3. This section will focus upon the definition of “intelli-
gence sources” that is most in conformance with the legislative histories of
the National Security Act of 1947 and the FOIA.54 The Note will conclude
that the Court’s decision in Sims is akin to those handed down in Mink and
Robertson in its deference to an agency’s interpretation of a FOIA exemp-
tion, and in its apparent reluctance to rely upon (1) congressional intent as
reflected in the FOIA’s legislative history and (2) previous congressional ex-
pressions of disenchantment with judicial deference.55 In adopting a broad
definition of “intelligence sources,” the Court has weakened the role of the
judiciary in the FOIA process, and in so doing diminished the ability of the
public to gain access to government information.

I. EARLY JUDICIAL INTERPRETATIONS OF THE FOIA BY THE SUPREME
COURT: CONGRESS CLARIFIES THE SCOPE OF THE
EXEMPTIONS AND THE NATURE OF JUDICIAL
REVIEW UNDER THE ACT

A. Legislative History of FOIA

The enactment of the FOIA,56 which followed a decade-long effort to

47. 105 S. Ct. at 1895-96 (Marshall, J., concurring in the result).
48. See supra note 16; see also infra notes 77-88 and accompanying text.
49. See supra note 19; see also infra notes 93-108 and accompanying text.
50. See infra notes 112-28 and accompanying text.
51. See infra notes 129-33, 142-46, and accompanying text.
52. See infra notes 154-67 and accompanying text.
53. See infra notes 168-84 and accompanying text.
54. See infra notes 185-205 and accompanying text.
55. See infra notes 113-15, 133, and accompanying text.
56. In the first session of the 89th Congress, the Senate approved S. 1160. S. 1160, 89th
Cong., 1st Sess., 111 CONG. REC. 26,821 (1965). S. 1160 was substantially similar to the bill
the Senate had passed in the preceding Congress. See S. 1666, 88th Cong., 1st Sess. (1963). A
revised version of S. 1666 won Senate endorsement on July 28, 1964. S. 1666, 88th Cong., 2d
reprinted in FOIA SOURCE BOOK, supra note 5, at 86 (discussing the provisions and purpose of
amend the public access section of the APA, was a first step into the sunshine. It provided the public with a judicially enforceable right of access to information generated by the federal government. Although the drafters were cognizant that certain areas would need to be outside the scope of the Act, the presumption was in favor of disclosure wherever possible, with the judiciary serving as guardian of the public's statutory right to know.

Despite House adoption of the Senate version of the FOIA (S. 1160), significant differences between the Senate and House reports accompanying

57. See FOIA SOURCE BOOK, supra note 5, at 6-9 (discussing the statute's legislative history). See also 112 CONG. REC. 13,659-60 (1966) (statement of Rep. Dwyer), reprinted in FOIA SOURCE BOOK, supra note 5, at 83.


59. See 5 U.S.C. § 552(b) (1982 & Supp. I 1983); see also supra note 7. The Senate report that accompanied passage of the FOIA stated:

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

60. See S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in FOIA SOURCE BOOK, supra note 5, at 38, which stated: "Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." Id. (emphasis added). See also 112 CONG. REC. 13,654 (1966) (statement of Rep. Rumsfeld) ("This bill is not to be considered . . . a withholding statute in any sense of the term. . . . It is our intent that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public."). reprinted in FOIA SOURCE BOOK, supra note 5, at 71-72.


62. See supra note 56.
the proposal made difficult a clear understanding of legislative intent. Commentators were quick to point out these discrepancies, and the committee which drafted the House report was severely criticized for its action. While the Senate report generally followed the proposal's language and reflected a view supporting a broad construction of the statute, the House report took a decidedly more restrictive approach. The uncertainty of legislative intent led to confusion in the courts. At the time, it was argued that the House had attempted to rewrite the provisions of the FOIA in a committee report. Although the House declined to amend the language of S. 1160 or take issue with the legislative intent as expressed in the Senate report, the House sought to alter the entire thrust of the proposal in a committee report rather than on the chamber floor. Compounding the difficulty for the courts was the fact that the memorandum prepared by the Attorney General, concerning agency implementation of the FOIA, generally adopted the positions contained in the House report.

In addition to the significant differences between the Senate and House
reports, the FOIA itself was criticized for being inartfully drafted. As a result, early court interpretations of the statute took varying approaches in construing the Act's ambiguous language. In the 1974 and 1976 amendments, however, Congress intended to resolve the ambiguities in favor of a broad construction of the disclosure provisions. Any indication that the original House report reflected legislative intent accurately should have been dispelled by these subsequent congressional actions to strengthen the judicial review section of the Act and to amend the language of exemptions 1 and 3. The Court in Sims, however, chose to disregard these clarifications of legislative intent.

B. The Supreme Court Interprets the FOIA

Given the ambiguities in the original Act, the confusion regarding its legislative history, and the restrictive interpretation adopted by the Attorney General, the courts often took a deferential attitude whenever any agency invoked one of the nine exemptions. This deferential approach was reinforced by two decisions of the United States Supreme Court in 1973 and 1975. In the first case, Mink v. EPA, the Court was asked to construe exemption 1, the national security exemption. In Mink, members of Congress sued to obtain executive branch documents relating to a scheduled underground nuclear test. The action was filed after the executive branch refused to disclose the documents, citing exemption 1 as the basis for its...

73. Id. at 761. See also Koch, The Freedom of Information Act: Suggestions for Making Information Available to the Public, 32 Md. L. Rev. 189, 195 n.26 (1972).
74. See generally Comment, supra note 12.
76. See supra note 68.
77. 410 U.S. 73 (1973). The Court was also asked to construe the inter/intra-agency exemption (exemption 5). In contrast to the Court's ruling that judges could not review classified documents in camera to assess the validity of an agency's exemption 1 claim, the Court held that lower courts could review items to determine whether an agency's exemption 5 claim was proper. Id. at 93. In so doing the lower courts could segregate the deliberative portions of a memorandum from the purely factual matters, and order the release of the latter. Id. at 91-94. However, agencies first should be permitted to show the appropriateness of withholding the items by affidavit before in camera review by the court is required. Id. at 93-94. The dissenting justices criticized the majority for treating exemptions 1 and 5 differently for purposes of judicial review. Id. at 96 (Brennan, J., concurring in part and dissenting in part). Id. at 109-10 (Douglas, J., dissenting).
78. Id. at 74. At the time Mink was decided, exemption 1 permitted nondisclosure of matters that were "specifically required by executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1970).
79. 410 U.S. at 75. See generally Mink, The Mink Case: Restoring the Freedom of Infor-
decision. The United States District Court for the District of Columbia granted summary judgment in favor of the government. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the national security exemption permitted the agency to withhold only the portions of the documents actually classified. The court of appeals directed the district court to review the classified items to determine whether portions of them could be released.

