BYU Law Review

Volume 1985 | Issue 4 Article 4

11-1-1985

Judge Wilkey's Contributions to Administrative Law and the Law of Separation of Powers

Steven S. Rosenthal

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

 Part of the Administrative Law Commons, Judges Commons, and the Legal Biography Commons

Recommended Citation

Steven S. Rosenthal, *Judge Wilkey's Contributions to Administrative Law and the Law of Separation of Powers*, 1985 BYU L. Rev. 613 (1984).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1985/iss4/4

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Judge Wilkey's Contributions to Administrative Law and the Law of Separation of Powers

*Steven S. Rosenthal**

I. Introduction

The majority of Judge Malcolm Wilkey's opinions discuss issues of federal administrative law. This is perhaps to be expected, since Judge Wilkey sat on the United States Court of Appeals for the District of Columbia Circuit, a court that attracts a disproportionate number of federal judicial review proceedings. Moreover, Judge Wilkey began his tenure just before Congress revoked the District of Columbia Circuit's jurisdiction as the court of last resort for the District of Columbia,[1] significantly decreasing the number of criminal and private civil cases that could come before the court. During the same period, Congress vested exclusive jurisdiction over actions for judicial review of certain new agencies in the federal courts of appeal, especially the District of Columbia Circuit.[2]

Judge Wilkey was thus in a position to significantly influence the development of federal administrative law. Furthermore, the special qualities which he brought to the task enabled him to, in fact, exercise such influence.

The number of times the Supreme Court has adopted Judge Wilkey's opinions is striking. Among those opinions are: (1) the dissent in *Cole v. Harris*,[3] which became the basis of the Supreme Court's unanimous decision in *Alexander v. United*

---

* Partner, Morrison & Foerster, Washington, D.C. A.B., 1971, Dartmouth College; J.D., 1974, Harvard University. Mr. Rosenthal was law clerk to Judge Wilkey from 1974 to 1975.

1. District of Columbia Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

2. *See, e.g.*, Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1707 (codified as amended at 42 U.S.C. § 7607(b)(1) (1982)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 11, 84 Stat. 1590, 1602 (codified as amended at 29 U.S.C. § 660(a) (1982)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 892 (codified as amended at 33 U.S.C. § 1369(b) (1982)).

3. 571 F.2d 590 (D.C. Cir. 1977), *rev'd*, 441 U.S. 39 (1979).

States Department of Housing and Urban Development,[4] holding that federal law requires relocation assistance only to persons forced to vacate property because of an actual or proposed acquisition of property by a federal program; (2) the dissent in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,*[5] which became the basis of the Supreme Court's unanimous decision in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,[6] upholding Nuclear Regulatory Commission rules evaluating environmental effects of the nuclear power fuel cycle; (3) the dissent in *Alabama Power Co. v. Gorsuch,*[7] which was adopted in *Ruckelshaus v. Sierra Club,*[8] holding that an award of attorneys' fees is "appropriate" under applicable statutes only if the requesting party achieved some degree of success on the merits; (4) the opinion in *Vaughn v. Rosen,*[9] which was the basis for the Supreme Court's interpretation of the Freedom of Information Act's (FOIA) exemption two in *Department of the Air Force v. Rose;*[10] and (5) the opinions in two legislative veto cases, which the Supreme Court affirmed without opinion, holding unconstitutional both one-house and two-house legislative vetoes as applied to generally applicable regulations of independent agencies.[11]

Although Judge Wilkey's opinions have dealt with virtually all important administrative law issues of the period and virtually every significant regulatory agency,[12] the following areas of administrative law have been of special interest to him: FOIA's procedural and substantive aspects,[13] the allocation of power among the branches of the federal government,[14] and attorneys'

---

4. 441 U.S. 39 (1979).

5. 685 F.2d 459 (D.C. Cir. 1982), *rev'd,* 462 U.S. 87 (1983).

6. 462 U.S. 87 (1983).

7. 672 F.2d 1 (D.C. Cir. 1982).

8. 463 U.S. 680 (1983).

9. 523 F.2d 1136 (D.C. Cir. 1975) (*Vaughn II*).

10. 425 U.S. 352 (1976).

11. Consumers Union of United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* United States House of Representatives v. FTC, 463 U.S. 1216 (1983); Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *aff'd,* 463 U.S. 1216 (1983).

12. A number of Judge Wilkey's opinions involved four agencies: the Civil Aeronautics Board, the Environmental Protection Agency, the Federal Communications Commission, the Federal Power Commission and its successor the Federal Energy Regulatory Commission.

13. *See infra* notes 16-69 and accompanying text.

14. *See infra* notes 70-110 and accompanying text.

fees in actions brought against the government.[15] Judge Wilkey has significantly contributed to the law in each of these areas.

This article examines Judge Wilkey's opinions in two of these three areas: FOIA and separation of powers. Reviewing these opinions in greater detail will highlight not only Judge Wilkey's important contributions to administrative law, but also those qualities that contribute to Judge Wilkey's unique approach to resolving administrative law issues.

II. Judge Wilkey's Freedom of Information Act Opinions

At least two dozen[16] of Judge Wilkey's opinions deal with FOIA issues. Several of these opinions have become the definitive word on the procedures the district courts are to use in reviewing claims arising under FOIA and on the scope of the principal exemptions from mandatory FOIA disclosure. Equally important, these FOIA opinions provide important insight into Judge Wilkey's views on the proper relationship of the judiciary to the political branches of government and on the appropriate means by which the judiciary can foster a fair and efficient system for administering justice.

