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ADMINISTRATIVE LAW—DEFINING THE CIA'S "INTELLIGENCE SOURCES" AS AN EXEMPTION TO THE FREEDOM OF INFORMATION ACT— *CIA v. Sims*, 471 U.S. 159 (1985)

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ADMINISTRATIVE LAW—DEFINING THE CIA'S "INTELLIGENCE SOURCES" AS AN EXEMPTION TO THE FREEDOM OF INFORMATION ACT—*CIA v. Sims*, 471 U.S. 159 (1985).

"A Democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating."¹

INTRODUCTION

In *CIA v. Sims*,² the United States Supreme Court sharply limited the public availability of information held by the Central Intelligence Agency (hereinafter CIA) and permitted the CIA to withhold virtually any information³ which the Agency obtains pursuant to its intelligence gathering function, despite the broad disclosure requirements of the Freedom of Information Act⁴ (hereinafter FOIA).

1. H.R. REP. NO. 1497, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2429 (from the concluding paragraph of the legislative history of the Freedom of Information Act).

2. 471 U.S. 159 (1985).

3. The lower courts have used *Sims* to uphold the non-disclosure of information by the CIA. *Villanueva v. United States Dep't of Justice*, 782 F.2d 528, 531 (5th Cir. 1986) (The court applied the *Sims* mandate of limited disclosure to a request for personnel files from the FBI.); *United States Student Ass'n v. CIA*, 620 F. Supp. 565, 570 (D.D.C. 1985) (The court applied the *Sims* definition of "intelligence sources" to a request for information made to the CIA under section (b)(3) thereby permitting the CIA to withhold the requested information.).

4. 5 U.S.C. § 552 (1982). To gain access to material held by a government agency, one must make a written request to the agency. The request must "reasonably describe [the] records" sought and the request must be "made in accordance with published rules stating the time, place, fees, (if any) and procedure to be followed . . ." 5 U.S.C. § 552 (a)(3)(A) & (B) (1982). If the request is in conformity with the rules, and the information requested does not fall under one of the nine exemptions, the agency *must* release the material. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975). If after reviewing the requested information, the government agency refuses to disclose the information, the requester has the right of appeal to a federal district court. 5 U.S.C. § 552 (4)(B) (1982).

In reviewing an agency refusal to disclose information, the court must follow certain procedures. *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). The court in *Hayden* stated that the procedure to be utilized by the trial court in FOIA cases is as follows:

(1) The trial court must make a *de novo* review of the agency's classification decision, with the burden on the agency to justify nondisclosure. (2) In conducting

In 1977, John Sims and Sidney Wolfe filed a request with the CIA in which they sought specific information about the Agency's MKULTRA experiments.⁵ Between 1953 and 1966, the MKULTRA project was part of a series of mind-altering drug experiments conducted by the U.S. government.⁶ MKULTRA was the principal program for CIA development of chemical and biological agents which were to be "capable of employment in clandestine operations to control human behavior."⁷ While the CIA intended to use the drugs developed in the project to assist in interrogations of foreign agents,⁸ the Agency also used MKULTRA/MKDELTA drugs overseas for "harassment, discrediting, . . . and disabling purposes."⁹ Some of the MKULTRA experiments themselves led to tragic results, including the death of one researcher.¹⁰

this review, the court is to give 'substantial weight' to the affidavits from the agency. (3) The court is to require the agency to create as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure. (4) If step (3) does not create a sufficient basis for making a decision, the court may accept classified affidavits *in camera*, or it may inspect the documents *in camera*. This step is at the court's discretion, with certain guidelines discussed below. (5) The court should require release of reasonably segregable parts of documents that do not fall within the FOIA exemptions.

Id. at 1384 (footnote omitted).

5. *Sims*, 471 U.S. at 162-63. The information that Sims and Wolfe requested concerned: "(1) the names of universities and other institutions that received funding from the [CIA] for the so-called MKULTRA program as well as the names of the principal researchers at each institution; and (2) the grant proposals and contracts awarded under the MKULTRA program." *Sims v. CIA*, 479 F. Supp. 84, 84 (D.D.C. 1979).

6. The mind control experiments were: CHATTER, which ran from 1947-1953; BLUEBIRD/ARTICHOKE, which ran from 1950-1956; MKNAOMI, which ran from 1952-1970; MKULTRA, which ran from 1953-1966; and MKDELTA, which was established to govern MKULTRA abroad. FOREIGN AND MILITARY INTELLIGENCE, FINAL REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess., Book I, 387-92 (1976) [hereinafter FOREIGN AND MILITARY INTELLIGENCE]. For a discussion of the project generally, see *Human Drug Testing by the CIA, 1977: Hearings before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977)*; *Project MKULTRA, The CIA's Program of Research in Behavioral Modification: Joint Hearings 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)* [hereinafter *Hearings on Project MKULTRA*].

7. FOREIGN AND MILITARY INTELLIGENCE, *supra* note 6, at 389.

8. *Id.* at 391.