The Supreme Court reversed the court of appeals' decision. It construed exemption 1 in favor of the executive branch and held that the exemption could not be used to compel the release of documents. In addition, the Court expressed the view that the Act did not permit in camera examination of such documents to determine whether unclassified segments could be disclosed. Under the Court's interpretation, once the government demonstrated that the specific items were entitled to the exemption's protection, the judiciary's role was at an end. Writing for the majority, Justice White rejected the view that the courts should second guess a classification decision made by the executive branch.

Justices Brennan, Marshall and Douglas dissented from the Court's construction of exemption 1. They disagreed with the majority's view that the FOIA's legislative history supported the position that exemption 1 should be treated differently from the other exemptions for purposes of court review. The three justices agreed that the Act directed the courts to review matters de novo, with the burden on the agency to sustain its arguments in favor of


80. 410 U.S. at 75.
81. \textit{Id.} at 78.
82. 464 F.2d 742, 746 (D.C. Cir. 1971).
83. \textit{Id.} at 746. The court of appeals directed the district court to examine the items in camera to determine whether any portions of them could be released. The court of appeals also noted that particular care must be taken in the review process because the documents concerned nuclear testing. \textit{Id.} at 746-47.
84. 410 U.S. at 78, 94.
85. \textit{Id.} at 81.
86. \textit{Id.}
87. \textit{Id.} at 84.
88. \textit{Id.} Justice White's reading of the legislative history of the FOIA made "wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen." \textit{Id.}
89. \textit{Id.} at 95 (Brennan, J., concurring in part and dissenting in part). \textit{Id.} at 105 (Douglas, J., dissenting).
90. \textit{Id.} at 96, 102-10.
91. \textit{Id.} at 96, 106. Justice Douglas argued that issuance of a new executive order by the President during the pendency of the case supported the appellate court's remand to the district court to segregate and release any portions of the documents that were unclassified. To
nondisclosure.92

Two years later, in Administrator, FAA v. Robertson,93 the Court again took a deferential approach in construing a FOIA exemption. The issue in Robertson was whether section 1104 of the Federal Aviation Act of 195894 qualified as a nondisclosure statute for purposes of exemption 3.95 Copies of FAA reports analyzing the operation and maintenance performance of commercial airlines had been requested.96 The agency refused to release the items because the FAA’s enabling statute gave the FAA Administrator discretionary authority not to disclose information if he determined that disclosure was not in the public interest.97

comply with the appellate court’s order, the district court would have had to examine the items in camera. The executive order—Exec. Order No. 11,652—contained a section directing agencies to mark documents to indicate which parts or paragraphs were classified and at what level. This practice is known as “portion marking.” Exec. Order No. 11,652, 3 C.F.R. 1085 (1971-75 Comp.) There have been two executive orders on classification since the Mink decision. Both have retained the portion marking requirement. See Exec. Order No. 12,065, 3 C.F.R. 190 (1979); Exec. Order. No. 12,356, 3 C.F.R. 166 (1983).

92. 410 U.S. at 96 (Brennan, J., concurring in part and dissenting in part). Id. at 109-10 (Douglas, J., dissenting).
94. 49 U.S.C. § 1504 (1970), provided, in pertinent part:
Any person may make written objection to the public disclosure of information contained in any . . . document filed pursuant to the provisions of this chapter or of information obtained by the . . . [FAA] Administrator, . . . stating the grounds for such objection. Whenever such objection is made, the . . . Administrator shall order such information withheld from public disclosure when, in [his] judgment, a disclosure . . . would adversely affect the interests of such person and is not required in the interest of the public.
Section 1504 has since been amended to eliminate the authority of the FAA Administrator to withhold information. Such authority has been transferred to the Secretaries of State or Transportation. In addition, the vague public interest standard has been replaced. Information can currently be withheld only “if disclosure . . . would prejudice the formulation and presentation of positions of the United States in international negotiations or adversely affect the competitive position of any air carrier in foreign air transportation.” See 49 U.S.C. app. § 1504 (1982 & Supp. I 1983).
95. 422 U.S. at 256-57. At the time of the Robertson decision, the FOIA permitted an agency to withhold matters that were “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3) (1970). The Robertson majority stressed that the language of exemption 3 was not changed in 1974 when Congress made extensive revisions in the FOIA. 422 U.S. at 256 n.2, 267. The FAA also justified denial of the release of the information on the basis of exemptions 4 (business information), 5 (intra-agency memorandums), and 7 (investigatory files). 422 U.S. at 259.
96. The documents at issue were Systems Worthiness Analysis Program (SWAP) reports. They were prepared by the FAA. Id. at 257-59. For further discussion of the nature of these reports, see Note, Freedom of Information—Exemption Three—SWAP Reports are Specifically Exempt from Disclosure by Statute Because FAA Administrator Issued a Withholding Order Pursuant to Discretionary Authority, 41 J. AIR L. & COM. 367-68 (1975).
In the subsequent suit, the United States District Court for the District of Columbia ruled against the government. The United States Court of Appeals for the District of Columbia Circuit affirmed that portion of the lower court's opinion which held that section 1104 was not within the scope of exemption 3. The court of appeals concluded that the statute relied on by the FAA permitted the agency too much discretion for it to meet the FOIA's exemption requirements.

The Supreme Court reversed the court of appeals' decision. Speaking for the Court, Chief Justice Burger, who would later write the opinion in Sims, concluded that the legislative history of the FOIA and the 1974 amendments did not demonstrate that Congress intended to "repeal by implication" all nondisclosure statutes in existence before the FOIA was enacted. In reaching this conclusion, the Chief Justice noted that because the exemption's language was ambiguous, the courts of appeals had given it varying interpretations. He then focused on the restrictive House report, which stated that FOIA exemption 3 would not modify the approximately 100 statutes already in effect that restricted public access to particular government documents. He cited the House report to justify the Court's acceptance of the FAA's arguments. The Chief Justice also suggested that the deferential position outlined in the House report remained in effect because Congress did not amend the exemption's language in 1974 when it made extensive changes to the Act.