---

15. *See, e.g.*, Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982); Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982) (Wilkey, J., dissenting); Copeland v. Marshall, 594 F.2d 244 (D.C. Cir. 1978), *reh'g en banc granted and opinion vacated*, 641 F.2d 880 (D.C. Cir. 1980).

16. Weisberg v. Webster, 749 F.2d 864 (D.C. Cir. 1984); Miller v. Casey, 730 F.2d 773 (D.C. Cir. 1984); Medina-Hincapie v. Department of State, 700 F.2d 737 (D.C. Cir. 1983); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting); Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981); Carlisle Tire and Rubber Co. v. United States Customs Serv., 663 F.2d 210 (D.C. Cir. 1980); Baez v. United States Dep't of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980); Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980); Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980); Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (en banc); Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 717 (D.C. Cir. 1978) (Wilkey, J., dissenting), *reh'g en banc granted and opinion vacated*, 591 F.2d 752 (affirming district court by an equally divided court), *cert. denied*, 441 U.S. 906 (1979); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976); Weisberg v. United States Dep't of Justice, 543 F.2d 308 (D.C. Cir. 1976); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Schwartz v. IRS, 511 F.2d 1303 (D.C. Cir. 1975); Ash Grove Cement Co. v. FTC, 511 F.2d 815 (D.C. Cir. 1975); Montrose Chem. Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974); Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (Wilkey, J., concurring).

A. Procedural Aspects of the Freedom of Information Act

1. Vaughn I: *Implementation of the procedural index*

One of the first of Judge Wilkey's FOIA opinions, *Vaughn v. Rosen* (*Vaughn I*),[17] is perhaps the best known. In *Vaughn I* the District of Columbia Circuit reversed a grant of summary judgment to the government. According to the opinion, the single affidavit upon which the summary judgment was based "did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the . . . opinion that the . . . [requested materials] were not subject to disclosure under the FOIA."[18] Since the requested materials did not clearly fit within one of the exemptions from mandatory disclosure, the decision directed the trial court on remand to require the government to provide a detailed itemization of each document or segment of a document for which exemption was being claimed, cross-referenced to the government's reasons for nondisclosure.[19] This "index" served to focus the adversary process, facilitate and narrow the trial court's or a special master's inquiry, and ease the reviewing court's task.

Vaughn I is an outstanding example of Judge Wilkey's interest in procedures that foster fair and efficient administration of justice. The opinion reviewed, in detail, impediments to resolving FOIA disputes, including lack of incentives to spur appropriate governmental disclosure, heavy burdens placed on the court system at both trial and appellate levels, and serious distortions in the traditional adversary system.[20] The decision stated that "existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity."[21] As a result, the court noted, "[i]t is vital that some process be formulated that will (1) assure that a party's right to information is not submerged . . . and (2) permit the court sys-

---

17. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

18. *Id.* at 823.

19. *Id.* at 827-28.

20. *Id.* at 824-26.

21. *Id.* at 826; *see also* Schwartz v. IRS, 511 F.2d 1303, 1306 (D.C. Cir. 1975); Cuneo v. Schlesinger, 484 F.2d 1086, 1091-92 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

tem effectively and efficiently to evaluate the factual nature of disputed information."[22]

The indexing procedure attempts to remedy these problems by shifting the burden of justifying nondisclosure from the court system to the party upon whom the statute has placed the burden—the agency seeking to justify nondisclosure.[23] By requiring that less conclusory justifications be given for nondisclosure and that assertedly exempt portions be separated from nonexempt portions of documents, the indexing procedure permits the trial court to focus upon narrow and controverted issues and permits the adversary process to operate more effectively. Finally, the indexing requirement attempts to stimulate maximum disclosure.[24]

Vaughn I, as well as subsequent opinions, emphasizes that the indexing procedure is not an inflexible requirement in all FOIA cases, especially in situations involving classified documents.[25] If the agency's initial affidavits are sufficiently detailed, or if affidavits, when combined with other facts of record, make the right to exemption sufficiently clear, then the purposes of the indexing procedure are met.[26] When those factors are not present, the indexing procedure of *Vaughn I* has gained widespread acceptance.[27] Moreover, over a decade of experience with

---

22. *Vaughn I*, 484 F.2d at 826.

23. *Id.* at 825, 828; *see also* Cuneo v. Schlesinger, 484 F.2d 1086, 1091 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

24. *Vaughn I*, 484 F.2d at 828; *see also* Schwartz v. IRS, 511 F.2d 1303, 1306 (D.C. Cir. 1975).

25. *Vaughn I*, 484 F.2d at 824, 826; *accord* Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1384-85 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Goland v. CIA, 607 F.2d 339, 351-52 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

26. *See, e.g.*, Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) ("[W]hen the facts in plaintiff's possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by *Vaughn* may be unnecessary."); Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980) (approving variations on the basic *Vaughn* approach, including index and court examination of sample reports stipulated by parties to be representative).