9. *Id.* See also 131 CONG. REC. S11,008 (daily ed. Aug. 1, 1985) (statement of Sen. Metzenbaum). The Senator noted that the CIA conducted experiments on "unwitting Canadian citizens" and that he was "aghast at the refusal of the U.S. Government to resolve . . . [the] matter." *Id.*

10. In 1953, at a conference run by CIA personnel, Dr. Frank Olsen unwittingly received 70 micrograms of LSD in a glass of *Cointreau*. Dr. Robert Lashbrook, a "CIA Officer," had intentionally placed the drug there. After the administration of the LSD,

Sims and Wolfe sought information from the CIA concerning grant proposals and contracts for the MKULTRA project, which the CIA released,¹¹ and the names of the researchers and their affiliated institutions, which the CIA did not release, invoking section (b)(3) of the FOIA.¹²

The Court in *Sims* held that researchers involved in the CIA's MKULTRA project were confidential "intelligence sources" under the National Security Act of 1947¹³ (hereinafter National Security Act), and thus exempt from disclosure under a specific exemption, section (b)(3) of the FOIA.¹⁴ The Court interpreted the statutory term, "intelligence source," to mean a person who "provides, or is engaged to provide information the Agency needs to fulfill its statutory obligations."¹⁵ Since the Court's interpretation encompasses virtually all information sources utilized by the CIA, it could allow that agency to withhold information gathered from such innocuous sources as "news-papers . . . public libraries, road maps and telephone books."¹⁶

This note assesses whether, in light of the limited congressional guidance and conflicting purposes governing information disclosure in the national security area, the decision in *Sims* was an appropriate interpretation of the statute. Part I of this note discusses the background, structure and text of the FOIA and the CIA's organic statutes. It includes an analysis of the FOIA's purposes as revealed by its legislative history and the exemptions created by Congress that would justify the withholding of information in the national security area.

Olsen exhibited symptoms of paranoia and schizophrenia. Olsen, accompanied by Lashbrook, went to New York City for treatment. While in New York, Olsen jumped to his death from a tenth story window in the Statler Hotel, where he was staying. FOREIGN AND MILITARY INTELLIGENCE, *supra* note 6, at 394.

11. *Sims v. CIA*, 479 F. Supp. 84, 85 (D.D.C. 1979).

12. *Id.*

13. 50 U.S.C. § 403(d)(3) (1982). For text, see *infra* note 49.

14. *Sims*, 471 U.S. at 173.

15. *Id.* at 177. Characterizing the MKULTRA researchers as "intelligence sources" authorizes the Director of the CIA to keep confidential the names of the researchers and the institutions with which they are affiliated. See 50 U.S.C. § 403(d)(3). Moreover, the names of persons designated as "intelligence sources" under the National Security Act are excluded from the scope of the FOIA section (b)(3) which exempts from disclosure any information deemed confidential by statute. 5 U.S.C. § 552 (b)(3) (1982). For the full text of the section, see *infra* note 26.

16. *Sims*, 471 U.S. at 191 (Marshall, J., concurring). See also *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980) (Markey, C.J., dissenting), in which Chief Judge Markey, commenting on the Agency's definition of "intelligence sources" which was adopted by the Supreme Court, stated: "The Agency's definition effectively reads 'intelligence source' as 'information source,' requiring protection of all sources of all information 'rationally related' to national security. As the majority opinion makes clear, that sucks into secrecy's maw too many sources of too many kinds of information." *Id.* at 576 (footnote omitted).

This section also examines the role of the CIA's organic statutes in the FOIA process. Part II presents the background of *CIA v. Sims* and discusses the two Court decisions issued in this case.¹⁷ Part III analyzes the majority Court's definition of "intelligence source" and criticizes the appropriateness of that definition in light of the facts in *Sims* and the congressional intent behind the enactment of section (b)(1) of the FOIA. The note discusses the concurring opinion, and its definition of "intelligence sources." Part IV analyzes the Court's failure to give the proper weight to section (b)(1) of the FOIA. Part V discusses the institutional conflict resulting from the Court's decision and concludes by proposing an amendment to the CIA Act to clarify the term "intelligence source."

I. THE STATUTORY FRAMEWORK

A. *The Freedom of Information Act*

While concern for an effective information disclosure act was expressed as early as 1953,¹⁸ it was not until July 4, 1966, that President Lyndon B. Johnson signed into law the Freedom of Information Act.¹⁹ President Johnson signed the FOIA hesitantly,²⁰ remarking that "this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires."²¹ This statement foreshadowed the nature of the continuing debate which would span the next two decades, reflecting the compet-

17. *Sims*, 471 U.S. 159; *Sims*, 471 U.S. at 181 (Marshall, J., concurring).

18. H.R. REP. NO. 1497, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2419. The House Report states that this first intention was evidenced by Dr. Harold L. Cross in 1953 in a report he prepared for the American Society of Newspaper Editors, which was "the first comprehensive study of [the] growing restrictions on the peoples's right to know the facts of government." *Id.* The House Report went on to say that, in his study:

Dr. Cross outlined three areas where, through legislative inaction, the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know: the 'housekeeping' statute which gives Government officials general authority to operate their agencies, the 'executive privilege' concept which affects legislative access to executive branch information, and section 3 of the Administrative Procedure Act which affects public access to the rules and regulations of Government action.

Id. For Dr. Cross' critique of the Administrative Procedure Act, see H. CROSS, THE PUBLIC'S RIGHT TO KNOW 223-28 (1953).

19. The bill signed into law was S. 1160. The legislation passed on a vote of 308 for, 0 opposed and 125 not voting. Smith, *The Freedom of Information Act of 1966: A Legislative History Analysis*, 74 LAW LIBR. J. 231, 278 (1981). For a full discussion of legislation leading up to the adoption of the FOIA, see *id.* at 260-78.