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100. Id.
101. 422 U.S. at 267.
102. Id. at 265-66. In analyzing the legislative history of exemption 3, the Chief Justice relied almost exclusively on the restrictive House report that accompanied passage of the original FOIA. Id. at 265. See supra notes 62-72 and accompanying text for a discussion of the differences between the Senate and House reports on the FOIA and the criticism engendered by the latter. See also Note, supra note 14, at 1036-41 (taking issue with the Robertson Court's reading of the legislative history relating to exemption 3).
103. 422 U.S. at 264-65, 267.
104. Id. at 263.
105. Id. at 262 n.6 (citing a number of cases in which courts of appeals have construed exemption 3 differently).
106. Id. at 265 (quoting from H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966)) ("There are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provision of S. 1160."). The Senate report contained no such language. See S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965), reprinted in FOIA SOURCE BOOK, supra note 5, at 44.
107. 422 U.S. at 267.
be permitted wide latitude in protecting certain of its information in the "public interest." 108

Justices Douglas and Brennan dissented in Robertson. 109 They agreed with the position of the court of appeals that the discretionary nature of section 1104 and its vague public interest standard were insufficient for it to qualify as a "specific exemption by statute" within the meaning of exemption 3 of the FOIA. 110 The dissenters agreed with the court of appeals' view that the legislative history of the Act supported a narrow construction of the exemption. 111

C. Congress Reacts to the Nondisclosure Bent of the Supreme Court

1. The 1974 Amendments

Both the Mink and Robertson decisions precipitated legislative action to strengthen the FOIA. 112 Although Congress had already expressed dissatisfaction with agency implementation of the Act, 113 it was not until the Supreme Court's first interpretation of the Act's provisions in Mink that Congress took action. 114 The primary effect of the Mink decision was to prompt Congress to amend exemption 1 and those sections of the statute

108. Id. at 265-66.
109. Id. at 268 (Douglas & Brennan, JJ., dissenting).
110. Id. See Robertson, 498 F.2d at 1036. The court of appeals argued that the FOIA was the controlling statute as to what constituted the public interest regarding information policy, and therefore took precedence over the previously enacted § 1104 of the Federal Aviation Act. Id. at 1035-36.
111. 422 U.S. at 268-69. See Robertson, 498 F.2d at 1032.
112. See infra notes 115-25, 133, 142-46, and accompanying text.
113. Congressional oversight of the administration and implementation of the FOIA was the responsibility of the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations and the Senate Subcommittee on Administrative Practice and Procedure. The House subcommittee held the first extensive hearings on implementation of the Act in March 1972. See U.S. Government Information Policies and Practices: Hearings Before the House Comm. on Government Operations, 92d Cong., 2d Sess (1972) (parts 4-6 of the nine volume set deal with the FOIA's public access provisions). As a result of the hearings, the committee made a number of specific findings. It determined that some agency regulations were unacceptable because they failed to adhere to congressional intent. The committee also concluded that agencies were charging excessive fees for search and reproduction costs and that the statutory exemptions were being "misused" by the agencies in an effort to block the release of government information. See H.R. REP. No. 1419, 92d Cong., 2d Sess. 8-11 (1972), reprinted in JOINT SOURCE BOOK, supra note 11, at 15-18 (outlining the committee's finding and conclusions).
114. Although Congress continued to hold hearings on the FOIA after the findings made by the House Committee on Government Operations and considered proposals to amend the Act, the proposals did not come to fruition until after the Supreme Court's decision in Mink. See Mink, supra note 79, at 13.
dealing with the nature of judicial review.\footnote{115}{See S. Rep. No. 854, 93d Cong., 2d Sess. 13-17, 28-31 (1974), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 165-67, 180-83. Regarding de novo review of classified documents under the FOIA, the Senate report stated: It is essential . . . to the proper workings of [the Act] that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing . . . are the only forums now available in which such review can properly be conducted. S. Rep. No. 854, 93d Cong., 2d Sess. 31 (1974), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 183.} During extensive congressional hearings,\footnote{116}{See, e.g., \textit{The Freedom of Information Act: Hearings Before the House Comm. on Government Operations}, 93 Cong., 1st Sess. (1973); Congressional Research Service, \textit{supra} note 13, at 109.} considerable debate occurred over both exemption 1 and the judicial review provisions.\footnote{117}{See 120 Cong. Rec. 6803-20 (House debate of Mar. 14, 1974); 120 Cong. Rec. 17,014-47 (Senate debate of May 30, 1974); 120 Cong. Rec. 33,157-59 (Senate action on conference report, Oct. 1, 1974); 120 Cong. Rec. 34,161-69 (House debate and action on conference report, Oct. 7, 1974).} Proponents of a heightened role for the judiciary in reviewing exemption 1 claims argued that the \textit{Mink} decision had to be overturned.\footnote{118}{See, e.g., 120 Cong. Rec. 6812-13 (1974) (statement of Rep. Mink criticizing the Supreme Court’s decision and asking for support of amendments to the FOIA that would overrule “this ridiculous court interpretation”), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 258-61.} While Congress declined to mandate in camera inspections of documents sought to be withheld under exemption 1,\footnote{119}{See 120 Cong. Rec. 17,019 (1974) (statement of Sen. Kennedy indicating that the courts will have the discretion to examine disputed classified documents in camera), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 294.} it also refused to require judges to uphold agency decisions based on the national security exemption if the agency merely had a “reasonable basis” for its decision.\footnote{120}{See 120 Cong. Rec. 36,869-70 (1974) (statement of Sen. Muskie supporting efforts to override President Ford’s veto and taking issue with the administration’s position in favor of a “reasonable basis” standard of review), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 447-49.} The administration argued forcefully for the reasonable basis language.\footnote{121}{See Letter from President Ford to Sen. Kennedy (Aug. 20, 1974), \textit{reprinted in JOINT SOURCE BOOK}, supra note 11, at 368-70. In his letter the President indicated the following: I could accept a provision with an express presumption that the classification was proper and with \textit{in camera} judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. \textit{Id.} at 369.}
forces and chief formulator of foreign policy.\textsuperscript{122} Congress dismissed the administration’s arguments and adopted language\textsuperscript{123} that buttressed the role of the courts in reviewing agency actions to withhold information under any exemption, although the debate had centered on exemption 1.\textsuperscript{124} The in camera examination of documents denied under exemption 1, however, was discretionary, not mandatory.\textsuperscript{125}

Although Congress declined to accept the administration’s position on the scope of judicial review, it attempted to assuage the administration’s concerns by inserting modifying language into the conference report that directed judges to give agency arguments considerable weight when classified documents were at issue.\textsuperscript{126} In spite of this conciliatory gesture, President Ford vetoed the amendments.\textsuperscript{127} Congress decided to accommodate the administration’s position no further and overrode the veto by a substantial margin.\textsuperscript{128}

After passage of the 1974 amendments, the intent of Congress

\textsuperscript{122} Id. ("It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief").