27. *See, e.g.*, Stsin v. Department of Justice, 662 F.2d 1245, 1253-54 (7th Cir. 1981); Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969 (3d Cir. 1981); Orion Research, Inc. v. EPA, 615 F.2d 551, 553 (1st Cir.) ("[A]gency must furnish a detailed description of the contents of the withheld material and of the reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material."), *cert. denied*, 449 U.S. 833 (1980); Lead Indus. Ass'n. v. OSHA, 610 F.2d 70 (2d Cir. 1979); Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1512 (N.D. Cal. 1984) (Government "must present sufficient evidence to enable the court to make an independent assessment of the exemption claims. At a minimum, where a substantial number of documents are at issue, this will require affidavits or declarations which index each dele-

the indexing procedure suggests that it helps the government meet its burden of proof in FOIA cases by creating a simple and practical mechanism whereby the agency can present the required justification for each segment of an assertedly exempt document. Above all, the indexing procedure helped the federal courts survive the substantial increase in litigation that occurred in the wake of the 1974 amendments to FOIA.

2. Open America: *FOIA time constraints*

Judge Wilkey's awareness of the realities of governmental administration is demonstrated in *Open America v. Watergate Special Prosecution Force*,[28] the first decision interpreting time constraints imposed by the 1974 amendments to FOIA. The plaintiffs had requested documents in the FBI's possession. The FBI acknowledged the request with a letter stating that the FBI had pending over 5,000 FOIA requests. Because the FBI was unable to respond to the request within the required ten day statutory period, plaintiffs appealed the "denial" of their request to the appeals officer. When the appeals officer failed to complete processing of the appeal within statutory time limits, plaintiffs filed suit in the district court, which issued an order under *Vaughn I* requiring detailed justification, itemization, and indexing of withheld documents within thirty days.[29]

Judge Wilkey, writing for the majority and reversing the district court, acknowledged that the 1974 FOIA amendments provide that a request not granted or denied within ten working days (or twenty days in specified unusual circumstances) is deemed denied, and that if an appeal of a denial is not determined within twenty days, the applicant has exhausted administrative remedies and may bring suit.[30] Nevertheless, in addition to the time constraints, Congress also enacted 5 U.S.C. § 552(a)(6)(C), which provides: "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain

---

tion and state the exemptions claimed along with a detailed description of the material withheld and justification for its withholding."); Burke Energy Corp. v Department of Energy, 583 F. Supp. 507, 514 (D. Kan. 1984); Gerash v. Smith, 580 F. Supp. 808, 809 (D. Colo. 1984); *see also* Parton v. United States Dep't of Justice, 727 F.2d 774, 776 (8th Cir. 1984) (noting that indexing is the typical agency procedure).

28. 547 F.2d 605 (D.C. Cir. 1976).

29. *Id.* at 608.

30. *Id.* at 609-10.

jurisdiction and allow the agency additional time to complete its review of the records."[31] After reviewing in great detail relevant portions of the Senate report and other legislative history dealing with the 1974 FOIA amendments, Judge Wilkey concluded that Congress added 5 U.S.C. § 552(a)(6)(C) "as a safety valve after the protests of the administration that the rigid limits . . . might prove unworkable."[32]

The requisite "exceptional circumstances" existed in *Open America* since the FBI was being "deluged with a volume of requests for information vastly in excess of that anticipated by Congress" and, as a result, the FBI's "existing resources [were] inadequate to deal with the volume of . . . requests within the time limits."[33] In making the latter determination, the court relied heavily on the House committee's estimate that the total additional cost of the 1974 FOIA amendments for all federal agencies would be $50,000 in fiscal year 1974 and $100,000 for each of the next five fiscal years. The FBI's actual costs were almost $500,000 in fiscal year 1975 and estimated to be over $2.5 million in fiscal years 1976 and 1977.[34] In determining that the FBI had exercised requisite "due diligence," Judge Wilkey found that, with the exception of three cases in which time was of the essence, the FBI had categorized all FOIA requests as complex or noncomplex and had, within each category, handled all requests on a first-in, first-out basis.[35]

Judge Wilkey emphasized in *Open America* that the plaintiffs had failed to allege urgency or exceptional need for the information they sought. Furthermore, the plaintiffs had not demonstrated that the FBI's procedure was "anything but fair, orderly, and the most efficient procedure which can be adopted under the circumstances."[36] Plaintiffs simply wanted an order giving them priority over every other FOIA request pending at the FBI. Judge Wilkey rejected the plaintiffs' interpretation of the statute on the practical ground that the interpretation would result in a system in which priority of requests would be determined by the order in which law suits were filed, instead of the order in which FOIA requests were made. Applicants with re-

---

31. 5 U.S.C. § 552(a)(6)(C) (1982).
32. *Open America*, 547 F.2d at 610 & n.11.
33. *Id.* at 616.
34. *Id.* at 612.
35. *Id.* at 612-13, 616.
36. *Id.* at 614.

sources to hire lawyers and go to court would be favored over those who did not. Most importantly, applicants "who have a real need and urgency for the information . . . will be unable to get to the head of the line, because of the crowd of miscellaneous requests already placed there by court order without any showing of urgency or need whatsoever."[37]

The *Open America* opinion shows keen appreciation for limited agency resources, recognizing that if courts order preferential treatment for one person, it necessarily will be at the expense of other persons, perhaps much more deserving, not represented before the court. While the opinion does not suggest that courts should never order special treatment, it suggest that courts must exercise extreme care in reviewing urgency requests, and should grant such requests reluctantly, if at all. While Congress could have created inflexible deadlines as advocated by plaintiffs, the existence of 5 U.S.C. § 552(a)(6)(C), the legislative history leading to its enactment, and common sense suggested that Congress had not done so, at least not as part of the 1974 FOIA amendments. Therefore, Judge Wilkey interpreted the FOIA amendments as limiting the role of courts to cases in which "(1) . . . the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations . . . and (2) [the] plaintiff can show a genuine need and reasons for urgency in gaining access."[38] Even though it was a case of first impression, the *Open America* decision proved to be the definitive interpretation of the deadline provisions of FOIA. *Open America*'s standards provided a workable and fair framework to guide other courts in considering requests for expedited treatment.[39]

B. Substantive Aspects of FOIA

1. Goland: *Defining FOIA*

Judge Wilkey's opinions also have provided authoritative interpretations of substantive provisions of FOIA. *Goland v.*

---

37. *Id.* at 615.