20. J. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 2.04 (1985).

21. Statement by the President Upon Signing Bill Revising Public Information Pro-

ing concerns of disclosure and confidentiality and the executive branch's commitment to protecting what it regards as information within the "national interest."²²

Congress enacted the FOIA because the previous vehicle for disclosing government held information, section three of the Administrative Procedure Act,²³ had "been used as an authority for withholding, rather than disclosing, information."²⁴ The drafters of the FOIA intended that the act serve as a "true Federal public records Act" and that public information be readily available.²⁵ At the same time, the drafters did not propose, and Congress did not adopt, a statutory requirement of complete disclosure. From the beginning, the FOIA has had nine exemptions,²⁶ authorizing the non-disclosure of information

vision of the Administrative Procedure Act, 2 WEEKLY COMP. PRES. DOC. 895 (July 4, 1966).

22. See J. O'REILLY, *supra* note 20, at § 2.04 ("At the time of passage, the Justice Department and other observers believed that the scope of executive privilege exceeded the scope of the Freedom of Information Act and that deficiencies in the protection which government documents might enjoy under the Act could be made up by claims of executive privilege for those materials.").

23. 5 U.S.C. § 1002(3) (1947).

24. H.R. REP. NO. 1497, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2421.

25. *Id.*, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 2418.

26. The text of the FOIA concerning the nine exemptions is as follows—

(b) This section does not apply to matters that are—

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

ranging from trade secrets²⁷ to geological and geophysical data.²⁸

This note examines the FOIA provisions which address the national security and statutory exemptions from the disclosure requirements; sections (b)(1) and (b)(3). The note contrasts the areas where Congress has expressly limited the information that can be released by administrative agencies under the FOIA provisions, and areas where Congress has been, for all intents and purposes, silent. Against this background, the note explores the consequences of this Congressional imprecision so well demonstrated in *Sims*.

Section (b)(1) of the FOIA exempts national security information classified pursuant to an executive order.²⁹ In the legislative history of this section of the Act, the drafters stated that information classified in such a manner “*must* be kept secret to protect the national defense or to advance foreign policy”³⁰ The applicable executive order³¹ creates three levels of classification—Top Secret; Secret; and Confidential.³² Section (b)(1) would exempt material classified under any one

(E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. § 552(b)(1)-(9) (1982). See generally Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177 (1973) (detailed discussion of the nine exemptions).

27. 5 U.S.C. § 552(b)(4).

28. 5 U.S.C. § 552(b)(9).

29. The drafters of the Act specifically cited Executive Order 10,501. The order, signed by President Dwight D. Eisenhower on November 10, 1953, listed three categories for the classification of information. These were: Top Secret, Secret and Confidential. The classification Top Secret was intended to be used “for defense information or material which requires the highest degree of protection.” For the classification of Secret, it was considered that “defense information or material the unauthorized disclosure of which could result in serious damage to the Nation” should be withheld. Lastly, in order for something to be classified as Confidential, it must be “defense information or material the unauthorized disclosure of which could be prejudicial to the defense interest of the nation.” Exec. Order 10,501, 18 Fed. Reg. 7049, 7051 (1953).

30. H.R. REP. NO. 1497, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2427 (emphasis added).

31. Exec. Order 12,065, 43 Fed. Reg. 28,949 (1978). *Sims v. CIA*, 479 F. Supp. 84, 88 (D.D.C. 1979). To determine the relevant executive order, the court should consider the final executive order “under which the agency made its ultimate classification determination.” *Lesar v. United States Dep’t of Justice*, 636 F.2d 472, 480 (D.C. Cir. 1980).

32. Exec. Order 12,065, 43 Fed. Reg. 28,949-50. Section 1-102 of the order stated,

of these categories.³³

The second relevant exemption, section (b)(3), authorizes non-disclosure of material "specifically exempted from disclosure by statute"³⁴ Thus, if Congress in a specific statute has required a federal agency to withhold certain information, the general language of the FOIA cannot be used to compel disclosure.³⁵ Section (b)(3) recognizes two types of statutes as qualifying for this exemption: those that "leave [the agency] no discretion on the issue" of public disclosure or those that establish "particular criteria for withholding" information.³⁶ Section (b)(3) is the section the CIA relies on most as a bar to the disclosure of sensitive information—requested by members of the public.³⁷

Congress has amended the FOIA on two occasions. Both amendments were congressional reactions to Supreme Court decisions narrowing the scope of the Act,³⁸ and both have broadened the scope of information available to the public.

"'Top Secret' shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Section 1-103 states, "'Secret' shall be applied only to information, the unauthorized disclosure of which could be expected to cause serious damage to the national security." Section 1-104 states, "'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security." *Id.*

33. 5 U.S.C. § 552 (b)(1) (1982).

34. 5 U.S.C. § 552 (b)(3) (1982).

35. *CIA v. Sims*, 471 U.S. 159, 181 (1985).

36. These recognitions are made by subsections (A) and (B) respectively. For a discussion on how subsections A and B were added to section three, see *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978).

37. In the following cases the court upheld the CIA's use of section (b)(3) to prevent the disclosure of sensitive national security information. *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert denied*, 445 U.S. 927 (1980); *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978); *Nat'l Comm'n on Law Enforcement & Social Justice v. CIA*, 565 F.2d 692 (D.C. Cir. 1977).