\textsuperscript{123} See 120 CONG. REC. 17,022-32 (1974), \textit{reprinted in Joint Source Book}, supra note 11, at 302-38, for a discussion of the Senate amendment that removed the "reasonable basis" language from the proposed FOIA legislation. The substitute language was incorporated into the final bill. \textit{See H.R. Rep. No. 1380, 93d Cong., 2d Sess. 3 (1974), reprinted in Joint Source Book, supra note 11, at 226.}

\textsuperscript{124} H.R. Rep. No. 1380, 93d Cong., 2d Sess. 2-3 (1974), \textit{reprinted in Joint Source Book, supra note 11, at 225-26.} See Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (per curiam), in which the court of appeals described the characteristics of de novo review in the national security context under the amended FOIA. The court stated that these characteristics applied to exemptions 1 and 3. \textit{Id.} at 1195. The court outlined the process in this manner:

(1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first "accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record." (4) Whether and how to conduct an \textit{in camera} examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases.

\textit{Id.} at 1194 (footnotes omitted).


\textsuperscript{126} H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974), \textit{reprinted in Joint Source Book, supra note 11, at 229.} The report stated:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making \textit{de novo} determinations in section 552(b)(1) cases . . . will accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.

\textit{Id.}

\textsuperscript{127} President’s Message to Congress Vetoing H.R. 12,471, To Amend the Freedom of Information Act (Oct. 17, 1974), \textit{reprinted in Joint Source Book, supra note 11, at 481, 484-85.}

\textsuperscript{128} The House overrode the veto by a vote of 371-31. 120 CONG. REC. 36,633 (1974).
seemed clear: the courts were to review more actively an agency's decision to invoke one of the FOIA's statutory exemptions.

2. The 1976 Amendments

Despite the expressed intent of Congress as reflected in the legislative history relating to the 1974 amendments to the FOIA, the Supreme Court subsequently deferred to the executive branch's interpretation of a FOIA exemption in the Robertson case. As originally enacted, exemption 3 protected matters "specifically exempted from disclosure by statute." The Robertson Court's view that this language indicated congressional intent to allow nondisclosure statutes passed before the FOIA to remain in effect was generally criticized by commentators and members of Congress. Once again a Court decision on the FOIA prompted legislation that overruled the Court's position.

The primary focus of congressional action in 1976, however, was consideration of proposals that eventually became known as the Government in the Sunshine Act. The purpose of this legislation was to publicly open meetings of approximately fifty government agencies and to permit their clo-

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reprinted in JOINT SOURCE BOOK, supra note 11, at 431. The Senate overrode the veto by a vote of 65-27. 120 CONG. REC. 36,882 (1974), reprinted in JOINT SOURCE BOOK, supra note 11, at 480.

The FOIA amendments were passed in the months following Richard Nixon's resignation in the wake of the Watergate scandals. The debates took place in light of the public outrage that accompanied the Watergate revelations, and the enactment of the legislation can be attributed, at least in part, to the antisecrecy mood prevailing at the time. See, e.g., 120 CONG. REC. 34,168 (1974) (statement of Rep. Thompson) ("This legislation . . . will be the first major step forward in helping to restore the confidence of the American people in the institutions of government by purging the body politic of the secrecy excesses which marked the sordid Watergate coverup"), reprinted in JOINT SOURCE BOOK, supra note 11, at 393-94. See also 120 CONG. REC. 36,867-69 (1974) (containing numerous newspaper editorials commenting on President Ford's veto of the FOIA amendments in light of the Watergate affair), reprinted in JOINT SOURCE BOOK, supra note 11, at 441-47.

129. See supra notes 93-108 and accompanying text.
131. See, e.g., K. DAVIS, supra note 9, at § 5:31; see also Note, supra note 14, at 1036-40.
133. See S. REP. NO. 1178, 94th Cong., 2d Sess. 25 (1976), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 807. The Senate conference report stated that "[t]he confer- ees intend [the amended language of exemption 3] to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson." Id.
135. See id. at 2-3 (1975), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 197-98. See 122 CONG. REC. 24,213-14 (1976) for a list of the agencies covered by the Sun-

shine Act.
sure only if the subject matter fell within specific categories that closely paralleled the FOIA exemptions. Congressional sponsors contended that the Sunshine Act was the logical outgrowth of efforts that began with the FOIA to make governmental decisionmaking more accessible to the public. Another goal of the legislation was to prohibit ex parte contacts between government adjudicators and parties interested in the outcome of particular administrative proceedings. Although it had taken Congress four years to act on the proposal, the Sunshine bill eventually won widespread support and passed both Houses by overwhelming margins. In contrast to his veto of the 1974 amendments to the FOIA, President Ford signed the Government in the Sunshine Act.


137. See H.R. REP. NO. 880, 94th Cong., 2d Sess., pt. 1, at 4 (1976), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 515. See also S. REP. NO. 354, 94th Cong., 1st Sess. 5 (1975), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 200. The Senate report described the relationship between the two pieces of legislation in this manner:

The Freedom of Information Act enables the public to review many of the documents on which government decisions are based. These represent a record of what has already transpired. Yet up to now the public has not had a full opportunity to learn how or why government officials make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public. . . . By requiring important decisions to be made openly, this bill will create better public understanding of agency decisions.

Id.


140. The House agreed to the conference report proposal by a vote of 384-0. See 122 CONG. REC. 28,475 (1976), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 820. The Senate approved the conference report on a voice vote. See 122 CONG. REC. 28,613 (1976), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 826-27. Fallout from the Watergate affair may have had as significant an impact on the enactment of the Sunshine Act as it had on passage of the 1974 amendments to the FOIA. See supra note 128. For Watergate's impact on consideration of the Sunshine Act, see 121 CONG. REC. 35,331 (1975) (statement of Sen. Weicker), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 347. See also 122 CONG. REC. 24,197-98 (1976) (statement of Rep. Downey), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 649-50.