38. *Id.* at 615-16.

39. *See, e.g.*, Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976); Ettlinger v. FBI, 596 F. Supp. 867, 878 (D. Mass. 1984); Crooker v. United States Marshals Serv., 577 F. Supp. 1217, 1218 (D.D.C. 1983); Reagan Bush Comm. v. Federal Election Comm'n., 525 F. Supp. 1330, 1337 (D.D.C. 1981).

CIA,[40] was a case of first impression that required the court to determine whether a congressional hearing transcript lent to the CIA for use "as a reference document only," was a "Congressional document," and thus not subject to FOIA, or an "agency record" within the meaning of 5 U.S.C. § 552(a)(3), and thus subject to FOIA disclosure.[41]

Judge Wilkey rejected the contention that the CIA's mere possession of the transcript made it an "agency record." He instead held that the question turned "on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides."[42] In so holding, Judge Wilkey placed special emphasis on the firmly rooted authority of Congress to keep its records secret and, on occasion, to give documents to executive agencies to assist them in carrying out the will of Congress. The court was unwilling to present Congress with an unresolvable dilemma absent clear intent expressed in FOIA's language.[43]

2. The scope of FOIA exemptions

Judge Wilkey has also rendered key rulings on the scope of FOIA exemption three, relating to records "specifically exempted from disclosure by statute."[44] In *Goland*, Judge Wilkey wrote that two principal CIA protective statutes, 50 U.S.C. § 403(d)(3) and 50 U.S.C. § 403(g), continued to qualify under exemption three despite amendments to FOIA in 1976 that narrowed that exemption.[45] Thus, records within the scope of the statutes are exempt from FOIA disclosure. Judge Wilkey reaffirmed this ruling in *Halperin v. CIA*, when he wrote that records detailing legal bills and fee arrangements of private attorneys employed by the CIA were protected by exemption three.[46]

Similarly, in *Hayden v. National Security Agency/Central Security Service*, the court held that section 6(a) of the principal National Security Agency protective statute qualified under

40. 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).
41. *Id.* at 344-46.
42. *Id.* at 347.
43. *Id.* at 346.
44. 5 U.S.C. § 552b(c)(3) (1982).
45. 607 F.2d at 349-50.
46. 629 F.2d 144, 147-152 (D.C. Cir. 1980).

exemption three.[47] Therefore, documents within the terms of the NSA statute—that is, those that would disclose "any function of the National Security Agency, or of any information with respect to the activities thereof"—were exempt from FOIA disclosure. Judge Wilkey's *Hayden* opinion emphasized that Congress had enacted an especially broad protective statute for the NSA, in view of its unique and sensitive functions, that was in fact broader than comparable CIA statutes. As a result, the NSA only needed to show that requested documents concerned a specific NSA activity; no showing of potential harm to national security was required.[48]

The Supreme Court recently confirmed the holdings and reasoning of *Goland* and *Halperin* in *CIA v. Sims*.[49] Explicitly relying on Judge Wilkey's analysis in *Halperin*, the Court held that Congress intended 50 U.S.C. § 403(d)(3) to be a withholding statute under exemption three.[50] The Court stated:

> [T]he very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.' Thus, '[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'[51]

In *Vaughn v. Rosen* (*Vaughn II*),[52] Judge Wilkey was called upon to interpret exemption two, which protects from mandatory disclosure agency records "related solely to the internal personnel rules and practices of an agency."[53] The difficulty in the case arose from conflicting views in the legislative history as to the scope of exemption two. The Senate report exempted only such things as "rules as to personnel's use of parking facili-

---

47. 608 F.2d 1381, 1389 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *see* National Security Agency Act of 1959, Pub. L. No. 86-36, § 6(a), 73 Stat. 63 (codified at 50 U.S.C. § 402 (1982)).

48. *Hayden*, 608 F.2d at 1390. Compare *Hayden* with the earlier decision in Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979). *Hayden* clearly lessens the burden imposed upon the NSA to justify exemption and thus overrules *Founding Church sub silentio*. *See* 608 F.2d at 1390-91.

49. 105 S. Ct. 1881 (1985).

50. *Id.* at 1887.

51. *Id.* at 1892-93 (citations omitted).

52. 523 F.2d 1136 (D.C. Cir. 1975).

53. 5 U.S.C. § 552b(c)(2) (1982).

ties or regulation of lunch hours." The House report included "[o]perating rules, guidelines, and manuals of procedure for government investigators or examiners," but *not* routine matters of internal management.[54] Faced with these two diametrically opposed indications of congressional intent, Judge Wilkey interpreted exemption two narrowly and held that the requested documents were subject to disclosure. Judge Wilkey's reasoning was adopted less than a year later by the Supreme Court in *Department of the Air Force v. Rose.* Indeed, the Supreme Court paid Judge Wilkey the ultimate compliment by referring to him by name twice and by quoting from *Vaughn II* at length.[55]

C. FOIA and Interbranch Relationships

1. Executive branch

Judge Wilkey's FOIA opinions frequently set forth his views on the proper relationship of the judiciary to political branches of government. For example, when he interpreted and applied exemptions one and three, Judge Wilkey consistently used an approach that requires the courts to defer to executive branch determinations on questions relating to intelligence gathering and national security. Under this approach, "substantial weight" is accorded an agency's affidavit setting forth the basis for exemption,[56] and an agency's assessment of risks of disclosure is accepted, provided the assessment is "plausible" or "reasonable."[57] "If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no

54. *See Vaughn II*, 523 F.2d at 1140-41. *Compare* S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965), *with* H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427.