38. The two Supreme Court decisions were: *EPA v. Mink*, 410 U.S. 73 (1973) and *Robertson v. FAA*, 422 U.S. 255 (1975).

In the House Report on the 1974 amendments to the FOIA, the drafters, commenting on *Mink*, stated:

A recent Supreme Court decision held that under the present language of the Act, the content of documents withheld under section 552(b)(1)—pertaining to national defense or foreign policy information—is not reviewable by the courts under the *de novo* requirement in section 552(a)(3). The Court decided that the limit of judicial inquiry is the determination whether or not the information was, in fact, marked with a classification under specific requirements of an Executive order, and that this determination was satisfied by an affidavit from the agency controlling the information. *In camera* inspection of the documents by the Court to determine if the information actually falls within the criteria of the Executive

In 1974, Congress broadened the definition of "agency" to bring more governmental bodies within the FOIA disclosure mandate.³⁹ In 1976, Congress limited the number of administrative statutes falling under section (b)(3).⁴⁰ While not "undertak[ing] to sort out those nondisclosure statutes that it comprehended as . . . [falling] within the exemption from those that it intended to exclude,"⁴¹ Congress made clear that exemptions to the FOIA should be interpreted narrowly.⁴²

A better "balance" between the public's right to free access to information and the CIA's need for secrecy was proposed in a 1981 FOIA amendment.⁴³ Drafted by the Department of Justice on behalf of the CIA,⁴⁴ the bill would have restricted the type of information the Director of the CIA was required to release under the FOIA.⁴⁵ Yet even under that bill, the Director of CIA could not withhold information concerning utilization of "scientific or technical systems for the collection of intelligence [which dealt with] research programs which involve experimentation with or risk to the health or safety of human beings."⁴⁶ Even when the CIA was seeking specific legislation to mini-

order was specifically rejected by the Court in its interpretation of section 552(b)(1) of the Act.

H.R. REP. NO. 876, 93d Cong., 2d Sess. 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6267, 6272-73 (footnote omitted).

The legislative history went on to say: "Two amendments to the Act included in this bill are aimed at increasing the authority of the courts to engage in a full review of agency actions." *Id.* at 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 6273.

In the House Report on the 1976 Government in the Sunshine Act, the drafters stated: "*Robertson* held that exemption (3) . . . included within its ambit . . . the Federal Aviation Act of 1958 . . . which allows the FAA Administrator to withhold from the public any FAA material when he believes that a 'disclosure of such information . . . is not required in the interest of the public.'" H.R. REP. NO. 880, 94th Cong., 2d Sess. 23, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2183, 2205. The drafters concluded that the Court's decision "misconceives the intent of exemption (3)" and that only specific statutes should fall under section (b)(3). *Id.*

39. H.R. REP. NO. 876, 93d Cong., 2d Sess. 8, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6267, 6274.

40. H.R. REP. NO. 880, 94th Cong., 2d Sess. 23, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2183, 2205.

41. *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978). Congress instead left such distinctions up to the judiciary. *Id.*

42. *Id.* at 630; *Seymour v. Barabba*, 559 F.2d 806, 807-09 (D.C. Cir. 1977).

43. *The Freedom of Information Act: Central Intelligence Agency Exemptions: Hearings on H.R. 5129, H.R. 7055 and H.R. 7056, before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 2d Sess. 2 (1980)* [hereinafter *The Freedom of Information Act Hearings*].

44. See H.R. REP. NO. 726, 98th Cong., 2d Sess. pt. 1, 7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3741, 3745.

45. The Central Intelligence Agency Information Act, P.L. No. 98-477, 98 Stat. 2209 (1984).

46. *The Freedom of Information Act Hearings, supra* note 43, at 16.

mize Agency disclosure requirements, it did not suggest restricting public access to information about research programs like MKULTRA.⁴⁷

B. *The CIA's Organic Statutes*

Of the more than 135 statutes which qualify as statutes requiring non-disclosure under section (b)(3),⁴⁸ the two statutes primarily used by the CIA to withhold information are the National Security Act⁴⁹ and the Central Intelligence Agency Act of 1949⁵⁰ (hereinafter CIA Act). Considered the CIA's "organic" statutes,⁵¹ both acts instruct the Director of the CIA to protect "intelligence sources and methods from unauthorized disclosure."⁵² Thus, the meaning of "intelligence sources" is critical to the scope of the CIA's competing duties of protection of sources and of public information disclosure.

Courts have searched fruitlessly for a clear indication of the definition of "intelligence source."⁵³ Resorting to the legislative histories of the National Security Act and the CIA Act has proved unsatisfying, for the sparse record reveals little of Congress' intended meaning of the term.⁵⁴ Two conclusions do emerge clearly, however. The first is

47. *Id.*

48. *The Freedom of Information Reform Act: Hearings Before a Subcomm. of the House Comm. on Government Operations, 98th Cong., 2d Sess. 1046-54 (1985)* [hereinafter *The Freedom of Information Reform Act Hearings*] (quoting THE AMERICAN SOCIETY OF ACCESS PROFESSIONALS, THE (B)(3) PROJECT: CITATIONS BY FEDERAL AGENCIES 5-13 (1984)).