141. See Statement by the President on Signing S. 5 Into Law, 12 WEEKLY COMP. PRES. DOC. 1333-34 (Sept. 13, 1976). In his statement, President Ford expressed doubts about the clarity of the amendment to the FOIA exemption 3. He wrote:

The most serious problem concerns the Freedom of Information Act exemption for withholding information specifically exempted from disclosure by another statute. While that exemption may well be more inclusive than necessary, the amendment in this act was the subject of many changes and was adopted without a clear or adequate record of what statutes would be affected and what changes are intended. Under such circumstances, it can be anticipated that many unintended results will
The House version of the proposal contained the provision amending the language of FOIA exemption 3. Its intent was to remove from the exemption's protection such discretionary statutes as the one at issue in Robertson. In conference, the Senate agreed to the addition of this section regarding the FOIA, and it became part of the final bill. In contrast to its predecessor, the amended exemption 3 permits the withholding of information prohibited from release by another statute only if that statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." The 1974 and 1976 amendments to the FOIA demonstrate that, in the past, Congress has not hesitated to overturn Supreme Court decisions that it believed were contrary to the Act's disclosure mandate. These legislative
overrulings reaffirm Congress' continuing commitment to a strong public policy favoring disclosure under the FOIA and to narrow interpretation of the exemptions. Despite these reversals, however, the Court continues to construe the exemptions in support of nondisclosure. In *CIA v. Sims*, the Court adopted an agency position regarding exemption 3 that emphatically favors shielding government information from public scrutiny. The Court's decision in *Sims* is similar to the approach taken in *Mink* and *Robertson* in its treatment of the FOIA's legislative history and in its deference to agency interpretations of the Act's exemptions.

II. *CIA v. Sims*: A Step Back into the Shadows

A. The Supreme Court's Decision

In upholding the CIA's decision to deny release of the names of the researchers in the MKULTRA project, the Court first concluded that section 102(d)(3) of the National Security Act was a nondisclosure statute under exemption 3.\(^{148}\) The justices parted company over that Act's definition of "intelligence sources."\(^{149}\) Although all justices agreed that the court of appeals' formulation was excessive,\(^{150}\) the majority opinion, written by Chief Justice Burger, favored granting the agency full discretion on the matter.\(^{151}\) Justice Marshall, in a concurring opinion, argued for a definition of the term

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The Agency's acceptance of the obligation under the FOIA to provide information to the public not exempted under the FOIA is one of the linchpins of this legislation. The Act has played a vital part in maintaining the American people's faith in their government, and particularly in agencies like the CIA that must necessarily operate in secrecy. In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected. The Committee nevertheless believes that current FOIA requirements create greater burdens and risks for the CIA than is necessary to achieve the essential goal of preserving full public access to significant information.


148. 105 S. Ct. at 1887. The Court noted that this was the position taken by other federal courts that had considered the question. *Id.* at 1887 & n.12.

149. *Id.* at 1894 & n.2 (Marshall, J., concurring in the result).

150. 105 S. Ct. at 1890-91. *Id.* at 1894 (Marshall, J., concurring in the result). See supra note 36.

151. 105 S. Ct. at 1894. The majority concluded:

The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And it is the responsibility of the Director of the Central Intelligence Agency, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether the disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

*Id.*
that he believed was in between the extreme views enunciated by the court of appeals and the Supreme Court's majority.\textsuperscript{152} Justice Marshall also argued that the majority's complete deference to the CIA's position essentially nullified the review function Congress had outlined for the courts in the FOIA and had reinforced by subsequent amendments to the Act.\textsuperscript{153}

1. \textit{The Majority Opinion}

Chief Justice Burger, writing for the majority as he did in \textit{Robertson}, focused on the "plain meaning"\textsuperscript{154} of section 102(d)(3) of the National Security Act and its lean legislative history\textsuperscript{155} to conclude that the CIA was given wide authority to protect all intelligence sources from unauthorized disclosure.\textsuperscript{156} He further suggested that the Director had the power to protect the entire intelligence process, including those areas of subject matter interest to the agency.\textsuperscript{157} He argued that the hearings held to consider enactment of

\begin{itemize}
\item \textsuperscript{152} Id. at 1897 (Marshall, J., concurring in the result).
\item \textsuperscript{153} Id. at 1895-96.
\item \textsuperscript{154} Id. at 1887-88. This was the primary argument made by the government in its case before the Supreme Court. See Brief for the Petitioners at 14-30, CIA v. Sims, 105 S. Ct. 1881 (1985). The government contended that nothing in the legislative history of the National Security Act remotely indicates that Congress intended [this section] . . . to be construed narrowly or in a way that would promote the disclosure of intelligence sources to the public. Nor is there any basis for concluding that Congress was concerned to restrict the authority of the Director of Central Intelligence to withhold information. . . . Congress . . . granted the Director . . . unqualified authority to protect the secrecy of sources.
\item \textsuperscript{155} Id. at 21-22.
\item \textsuperscript{156} There is little discussion of § 102(d)(3) of the National Security Act in the congressional reports relating to enactment of the statute. See, e.g., H.R. REP. No. 1051, 80th Cong., 1st Sess. 2-3 (1947), reprinted in 1947 U.S. CODE CONG. & AD. NEWS 1483-85; S. REP. No. 239, 80th Cong., 1st Sess. 6 (1947), reprinted in 1947 U.S. CODE CONG. & AD. NEWS 1494. Neither report makes specific comments regarding the meaning of "intelligence sources."
\item \textsuperscript{157} The Chief Justice did not believe that Congress would have intended the judiciary to be involved in reviewing agency decisions of this kind. He wrote:
\begin{quote}
The plain meaning of the statutory language, as well as the legislative history of the National Security Act . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure . . . .
\end{quote}
\begin{quote}
. . . .
\end{quote}

The legislative history . . . also makes clear that Congress intended to give the Director . . . broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious for enlarged discussion.
\end{itemize}
the National Security Act demonstrated that Congress knew the CIA would obtain intelligence from an extensive variety of sources, without regard to guarantees of secrecy.\footnote{158}