55. Department of the Air Force v. Rose, 425 U.S. 352, 365-66 (1976).

56. Miller v. Casey, 730 F.2d 773, 776-78 (D.C. Cir. 1984); Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980); Halperin v. CIA, 629 F.2d 144, 147-48 (D.C. Cir. 1980); Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Goland v. CIA, 607 F.2d 339, 350 n.64 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

57. Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) ("agency assessments are both plausible and factually uncontradicted"); Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) ("more than ample evidence to show the plausibility of the alleged potential harm"); Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387-88 (D.C. Cir. 1979) (district court concluded that "there were reasonable grounds for expecting the requisite potential harm from disclosure"; court of appeals agreed, stating that "for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review"), *cert. denied*, 446 U.S. 937 (1980).

evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents."[58] When the agency has failed to meet its burden by affidavits alone, *in camera* review of materials must substitute for creation of a public record, despite the resulting loss to the adversary process.[59]

Each element of Judge Wilkey's approach in intelligence gathering and national security cases derives substantial support from the language and legislative history of FOIA,[60] as well as decisions of the District of Columbia Circuit. However, congressional intent was, at best, inchoate as to how courts should approach FOIA cases involving intelligence gathering and national security, as is especially evidenced by the statutory requirement that district court proceedings be conducted *de novo*.[61] Consistent with statutory language, legislative history, and precedent, Judge Wilkey enthusiastically crafted an approach that gives executive branch determinations great deference and limits courts to overturning only exemption determinations based upon implausible assertions. As Judge Wilkey stated in *Halperin v. CIA*, "[j]udges . . . lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case."[62] The legal soundness of this approach received ringing support from the Supreme Court in *CIA v. Sims*.[63]

2. *Executive privilege*

Soucie v. David[64] provided Judge Wilkey another opportunity to discuss interbranch relations. *Soucie* involved a FOIA request for a report prepared by a panel of experts convened by the Office of Science and Technology (OST). The report was to

---

58. Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *accord* Carlisle Tire and Rubber Co. v. United States Customs Serv., 663 F.2d 210, 216 (D.C. Cir. 1980); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1335 (D.C. Cir. 1980); Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980).

59. Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980); Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

60. *See, e.g.*, Goland v. CIA, 607 F.2d 339, 350 n.64 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

61. 5 U.S.C. § 552a(g)(3) (1982).

62. 629 F.2d 144, 148 (D.C. Cir. 1980).

63. 105 S. Ct. 1881, 1892-93 (1985).

64. 448 F.2d 1067 (D.C. Cir. 1971).

assist the director of the OST in preparing an evaluation, requested by the president, of the government's program for developing a supersonic transport aircraft. The court of appeals reversed a trial court determination that the OST was not an "agency" for FOIA purposes and remanded to consider whether the report was exempt from disclosure. The majority refused to reach the question whether executive privilege supported the decision not to disclose on the ground that "[s]erious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under [FOIA]."[65]

Judge Wilkey concurred and reached the question of executive privilege.[66] He first noted that "the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive."[67] He then briefly traced common law and constitutional bases for the privilege and cited examples in which each of the three branches recognized "a constitutional privilege to withhold certain documents under given circumstances."[68] Judge Wilkey had no difficulty concluding that if FOIA did not permit withholding the report, the executive branch could still assert constitutional privilege as a defense to a FOIA action. This conclusion was based upon the unassailable premise that if Congress "would not be entitled to receive [information] directly upon request" it certainly could not compel, by statute, disclosure of that information either to itself or to a private citizen.[69]

---

65. *Id.* at 1071.

66. *Id.* at 1080 n.1 (Wilkey, J. concurring). Judge Wilkey noted that the trial court cited executive privilege as a second ground for its ruling and that the trial court might reach the constitutional question on remand. *Id.* at 1080 & n.1.

67. *Id.* at 1080 (Wilkey, J. concurring).

68. *Id.* at 1082 (Wilkey, J. concurring).

69. *Id.* at 1083 (Wilkey, J. concurring). Other FOIA decisions of Judge Wilkey that discuss interbranch relations are Halperin v. CIA, 629 F.2d 144, 154-62 (D.C. Cir. 1980) (discussing at length the constitutionality of statutes that provide for secrecy of CIA expenditures); Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980) (affirming the exclusive power of Congress to control disclosure of its records); Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (*Vaughn II*) (underscoring, in a theme to be revisited in later Wilkey opinions, the requirement that both houses of Congress concur in the enactment of a statute).