49. 50 U.S.C. § 403(d)(3) (1982), which states: "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure"

50. 50 U.S.C. § 403g (1982), which states: "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from . . . the provisions of any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency"

51. *Goland v. CIA*, 607 F.2d 339, 343 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

52. *See supra* notes 49-50. The "intelligence sources and methods" language is presumed to have the same meaning in both acts. An example of this can be found in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). In *Overstreet* the language, "engaged in commerce," used in two similar statutes, was interpreted to have the same meaning. *Id.* at 131-32.

53. In the following cases courts have had great difficulty over how to apply and define "intelligence sources." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Halperin v. CIA*, 629 F.2d 1009 (D.C. Cir. 1976); *Fitzgibbon v. CIA*, 578 F. Supp. 704 (D.D.C. 1983); *Shaw v. United States Dep't of State*, 559 F. Supp. 1053 (D.D.C. 1983); *Edwards v. CIA*, 512 F. Supp. 689 (D.D.C. 1981).

54. *See* H.R. REP. NO. 1497, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2424-25. *See also* O'REILLY, *supra* note 20, at § 13.02; M.

that the drafters of the FOIA did intend the National Security Act and the CIA Act to fall under section (b)(3).⁵⁵ The second is that the CIA Act established the parameters within which Congress expected the CIA to act.⁵⁶

HALPERIN & D. HOFFMAN, *TOP SECRET NATIONAL SECURITY AND THE RIGHT TO KNOW* (1977), which states:

The exemption for national defense and foreign policy information received very little attention during the hearings and debate on the act. Opposition to the whole idea of a Freedom of Information Act was universal within the executive branch, and since abuses in the secrecy system had not yet come to light, public concern was minimal.

Id. at 47. See also *Admiral Redman May Have Been a Navy Villain, but He Deserves a CIA Medal and a Supreme Court Apology*, FOREIGN INTELLIGENCE LITERARY SCENE, Dec. 1985, at 1. The article notes the absence of any clear legislative history concerning the meaning of "intelligence source," that the CIA was established as a solely external intelligence gathering organization, and that Chief Justice Burger's conclusion of the plain meaning of the Act was erroneous. The article concludes:

Knowing no history and reading only words, the Supreme Court came up with a theoretically plausible but historically untenable view of "sources and methods." What the Court would have us believe is that an alert, all-seeing Congress, worried about our intelligence secrets, gave CIA, entrusted CIA, helped CIA and vested in CIA what CIA needed to carry out its mission, namely, virtually unlimited power to protect all sources, no matter how commonplace and public What the Court failed to appreciate is that neither General Donovan, [Head of the Office of Strategic Services in 1944] nor any OSS official, nor any other official ever thought the agency needed such a weapon or sought it. What the Court failed to learn is that the phrase came from a person, an institution, and a body of people who simply did not want a CIA but who wanted to make sure that if such a dreaded thing came to be that at least it would be subject to a "legal compulsion to adhere to a sound [comint] security policy." It was imposed on CIA.

Id. at 7.

55. *CIA v. Sims*, 471 U.S. 159, 168 (1985). See also *Weissman v. CIA*, 565 F.2d 692, 694 (D.C. Cir. 1977); *Goland v. CIA*, 607 F.2d 339, 349-50 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980). In both cases, the courts held that the Central Intelligence Agency Act of 1949 and the National Security Act of 1947 were statutes that the drafters of the FOIA contemplated as falling under section (b)(3). The court in *Weissman* stated that: "the legislative history clearly demonstrates that both § 403(d)(3) [National Security Agency Act] and § 403(g) [Central Intelligence Agency Act] are precisely the type of statutes comprehended by exemption (b)(3)." *Weissman*, 565 F.2d at 694.

56. The first indication of the establishment of a CIA was evidenced in a Presidential Directive, Jan. 22, 1946, issued by President Harry S. Truman, 11 Fed. Reg. 1337 (1946), which stated that the purpose of the Agency was to "[a]ccomplish the correlation and evaluation of intelligence relating to the national security, and the appropriate dissemination within the Government of the resulting strategic and national policy intelligence." *Id.*

The directive went on to state: "Nothing herein shall be construed to authorize the making of investigations *inside* the continental limits of the United States. . . ." *Id.* at 1339 (emphasis added). Finally, for the first time, the Directive stated the "intelligence sources and methods" language that would later be incorporated into § 403(3) and at issue in *Sims*. "In the conduct of their activities the National Intelligence Agency and the Director of Central Intelligence shall be responsible for fully protecting *intelligence sources and methods*." *Id.* (emphasis added).

The drafters of the CIA Act desired that the intelligence gathering process should occur outside of the United States⁵⁷ and that the identities of agents operating in other countries should be protected.⁵⁸ Congress was also concerned with the danger presented by powerful, domestic centralized intelligence organizations.⁵⁹ The CIA Act was Congress' attempt to address the dual concerns of protecting the confidentiality of worldwide intelligence gathering operations⁶⁰ and of preventing "the establishment of a *Gestapo* in the United States"⁶¹ The drafters envisioned a CIA operating outside of the United States and using trained, professional operatives.⁶² Extrapolating these parameters to the definition of "intelligence sources," one can infer that the term refers to covert CIA operatives working in foreign countries.