The Chief Justice dismissed the court of appeals' reading of "intelligence sources" as "crabbed."\footnote{159} In his estimation, the lower court ignored the realities of the intelligence field when it stressed that a source could be protected only if the information that he provided was unobtainable without the promise of confidentiality.\footnote{160} He articulated concern that sources of information would no longer come forward if they believed that their identities might be revealed in the future.\footnote{161} Chief Justice Burger also expressed skepticism about the qualifications of the judges who would be called upon to consider the disclosure of such information in a FOIA suit.\footnote{162}

In its breadth, the Court's definition of "intelligence sources" was the antithesis of the court of appeals' narrow definition.\footnote{163} In the Court's view, an "intelligence source" was anyone who "provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations."\footnote{164} In light of this formulation, which relieved the CIA of a substantial burden of proof,\footnote{165} the Court determined that the research performed by the MKULTRA scientists was required for the agency to meet its intelligence functions.\footnote{166} Thus, the researchers involved in the project were "intelligence sources," and the agency could properly refuse to disclose their identities in

\begin{itemize}
  \item[158.] 105 S. Ct. at 1888-90.
  \item[159.] Id. at 1890. See supra note 36 and accompanying text.
  \item[160.] 105 S. Ct. at 1891-92.
  \item[161.] Id. at 1891. According to Chief Justice Burger, "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' " Id. Judge Bork expressed similar concerns about the long-term effects potential disclosure might have on the CIA's ability to acquire important intelligence information. 709 F.2d at 102 (Bork, J., concurring in part and dissenting in part).
  \item[162.] 105 S. Ct. at 1891. The Court doubted that judges were capable of weighing the intricate political and psychological elements involved in deciding when a source would be injured by revealing the informant's identity. Id. See infra note 205.
  \item[163.] See supra note 36 and accompanying text; infra note 164 and accompanying text.
  \item[164.] 105 S. Ct. at 1892.
  \item[165.] See 105 S. Ct. at 1898-99 (Marshall, J., concurring in the result). See also infra note 170.
  \item[166.] 105 S. Ct. at 1890, 1892. The CIA had argued that the research was undertaken to ascertain the ability of foreign powers to use drugs in various psychological situations. See Brief for the Petitioners at 2, CIA v. Sims, 105 S. Ct. 1881 (1985). Although the agency admitted that some of the individuals involved in MKULTRA were unaware of the CIA's participation, it argued that valuable intelligence information could be obtained from such sources and contended that their identities should not be automatically revealed. Id. at 3, 39 n.15. Sims argued that because many of the researchers were unaware they were providing information to the CIA, the agency could not contend that their names should be withheld as "intelligence sources." Brief for Respondents at 3-5, CIA v. Sims, 105 S. Ct. 1881 (1985).
\end{itemize}
response to Sim's FOIA request.\textsuperscript{167}

2. The Concurring Opinion

Despite the relevance of national security to the activities of the CIA, nowhere did the majority opinion discuss exemption 1 as it applied to the facts of this case.\textsuperscript{168} Justice Marshall, who concurred in the judgment, pointed out the importance of exemption 1 in these circumstances.\textsuperscript{169} In his view, the CIA must have made a conscious decision not to utilize the national security exemption argument in an effort to circumvent the effect of the 1974 amendments to the FOIA,\textsuperscript{170} which required de novo review of agency decisions to deny disclosure of documents on grounds of security classification.\textsuperscript{171} In addition, the amendments gave discretionary authority to review the documents in camera to determine whether the items were in fact properly classified.\textsuperscript{172} Justice Marshall argued that by ignoring the availability of exemption 1 as a means to protect this information and by accepting an overly broad formulation of "intelligence source," the Court was giving the CIA Director the type of discretion that Congress was trying to eliminate when it overturned the \textit{Mink} decision in 1974.\textsuperscript{173}

\textsuperscript{167} 105 S. Ct. at 1892.
\textsuperscript{168} See \textit{id.} at 1895 (Marshall, J., concurring in the result).
\textsuperscript{169} \textit{id.} Exemption 1 as amended in 1974 covers matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1982 & Supp. 1 1983) (emphasis added). At the time the Sims suit was initiated, Exec. Order No. 12,065 was in effect. 3 C.F.R. 190 (1979). In 1982, President Reagan issued a new order regulating the security classification system. Exec. Order No. 12,356, 3 C.F.R. 166 (1983). Justice Marshall pointed out that § 1.3(c) of the new order created a presumption that information relating to "intelligence sources" is to be treated as confidential. 105 S. Ct. at 1898 n.6 (Marshall, J., concurring in the result). He argued that this presumption removed from the CIA the burden of showing the likely result disclosure would have on national security. \textit{Id.}
\textsuperscript{170} 105 S. Ct. at 1895 & n.3, 1898-99 (Marshall, J., concurring in the result).
\textsuperscript{171} \textit{Id.} at 1895. See \textit{also supra} notes 115-25 and accompanying text.
\textsuperscript{172} 105 S. Ct. at 1898 n.5 (Marshall, J., concurring in the result). See \textit{also supra} notes 123-28 and accompanying text.
\textsuperscript{173} 105 S. Ct. at 1898 (Marshall, J., concurring in the result). According to Justice Marshall, FOIA exemption 1 was the "keystone" of the congressional effort to balance the needs of the executive branch with the oversight responsibilities of the Congress and the courts. \textit{Id.} at 1895. In reaching this conclusion, Justice Marshall relied on the legislative history relating to the 1974 amendments. See \textit{id.} at 1895, 1898 & n.5, 1899. He contended that exemption 1 was also the primary means for the agency to protect intelligence information from unauthorized disclosure. \textit{Id.} at 1895. The district court had originally urged the agency to justify nondisclosure on the basis of exemption 1 rather than exemption 3. \textit{Id.} at 1895 n.3 (citing 479 F. Supp. at 88). The CIA refused to do so even though the district court had delayed the effective date of its order to give the agency time to classify the information. \textit{Id.} The information sought by Sims was initially classified, but was subsequently declassified by the agency. \textit{Id.}
In addition to criticizing the majority for its failure to discuss the relevance of exemption 1 to the facts of the case, Justice Marshall also chided the Court for concluding that the "plain meaning" of "intelligence sources" in section 102(d)(3) of the National Security Act supported a sweeping definition of the term.\(^\text{174}\) He agreed that the court of appeals' formulation was insufficient and would result in the disclosure of too much material.\(^\text{175}\) Nonetheless, he contended that the majority's approach went too far in the other direction.\(^\text{176}\) Justice Marshall's reading of section 102(d)(3)'s scant legislative history convinced him that the term "intelligence source" was ambiguous at best,\(^\text{177}\) and certainly could not be used to sustain the Court's deferential position regarding the CIA Director's powers under the statute.\(^\text{178}\) In his view, the Court should have adopted a definition of the term that afforded the courts a greater role in determining whether specific information could be withheld under exemption 3.\(^\text{179}\) He argued that the crucial element in deciding whether particular information had been provided by an "intelligence source" was whether the informant had been promised confidentiality either implicitly or explicitly.\(^\text{180}\)