III. Relations Among the Three Branches of Government

A. Consumer Energy Council: *Unconstitutionality of One-House Legislative Veto*

Several of Judge Wilkey's opinions deal directly with separation of powers and proper relations among the three branches of government. Unquestionably his most important opinion in this regard is *Consumer Energy Council of America v. Federal Energy Regulatory Commission*,[70] in which the court held a one-house legislative veto unconstitutional. Both the result and a substantial portion of the analysis of *Consumer Energy Council* anticipated the Supreme Court's decision eighteen months later in *Immigration and Naturalization Service v. Chadha*.[71] Moreover, the District of Columbia Circuit, sitting en banc, unanimously adopted *Consumer Energy Council* in *Consumers Union of United States v. FTC*,[72] a *per curiam* opinion written by Judge Wilkey. The Supreme Court affirmed both *Consumer Energy Council* and *Consumers Union* shortly after *Chadha*.[73]

1. Factual background

Consumer Energy Council concerned title II of the Natural Gas Policy Act of 1978 (NGPA).[74] The NGPA directed the Federal Energy Regulatory Commission (FERC) to implement an "incremental pricing" program under which portions of price increases resulting from deregulation of natural gas, provided for by the NGPA, would be shifted from residential users to industrial users. Section 201 of the NGPA provided that under phase I of the program, FERC was required within one year of enactment of the NGPA to issue a rule implementing incremental pricing for certain uses of natural gas as boiler fuel.[75] Section 202 provided that under phase II of the program, the phase at issue in the case, FERC was required within eighteen months of enactment to issue a rule expanding incremental pricing to "any industrial facility which is within a category defined by the Commission" that was not otherwise exempt.[76] Section 202(c)

70. 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983).
71. 462 U.S. 919 (1983).
72. 691 F.2d 575 (D.C. Cir. 1982) (per curiam), *aff'd*, 463 U.S. 1216 (1983).
73. 463 U.S. 1216 (1983).
74. 15 U.S.C. §§ 3341-3342 (1982).
75. *Id.* § 3341.
76. *Id.* § 3342b(2).

provided that the phase II rule would take effect if neither house of Congress adopted a resolution of disapproval within thirty days.

FERC promulgated the phase II rule May 6, 1980,[77] and on May 20, 1980, the House of Representatives adopted a resolution of disapproval by a vote of 369 to 34.[78] On June 5, 1980, Consumer Energy Council petitioned for rehearing, seeking elimination of the veto provision on the ground that section 202(c) was unconstitutional.[79] On August 1, 1980, FERC both denied the petition for rehearing and revoked the phase II rule.[80] In denying the petition, FERC declined to rule on the constitutionality of the legislative veto. However, in revoking the rule, FERC reasoned that, if section 202(c) were declared unconstitutional, the rule might take effect before the commission had "independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program."[81] Consumer Energy Council petitioned for rehearing of the revocation order on the ground that the revocation was in violation of notice and comment requirements of the Administrative Procedure Act. This rehearing was also denied[82] and Consumer Energy Council sought judicial review of both the revocation and the denial of its second rehearing petition.

2. *The court's opinion*

After disposing of several preliminary issues,[83] the court reached the merits of the constitutional claim and declared the one-house legislative veto embodied in section 202(c) unconstitutional on two grounds. First, it violated article I, section 7 by preventing the president from exercising his veto power and by failing to require concurrence of both houses of Congress on leg-

---

77. FERC Order No. 80, 45 Fed. Reg. 31,622 (1980).

78. H.R. RES. 655, 96th Cong., 2d Sess., 126 CONG. REC. 11,800-16 (1980).

79. *See Consumer Energy Council*, 673 F.2d at 438.

80. Order Denying Rehearing and Revoking Amendments Made by Order No. 80, 45 Fed. Reg. 54,741 (1980).

81. *Id.* at 54,741.

82. FERC Order Denying Rehearing on Revocation of Amendments in Order No. 80, 45 Fed. Reg. 71,780 (1980).

83. The court determined that it had subject matter jurisdiction, 673 F.2d at 439-40, that the legislative veto provision was severable so as not to invalidate the remaining NGPA scheme, *id.* at 440-45, that the case had not been rendered moot by FERC's revocation of the phase II rule, *id.* at 445-48, and that the constitutional issue presented by the legislative veto was not a nonjusticiable political question, *id.* at 451-54.

islative action.[84] Second, the one-house legislative veto contravened separation of powers "implicit in Articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches."[85] The court declined to reach the issue of whether section 202(c) represented an unduly broad delegation of legislative power to a part of Congress itself.[86]

With respect to its first ground, the court agreed with congressional *amici* "that Article I, Section 7 does not apply rigidly to every single congressional activity," but resisted the "implication that law or history supports a relaxed construction of the presentation and bicameralism requirements."[87] Only with respect to the exceptional case of a constitutional amendment has the Supreme Court definitively ruled that the presentation requirement does not apply.[88] Other suggested exceptions either do not represent substantial lawmaking or represent an interbranch "accommodation in the exercise of special powers, an accommodation that nonetheless remains clouded by constitutional controversy."[89] The court then examined the purposes of article I's presentation and bicameralism requirements and concluded "that the Framers were determined that the legislative power should be difficult to employ. [They restricted] the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two."[90]

Finally, the court rejected the argument that the phase II rule was no different than a proposed bill that a single house of Congress undoubtedly may refuse to enact.[91] This argument, while weak, was nevertheless the strongest argument of legislative veto supporters. It was rejected for two reasons. First, the status of the phase II rule was in no sense comparable to that of a bill. Congress had provided that the phase II rule, when adopted by FERC, would have the force of law without further affirmative act by Congress. A bill, by contrast, in order to have the force of law requires the affirmative vote of a majority, and if vetoed, a supermajority of both houses of Congress. Second, by

84. *Id.* at 448, 461-70.
85. *Id.* at 448; *see id.* at 470-78.
86. *Id.* at 448 n.82.
87. *Id.* at 460.
88. *Id.* at 460-61 (citing Hollingsworth v. Virginia, 3 U.S. (3 Dal.) 378 (1798)).
89. *Id.* at 460.
90. *Id.* at 464; *see id.* at 461-64.
91. *Id.* at 465-70.

vetoing the phase II rule, the House effectively engaged in legislative action, since its action had the inevitable result of changing a policy judgment made by both houses of Congress and the president when they cooperated in enacting section 202. Thus, whether viewed from FERC's perspective, whose rule had been blocked, or from the perspective of the Senate and the president, whose policy judgment as embodied in section 202 had been reconsidered by the House, the veto resolution represented legislative action that qualitatively was no different than that usually undertaken by statute.