C. *The CIA Act of 1984*

Congress has taken only limited action to define further the appropriate balance between national security and information disclosure. Although the FOIA broadened general information disclosure to the public,⁶³ it did not necessarily broaden the amount of information obtainable from the CIA under its organic statutes. In fact, Congress has narrowed what may be gathered from the CIA via the FOIA.⁶⁴

57. Commenting on the CIA Act, Senator Tydings stated: "The bill relates entirely to matters external to the United States; it has nothing to do with internal America. It relates to the gathering of facts and information beyond the borders of the United States. It has no application to the domestic scene in any manner, shape, or form." 95 CONG. REC. 6947 (1949) (statement of Sen. Tydings).

58. Senator Tydings, speaking of three Americans killed in intelligence gathering stated: "What the . . . [CIA Act of 1949] does is to seek to keep . . . [the names and identities of operatives] out of the normal accounting channels, so that they cannot be picked up through the promiscuous dissemination of information. That is the principle point of the bill." *Id.* at 4240 (statement of Sen. Tydings).

59. Senator Langer, in the hearing on the CIA Act of 1949, expressed the view that the drafters were "against the establishment of a *Gestapo* in the United States by which people may be hounded and harassed by a central bureau, or by anyone else." *Id.* at 6952 (statement of Sen. Langer).

60. *See supra* note 58.

61. *See supra* note 59.

62. Senator Tydings, discussing the nature of the proposed CIA Act and the people who would work as agents, stated: "All these men work outside the United States of America, and the bill so provides. They cannot work in the United States of America. Their functions are exclusively in foreign fields, and they are gathering, by close examination, information which it is deemed necessary for our country to have" 95 CONG. REC. 6954 (1949) (statement of Sen. Tydings).

63. *See supra* notes 23-25 and accompanying text.

64. *See infra* note 71.

In 1980, 1981, 1983, and 1984,⁶⁵ Congress considered legislation affecting either the CIA Act or the National Security Act. The first three attempts were not enacted into legislation. The most recent effort, however, the Central Intelligence Agency Information Act of 1984⁶⁶ (hereinafter CIA Act of 1984), was signed into law on October 15, 1984.⁶⁷ On that occasion, President Reagan remarked that the law "assures the public of continued access to information that is releasable."⁶⁸ The House Report on the bill⁶⁹ stressed the importance of the FOIA in maintaining faith in the government and particularly in the CIA.⁷⁰

One of the primary purposes of the CIA Act of 1984 was to release the CIA from the burden of answering frivolous FOIA requests.⁷¹ The goal was to protect "individual agents and intelligence

65. *National Intelligence Act of 1980, S. 2284: Hearings Before the Senate Select Comm. on Intelligence, 96th Cong., 2d Sess. (1980); National Intelligence Act of 1980, H.R. 7668: Hearings Before the Subcomm. on Legislation of the Permanent House Select Comm. on Intelligence, 96th Cong., 2d Sess. (1980); The Intelligence Reform Act of 1981: Hearings before the Senate Select Intelligence Comm., 97th Cong., 1st Sess. (1981).* For Congressional action in 1983 and 1984, see *infra* note 67.

66. The Central Intelligence Agency Information Act, P.L. No. 98-477, 98 Stat. 2209 (1984). The Act has been codified as 50 U.S.C. §§ 431-32 (Supp. II 1984).

67. 20 WEEKLY COMP. PRES. DOC. 1543 (Oct. 15, 1984). Briefly, the legislative background of the CIA Act of 1984 is as follows: First, the Senate Select Committee on Intelligence held hearings on June 21, 28 and October 4, 1983. *S. 1324, An Amendment to the National Security Act of 1947: Hearings before the Senate Select Comm. on Intelligence, 98th Cong., 2d Sess. (1983).* The Committee made public a report on November 9, 1983. *S. REP. NO. 305, 98th Cong., 2d Sess. (1983).* After debating the bill, the Senate passed the Act on November 17, 1983. 129 CONG. REC. S16,742-46 (daily ed. Nov. 17, 1983). In the second stage of the bill, the House version, the Subcommittee on Intelligence held its hearings on February 8, 1984, and issued its report on May 1, 1984. *H.R. REP. NO. 726, pt. 1, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE AND CONG. & ADMIN. NEWS 3741.* Also, the Government Information, Justice and Agriculture Subcommittee of the House Committee on Government Operations held its hearing on May 10, 1984 and released a report on September 10, 1984. *H.R. REP. NO. 726, pt. 2, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3778.* On September 19, 1984, the House debated and passed its version of the CIA Act of 1984, H.R. 5164, 130 CONG. REC. S12,395-97 (daily ed. Sept. 28, 1984).

68. Statement on Signing H.R. 5164 into Law, 20 WEEKLY COMP. PRES. DOC. 1543 (Oct. 15, 1984).

69. *H.R. REP. NO. 726, 98th Cong., 2d Sess. pt. 1, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3741.*

70. "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." *Id.* at 9, *reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS* at 3747.