Justice Marshall reasoned that his reading of "intelligence source" was more in keeping with the spirit of the FOIA than the overly deferential approach of the majority. He agreed that the court of appeals' formulation was insufficient and would result in the disclosure of too much material. He also contended that the majority's approach went too far in the other direction. Justice Marshall's reading of section 102(d)(3)'s scant legislative history convinced him that the term "intelligence source" was ambiguous at best, and certainly could not be used to sustain the Court's deferential position regarding the CIA Director's powers under the statute. In his view, the Court should have adopted a definition of the term that afforded the courts a greater role in determining whether specific information could be withheld under exemption 3. He argued that the crucial element in deciding whether particular information had been provided by an "intelligence source" was whether the informant had been promised confidentiality either implicitly or explicitly.

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174. *Id.* at 1896-97. *See supra* note 155.
175. 105 S. Ct. at 1894, 1900 (Marshall, J., concurring in the result).
176. *Id.*
177. *Id.* at 1897. *See supra* note 155.
178. 105 S. Ct. at 1894. Justice Marshall also pointed out there seemed to be differences of opinion within the executive branch as to the meaning of "intelligence source." He cited testimony of the Director of the Information Security Oversight Office (ISOO) at a congressional hearing to the effect that the term was a narrow one. *Id.* at 1896-97. Established under Exec. Order No. 12,065 and continued under Exec. Order No. 12,356, ISOO is responsible for monitoring the information security program within the entire executive branch. Accordingly, it could be an important player with respect to an agency's use of FOIA exemption 1 relating to classified information. *See generally* ISOO ANN. REP. FY 1984, at 1-3 (1985) (describing the responsibilities of the Office for the government-wide information security program). In addition to the FOIA, United States citizens and government agencies may request the review of classified information through the mandatory declassification program. This program is currently authorized by Exec. Order No. 12,356, and has been in existence since 1972. *See Exec. Order No. 12,356, § 3.4, 3 C.F.R. 166, 173-74 (1983). See also* ISOO ANN. REP. FY 1984, at 11-14 ("Mandatory review is a process popular with researchers as a less combative alternative to Freedom of Information Act requests."). Unlike denials under the FOIA, agency denials of declassification requests made under the mandatory review program are not reviewable in the courts. See ISOO Directive No. 1, § 2001.32(a)(2)(iii), 32 C.F.R. 147, 154 (1985) (providing only administrative appeals for those denied access under mandatory review).
179. 105 S. Ct. at 1894-95 (Marshall, J., concurring in the result).
180. *Id.* at 1897, 1900. Justice Marshall's definition of an "intelligence source" was "one who contributes information on an implicit understanding or explicit assurance of confidentiality, as well as information that could lead to such a source." *Id.* at 1897.
B. The Majority and Concurring Opinions: Divergent Views of Statutory Construction and Judicial Review Under the FOIA

1. Statutory Construction

In defining "intelligence sources" and applying the definition to the facts of the case, the majority attached little weight to the legislative history of the FOIA and its amendments. Chief Justice Burger's primary reference to the Act's legislative history concerned the uncontested issue of whether section 102(d)(3) of the National Security Act qualified as an exemption. Chief Justice Burger's primary reference to the Act's legislative history concerned the uncontested issue of whether section 102(d)(3) of the National Security Act qualified as an exemption. Justice Marshall believed that in its unquestioning acceptance of the arguments advocated by the agency, the Court was violating the FOIA's requirement that the judiciary review de novo agency claims of exemption. In addition, he maintained that the majority in effect was substituting its own judgment for that which properly belonged to the legislative branch.

181. Id.
182. Id. at 1895-96.
184. 105 S. Ct. at 1900 (Marshall, J., concurring in the result). One commentator has recommended that Congress amend the FOIA to clarify the role of the courts in reviewing CIA claims under exemption 3. Note, FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy, 68 MINN. L. REV. 1231, 1260-62 (1984). Such an amendment would provide the courts with a stronger role in reviewing de novo CIA decisions to deny release of documents requested under the FOIA. See id. at 1261 for the text of the proposed amendment.
185. Ironically, the only reference to the Mink decision in the majority opinion was used to support its statement that the Court has consistently held that the FOIA mandates broad disclosure of government information. 105 S. Ct. at 1886 & n.9. Justice Marshall argued that the effect of the Sims decision was the opposite of the Act's broad disclosure mandate, i.e., it removed whole categories of information from release under the FOIA. Id. at 1899 (Marshall, J., concurring in the result).
186. Although Sims argued against the CIA's interpretation of the meaning and legislative history of § 102(d)(3), he did not specifically challenge the holding of the court of appeals that
statute. In fact, those federal courts that previously considered the issue had come to the conclusion that section 102(d)(3) was a withholding statute under FOIA exemption 3.

By relying almost exclusively on the legislative history of section 102(d)(3) of the National Security Act in making its decision, the majority grounded its opinion on a legislative record that did not deal specifically with congressional intent regarding the definition of "intelligence sources." The primary focus of the hearings and debates surrounding passage of the National Security Act was the establishment of a unified military department and the creation of a centralized intelligence-gathering agency. The legislative history of the National Security Act does not appear to contain any significant discussion of section 102(d)(3).