The second ground of the decision was that the one-house veto violated principles of separation of powers inherent in the tripartite constitutional scheme.[92] The one-house veto improperly intrudes into the executive sphere by seeking to control actual exercise of discretion during performance of an executive function—agency rulemaking. "If rulemaking is sufficiently an executive function so that only Article II officers may conduct it, it would seem *a fortiori* that Congress is prohibited from substantial interference in the rulemaking process."[93] Unlike usual techniques of legislative oversight, such as conducting investigations, reducing or increasing appropriations, or imposing reporting requirements, and especially unlike cases in which Congress has statutorily established detailed rules for exercise of discretion by administrative officers, the one-house veto is an effort by Congress to "insert one of its houses as an effective administrative decisionmaker."[94] When Congress has delegated broad discretion to the executive, it cannot, other than through the legislative process, seek to affect the executive's exercise of that discretion.[95]

The court also found that the exercise of the one-house veto intruded into the judicial sphere.[96] The rationale for this holding is less compelling in a case such as *Consumer Energy Council,* in which a legislative veto overturns a rule of general applicabil-

---

92. *Id.* at 470-78.

93. *Id.* at 474.

94. *Id.* at 476; *see id.* at 474-76.

95. *Id.* at 476 n.216 (" '[T]he vice is that Congress not having chosen to [designate specific terms], and having delegated its authority to the Executive, it may not then control Executive exercise of this delegated power.' ") (quoting Rehnquist, Committee Veto, Fifty Years of Sparring between the Executive and the Legislature 7 (Aug. 12, 1969) (remarks before the Administrative Law Section of the American Bar Association)).

96. *Id.* at 477-78.

ity, than it is in a case such as *Chadha,* in which the veto overturns an adjudication affecting a single individual. The court's holding appears to be based upon the possibility that the veto was the result of congressional sentiment that the FERC rule was inconsistent with law, and that Congress had, therefore, assumed a judicial function and exercised that function without the safeguards usually attendant to exercise of judicial power.

3. Chadha: *The Supreme Court's approval*

The importance of Judge Wilkey's *Consumer Energy Council* decision goes beyond it's mere anticipation of the result in *Immigration and Naturalization Service v. Chadha.*[97] First, it was an impressively researched compendium of available materials and arguments relevant to the legislative veto issue and to preliminary issues that had to be resolved before the merits could be reached in such a case. Second, the Supreme Court's analysis in *Chadha,* finding a violation of the bicameralism and presentment clauses, closely paralleled the analysis used in *Consumer Energy Council.* As did Judge Wilkey, the Supreme Court first discussed the purposes of the Constitution's lawmaking procedures and then, after conceding that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements,"[98] determined that the one-house veto at issue in *Chadha* was legislative in character. In language analogous to that of *Consumer Energy Council,* the Supreme Court stated:

> Disagreement with the Attorney General's decision on Chadha's deportation . . . no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; hicameral passage followed hy presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[99]

Third, *Consumer Energy Council*'s argument that the legislative veto intruded into the judicial sphere is closely paralleled in Justice Powell's concurring opinion.[100] Justice Powell rejected

---

97. 462 U.S. 919 (1983).

98. *Id.* at 952

99. *Id.* at 954-55.

100. *Compare id.* at 959-67 (Powell, J., concurring) *with Consumer Energy Council,* 673 F.2d at 477-78. Justice Powell specifically referenced the *Consumer Energy Council*

the majority's rationale that "apparently will invalidate every use of the legislative veto" and instead decided the case on a narrower ground: "When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers."[101] The analogy between *Chadha,* a case involving deportation of a single individual, and *Consumer Energy Council,* a case involving a broadly applicable rule, is less than perfect. Nevertheless, it is notable that Justice Powell, like Judge Wilkey in *Consumer Energy Council,* relied heavily on the fact that Congress "undertook the type of decision that traditionally has been left to other branches" and that, "[u]nlike the judiciary or an administrative agency, Congress is not bound by established substantive rules [or] subject to . . . procedural safeguards, such as the right to counsel."[102]

Finally, *Consumer Energy Council* has great jurisprudential significance because it went beyond *Chadha* in holding the one-house veto unconstitutional in the context of an agency rule of general applicability. Such agency rulemaking is the type of agency action to which legislative veto provisions most commonly apply.[103] Similarly, Judge Wilkey's opinion for the en banc court in *Consumers Union* also goes beyond *Chadha* by invalidating the two-house legislative veto as applied to agency rulemaking. The *Consumer Energy Council* and *Consumers Union* opinions thus resolved the constitutional status of two principal variants of the legislative veto mechanism and avoided a period of uncertainty during which it might have been argued that *Chadha* should be limited to the one-house veto, or to adjudications, or to actions of executive branch agencies and not those of independent agencies.