71. The House Report stated that the purposes of the bill were:

(1) to relieve the Central Intelligence Agency from an unproductive Freedom of Information Act (FOIA) requirement to search and review certain CIA opera-

services of friendly nations”⁷² by “excluding certain specifically defined sensitive CIA operational files from the Freedom of Information Act process.”⁷³ Thus, the most prominent subsection of the Act exempted from the FOIA most of the CIA’s operational files.⁷⁴ The subsection listed the four directorates of the CIA whose operational files are exempt: Intelligence, Administrative, Operations, and Science and Technology.⁷⁵ The legislative history of the Act specifically stated that “only those files concerning intelligence sources and methods are comprehended by the definition of ‘operational files.’”⁷⁶

The Congressional debate over the scope of the CIA Act of 1984 reflected concern for the physical safety of intelligence operatives and the potential danger which disclosure might create.⁷⁷ Concerns for

tional files consisting of records which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA;

(2) to improve the ability of the Central Intelligence Agency to respond to Freedom of Information Act requests from the public in a timely and efficient manner, while preserving undiminished the amount of meaningful information releasable to the public under the Freedom of Information Act; and

(3) to provide additional assurance of confidentiality to sources who assist the United States by cooperating with the Central Intelligence Agency.

Id. at 4, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 3742.

72. *Id.* at 16, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3754.

73. *Id.* at 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3742.

74. Operational files are defined in the following manner:

For the purposes of this title the term “operational files” means-

(1) files of the Directorate of Operations which document the conduct of foreign intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or counterintelligence operations or . . . security services;

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.

50 U.S.C. § 431(b) (Supp. II 1984).

75. *Id.*

76. H.R. REP. NO. 726, 98th Cong., 2d Sess. 20, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3758.

77. In a House debate over the scope of the CIA Act of 1984, Congressman Young stated that the intent of the bill was to reassure intelligence sources that their identities would be kept confidential. 130 CONG. REC. H9625 (daily ed. Sept. 17, 1984) (statement of Rep. Young). Young discussed how an intelligence source “places his life and livelihood in the hands of the CIA when he agrees to serve as a source of information . . . for the U.S. Government.” *Id.* In his address, Congressman Young said: “We must reassure CIA sources abroad who cooperate with the CIA that the United States can keep secrets. This bill will send a message to CIA sources that they are safe in trusting the United States.” *Id.*

Thus, Congress enacted the CIA Act of 1984 to aid CIA intelligence gathering opera-

safety which are legitimate in the context of overseas operations, however, do not transfer directly to the different setting of CIA-employed scientists in domestic institutions. A weighing of the harm caused by disclosure versus the public interest in access to government held information may produce a different result depending on the activity involved and the location of that activity. Congress has not addressed these differences explicitly, however—not in the FOIA, the National Security Act, the CIA Act, or the CIA Act of 1984. Thus, the Supreme Court in *Sims* had to devise its own balancing test when it reached the conclusion that the names of the researchers and institutions involved should not be disclosed.

II. THE DECISIONS IN *CIA v. SIMS*

A. *District Court Decision*

After the CIA denied their request for information concerning the names of researchers in the MKULTRA project,⁷⁸ the requesters, exercising their rights under the FOIA, sought review of the CIA's decision in the United States District Court for the District of Columbia.⁷⁹ The district court held that because the institutions and researchers were not "intelligence sources," as defined by the National Security Act, their names were not exempt from disclosure under section (b)(3) of the FOIA and must be released to those seeking the information.⁸⁰

The court gave three reasons for its conclusion. First, it noted that "this Court cannot look to detailed agency affidavits that describe MK-ULTRA activities and thereby assure itself that the MK-ULTRA projects involved intelligence-related work."⁸¹ Second, the court noted that because details were sketchy there were no hard facts to support the conclusion that the parties involved really did constitute "intelligence sources" and that it was "apparent from the face of the Director's [Stansfield Turner of the CIA] affidavit that his definition of the institutions and researchers as intelligence sources is not well tied

tions by assuring those sources who are potentially in danger that their safety would not be compromised by public disclosure of their identities.

78. For a discussion of the MKULTRA project, see *supra* notes 6-10 and accompanying text.

79. *Sims v. CIA*, 479 F. Supp. 84 (D.D.C. 1979).

80. *Id.* at 87-88 ("[In order for the Director of the CIA to have researchers declared] 'intelligence sources'. . . [there must be] a strong and detailed showing of the work done under the auspices of MK-ULTRA or . . . by the identification of clear, non-discretionary guidelines to test whether an intelligence source is involved in a particular case.").

81. *Id.* at 87.

to particular facts and is 'potentially quite expansive.'"⁸² The court further reasoned that "[t]his definition is susceptible to discretionary application and overbroad interpretation."⁸³ Third, the court noted that the "intelligence sources" whose identity the CIA wanted to protect, represented a "case on the margin" for qualification under section (b)(3).⁸⁴ The court found it significant that these were not "CIA operatives, couriers who transport secret materials, etc. [but were mainly Americans conducting research at] American universities, with the witting or unwitting participation of American students, for a purpose which may be collateral to the main business of intelligence."⁸⁵ The court concluded that it could not endorse the CIA's contention that the parties involved were "intelligence sources . . . without a strong and detailed showing of the work done under the auspices of MK-ULTRA or, if that does not make it obvious that intelligence sources are involved, by the identification of clear, non-discretionary guidelines to test whether an intelligence source is involved in a particular case."⁸⁶ Finally the court suggested that while the names of the researchers were not classified under section (b)(3), they possibly could be classified under sections (b)(1) or (6), and delayed the effective date of its order for nearly two months to permit the Agency to consider reclassification.⁸⁷

B. *Court of Appeals Decision—Sims I*

The CIA appealed the district court's decision to the District of Columbia Circuit Court of Appeals.⁸⁸ Recognizing that the meaning of the term "intelligence source" was "ambiguous,"⁸⁹ the court held that the definition of the term should focus on the source's need for confidentiality.⁹⁰ The court looked to Congress for guidance and decided that "[i]n chartering the CIA Congress set out, not to protect

82. *Id.*

83. *Id.* (footnote omitted).