Given this legislative background, it is difficult to accept the Court's position that the record is such that "intelligence sources" was understood to have a single, broad meaning. It is just as plausible that in considering the term, legislators were concerned primarily with a source who might face "deadly peril" if his identity or assistance to the CIA was revealed. Such
a reading of "intelligence sources" would support a narrower definition that focuses on the need for confidentiality to protect individuals or institutions who have aided the CIA.\textsuperscript{194}

The majority's preoccupation with congressional intent concerning section 102(d)(3) obscures the fact that Sims filed suit under the FOIA, not the National Security Act.\textsuperscript{195} In determining whether a particular statute sanctions the withholding of information under FOIA exemption 3, it is important to ascertain legislative intent regarding that statute.\textsuperscript{196} However, such an examination cannot take place in isolation. The nondisclosure statute, in this case section 102(d)(3) of the National Security Act, must be construed in light of congressional intent regarding the FOIA in general and the amended exemption 3 in particular.\textsuperscript{197} In Sims, the Court failed to undertake this kind of analysis.\textsuperscript{198} If the Court had, it might have concluded, as the concurrence did, that a broad definition of "intelligence sources" would give the CIA the type of discretion that Congress was attempting to limit by statutorily overruling the Mink and Robertson decisions in 1974 and 1976.\textsuperscript{199}

2. Judicial Review Under the FOIA

Although the Court did not directly address the scope of judicial review under the Act, the effect of Sims is to limit the ability of the courts to review matters involving "intelligence sources." The Court's expansive reading of the term essentially negates the review function Congress prescribed for the judiciary in the original statute and refined in subsequent amendments to the Act.\textsuperscript{200}

\textsuperscript{194} See 105 S. Ct. at 1897 (Marshall, J., concurring in the result).
\textsuperscript{196} See id. at 12.
\textsuperscript{197} See id. at 11-18. See also 105 S. Ct. at 1894-95 (Marshall, J., concurring in the result). But see Brief for the Petitioners at 12, 22-24, CIA v. Sims, 105 S. Ct. 1881 (1985) (arguing that it is a "fundamental error" to incorporate the prodisclosure philosophy of the FOIA into an analysis of § 102(d)(3) of the National Security Act and a determination of the meaning of "intelligence sources"). Id. at 12.
\textsuperscript{198} Cf. 105 S. Ct. at 1895-96, 1900 (Marshall, J., concurring in the result).
\textsuperscript{199} Id. at 1894, 1896, 1898.
\textsuperscript{200} In contrast to the majority's lack of discussion relating to the scope of judicial review under the FOIA, Justice Marshall emphasized congressional action to expand the role of the courts. Id. at 1895, 1898 & n.5. In his view, the amendments enacted in 1974 to overrule Mink were evidence of legislative intent to check agency discretion to invoke the FOIA's statutory exemptions. Id. at 1898 & n.5. These amendments required the courts to review de novo agency decisions to deny the release of information requested under the Act. Id. at 1894-95, 1898 & n.5. This de novo review included material that involved the national security. In these instances, the 1974 amendments gave judges the option of examining the disputed documents in camera. 105 S. Ct. at 1898 & n.5 (Marshall, J., concurring in the result). See supra notes 115, 119-26, and accompanying text. Justice Marshall contended that:
The Court's implicit view of a limited role for the judiciary in the FOIA process strongly suggests that its position has not changed in the years since the *Mink* decision. 201 This position may be attributable in part to the sensitive nature of the information involved in these cases. Nonetheless, Congress was well aware of the type of information that intelligence and defense agencies were interested in protecting when it amended exemption 1 and the judicial review provision of the FOIA in 1974. 202 As it implied in *Mink*, 203 the Court in *Sims* questioned the ability of judges to make disclosure decisions about documents relating to the national security. 204 Although Congress had rejected this viewpoint in 1974, 205 the *Sims* majority simply avoided discussion of such legislative efforts to strengthen the role of the courts under the FOIA. The result of the Court's decision in *Sims* is to deny the judiciary any meaningful role in determining whether the CIA, in a particular case, has correctly invoked FOIA exemption 3 and properly withheld material to protect the identity of or information provided by "intelligence sources."

III. Conclusion

In *CIA v. Sims*, the Supreme Court held that the names of researchers involved in the MKULTRA project were exempt from release under the FOIA 206 because they were "intelligence sources." 207 The *Sims* opinion reflects the generally deferential approach the Court has taken in interpreting
the FOIA's statutory exemptions. It follows the line of reasoning developed by the Court in *Mink* and *Robertson*.\textsuperscript{208} Congress enacted amendments to the FOIA as a result of the latter two cases in an effort to enhance the role of the courts in the FOIA process. In spite of these changes, the Court in *Sims* declined to acknowledge the judiciary's role in determining whether potentially sensitive intelligence information could be disclosed. It bowed to the agency's discretion in making the final decision regarding the use of exemption 3 in denying release of the requested information, and ignored the availability of other options that may have been more appropriate under the circumstances.\textsuperscript{209} As a result of this decision, those who voice concern over increasing government secrecy will again have to turn to Congress if sweeping executive and judicial policies favoring nondisclosure are to be overturned.\textsuperscript{210}

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\textsuperscript{208} See supra notes 77-88, 93-108, and accompanying text. But see Department of the Air Force v. Rose, 425 U.S. 352 (1976) in which the Supreme Court narrowly construed the internal personnel rules and practices exemption (exemption 2) to protect only such matters so trivial or routine that they could not be "subject to . . . a significant public interest." *Id.* at 369. In contrast to the congressional reaction to the Court's decisions in *Mink* and *Robertson*, the conferees for the Sunshine Act acknowledged the Court's opinion in *Rose* regarding exemption 2. S. REP. NO. 1178, 94th Cong., 2d Sess. 15 (1976), reprinted in SUNSHINE ACT SOURCE BOOK, supra note 14, at 797 ("The House version of the personnel exemption is agreed to with recognition of the Supreme Court's interpretation of the analogous Freedom of Information Act exemption in [*Rose*] . . . .").

\textsuperscript{209} See supra notes 168-73 and accompanying text.

\textsuperscript{210} In fact, the Supreme Court seemed to invite Congress to act if it disagreed with the Court's holding. Chief Justice Burger wrote: "Congress certainly is capable of drafting legislation that narrows the category of protected sources of information." 105 S. Ct. at 1888 n.13. Proposals have been introduced in the 99th Congress to amend the FOIA. One such proposal was introduced by Rep. Kleczka. 131 CONG. REC. H7474-75 (daily ed. Sept. 17, 1985) (statement of Rep. Kleczka). H.R. 3319 or the Freedom of Information Public Improvements Act of 1985 calls for substantial changes in the FOIA process, including the shifting of oversight responsibility from the Department of Justice to the Archivist of the United States and the establishment of penalties for agency delay in complying with the FOIA. It does not, however, seek to overturn legislatively the Supreme Court's decision in *Sims*. Similar to other proposals introduced in the 99th Congress, H.R. 3319 includes a provision that would require each agency to identify those statutes that authorize the withholding of information under exemption 3. See H.R. 3319, 99th Cong., 1st Sess. (1985). See also supra note 147.

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