B. Nixon v. Sirica: *Executive Privilege*

Consumer Energy Council and *Consumers Union* are not the only decisions of Judge Wilkey that touch significantly on relations among the three branches of the federal government. He also wrote a dissenting opinion in the celebrated case of *Nixon v. Sirica,* in which he discussed the question of "who

---

decision. *Chadha,* 462 U.S. at 960 n.2 (Powell, J., concurring).

101. *Chadha,* 462 U.S. at 959-60 (Powell, J., concurring).

102. *Id.* at 965-66.

103. *See id.* at 1003-13 (appendix to opinion of White, J., dissenting).

decides the scope and applicability of the Executive Branch privilege, the Judicial Branch or Executive Branch."[104]

Judge Wilkey began his dissent with an impressively detailed discussion of "common sense-common law" origins of executive branch privilege and origins of the privilege in the "Constitutional principle of separation of powers."[105] He then concluded, at least as to the assertion by the president of the constitutionally based privilege, "that it is the holder of the Constitutional privilege [w]ho [d]ecides [its scope and applicability]."[106] In so doing, Judge Wilkey rejected the majority's holding "that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case,"[107] and that ultimately it is the judiciary that must weigh applicable interests.

The core of Judge Wilkey's disagreement with the majority was Judge Wilkey's conclusion that the Framers intended that each of the three branches would determine independently which papers it would furnish to another branch. While Judge Wilkey conceded that his approach left open the "possibility of irreconcilable conflict," he concluded that "the possibility of irreconcilable conflict was not necessarily bad, because above all this would guarantee that the National Government could never become an efficient instrument of oppression of the people."[108]

C. The Proper Role of the Judiciary

While it might be argued that the self-abnegating role set out for the judiciary in the *Nixon v. Sirica* dissent conflicts with the role of the judiciary in *Chadha, Consumer Energy Council,* and *Consumers Union,* that inconsistency is more apparent than real. In *Chadha, Consumer Energy Council,* and *Consumers Union,* statutes mandating that article III courts be available to adjudicate petitions for review of agency action forced the constitutional issue upon the courts. While courts must avoid determining constitutional issues unless essential to resolution of a case or controversy squarely presented for decision, determining

104. Nixon v. Sirica, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, J., dissenting) (emphasis omitted).

105. *Id.* at 763-73.

106. *Id.* at 774 (emphasis omitted).

107. *Id.* at 716.

108. *Id.* at 797 (Wilkey, J., dissenting).

the constitutionality of the legislative veto was clearly so essential. In these three cases, for the court to exercise its accepted function of applying the law to the facts of the case, the court first had to determine whether the legislative veto had vitiated the agency action at issue.

By contrast, *Nixon v. Sirica* used judicial resources offensively to acquire materials not otherwise before it. The constitutional issue was raised by action of the judiciary itself, albeit through a subpoena issued by the grand jury. Judge Wilkey's position in *Nixon v. Sirica* was clearly presaged two years earlier in his concurring opinion in *Soucie v. David.* After reviewing "common sense-common law" and constitutional sources of "the privilege against disclosure of the decision-making process,"[109] Judge Wilkey stated that "if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the executive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request."[110]

IV. Conclusion

Judge Wilkey's judicial tenure required him to confront many newly enacted, complex, and ambitious regulatory programs, many of which vested broad, if not awesome powers in the executive and the judiciary. In confronting these new challenges, several guiding principles characterized his approach to administrative law issues.

First and foremost was Judge Wilkey's commitment to the principle that public policy is to be established by Congress through statute and through the exercise of such discretion as Congress may vest in the executive. Judges all too frequently incant familiar vocabulary of judicial deference and then proceed to overturn agency action on grounds that barely disguise the fact that the court is substituting its policy judgment for that of Congress or the executive. Judge Wilkey is at his best when he is in dissent, exposing a majority opinion that seeks to take "too hard a look" at agency action with the effect that the majority

---

109. Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *see supra* notes 64-69 and accompanying text.

110. *Soucie*, 448 F.2d at 1082-83.

substitutes its "own perceptions of public good" for those of the agency under review.[111]

Second is Judge Wilkey's commitment to the principle that the judiciary's primary role is to protect and foster fair procedures within which substantive determinations can be made. Judge Wilkey well understood that "[a] *reviewing court* exceeds its authority . . . when by the stringency of its review it effectively forces an agency to employ new procedures or to rewrite its rules until it reaches what the court believes is the best or correct result."[112] He nevertheless insisted that agencies give a fair hearing to views of those affected by agency action and respond to those views in at least a minimally reasoned fasbion. As his FOIA cases illustrate, Judge Wilkey insisted that the plaintiff be given a fair opportunity to present his case and that the adversary process operate to the fullest extent possible. However, he stopped well short of insisting that the government engage in needless procedures when it was clear that the plaintiff could not prevail on the merits.

Finally, Judge Wilkey brought to his decisionmaking a healthy dose of common sense and practicality drawn from a broad career of private practice and extensive public service. Judge Wilkey's experience reinforced his understanding that the rule of unintended results frequently operates to set awry decisions of even the most well informed and sophisticated policymaker. It was precisely because of Judge Wilkey's broad background tbat he evidenced a sensitivity to the real world impact his decisions were likely to have.

---

111. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 685 F.2d 459, 517 (D.C. Cir. 1982) (Wilkey, J., dissenting), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).

112. *Id.* at 541.