84. *Id.*

85. *Id.*

86. *Id.* at 87-88.

87. *Id.* at 88-89. The court held that normally it would not hesitate to apply section (b)(3) to CIA identified "intelligence sources" such as "CIA operatives, couriers who transport secret materials, etc." *Id.* at 87, in this present case the sources in question did not fall into the above categories, and therefore, should not be exempt. *Id.* The court, however, did allow the Agency to consider classification under section (b)(1). The court even set forward the effective date of the order to October 1, 1979. *Id.* at 88. The court made its decision on August 7, 1979, and amended on August 13, 1979. *Id.* at 84.

88. *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980).

89. *Id.* at 570.

90. *Id.*

secrecy as an end in itself, but to provide for effective collection and analysis of foreign intelligence pertinent to concerns of national security."⁹¹ Concluding that "[a]nalysis should therefore focus on the practical necessity of secrecy,"⁹² the court defined "intelligence source" to mean "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 functions effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it."⁹³

Applying its definition to the case, the court of appeals remanded it to the district court to apply the new definition of "intelligence source" to the MKULTRA researchers.

C. District Court—Decision on Remand

On remand, the district court ordered the CIA to disclose some, but not all, of the names of the MKULTRA researchers and the institutions with which they had been affiliated.⁹⁴ The district court held that those researchers and connected institutions that had expressly sought assurances of confidentiality from the CIA could continue to rely on those assurances. However, the court held that the identity of those who did not request confidentiality should be disclosed.⁹⁵

D. Court of Appeals—*Sims II*

Both *Sims* and the CIA appealed the decision of the district court on remand.⁹⁶ A new and divided panel of the court of appeals held that the district court had not properly applied the *Sims I* definition of "intelligence source" and had interpreted improperly the confidential-

91. *Id.* at 571.

92. *Id.*

93. *Id.* Chief Judge Markey dissented in part from the majority's decision. Judge Markey held that the CIA should not be allowed to procrastinate further and withhold the requested information. *Id.* at 576 (Markey, C.J., dissenting in part). The CIA was chastised by the Judge for attempting to effect an "overbroad" interpretation of section (b)(3). *Id.* The court had given the CIA an opportunity to classify the material under section (b)(1). *Id.* Judge Markey stated: "It does the Agency no injustice to remark that one who appears to have thrown down a gauntlet should not be surprised when it appears to have been picked up." *Id.* Judge Markey concluded that, where the CIA has not attempted to meet the guidelines set up by the district court, the case should not be remanded, the district court's holding in respect to section (b)(3) should be affirmed. *Id.* at 578.

94. The district court's decision on remand is unpublished. *CIA v. Sims*, 471 U.S. 159, 164 (1985) (the court ordered the names of forty-seven of the researchers released).

95. *Id.*

96. *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983), *cert. granted*, 465 U.S. 1078 (1984); 467 U.S. 1240 (1984).

ity issue.⁹⁷ In remanding the case for a second time, the court urged the district court to "begin by defining the type or types of information provided by the various researchers," and then "determine whether the CIA could reasonably expect to obtain information . . . without pledging its providers confidentiality."⁹⁸ Both the CIA and Sims petitioned the Supreme Court for review and the Court granted certiorari.⁹⁹

E. *The Supreme Court Decision*

A majority of the Supreme Court agreed with the CIA that the MKULTRA researchers and their affiliated institutions were "intelligence sources" within the meaning of the National Security Act.¹⁰⁰ Because the Act mandates that the CIA protect those sources,¹⁰¹ "the Director of Central Intelligence was within his statutory authority to withhold the names of the MKULTRA researchers from disclosure under [section (b)(3)] of the FOIA."¹⁰² Writing for the majority, then

97. *Id.* at 99. The majority opinion, written by Judge Edwards, was criticized in the concurring in part, dissenting in part, opinion of Judge Bork. *Id.* at 101 (Bork, J., concurring in part, dissenting in part). Judge Bork had difficulty with the majority's interpretation of the *Sims I* decision. Specifically, the Judge disliked the construction that a person receiving a grant of confidentiality would not be an "intelligence source" if the CIA could have obtained the same information from another source. *Id.* at 102.

Judge Edwards countered Bork's reasoning by stating that "there is the serious potential for widespread evasion of the letter and spirit of the FOIA that would be created by the rule advocated by the dissent." *Id.* at 99. He also noted that if the Agency felt that the disclosure of the names of the CIA's sources would jeopardize national security, it could have withheld them under section (b)(1). *Id.*

Bork also disagreed with Edward's statement that "the agency's desire for secrecy seems to derive principally from fear of a public outcry resulting from revelation of the details of its past conduct." *Id.* at 103 (Bork, J., concurring in part, dissenting in part) (quoting *id.* at 101). Observing that news of the MKULTRA experiments already had been made public and that the release of the names of the researchers would do little to heighten public concern, he concluded that the CIA had a nobler reason for withholding the names, such as the promise of confidentiality. *Id.* at 103. Edwards noted, on the other hand, that most of the details of the MKULTRA experiments had been destroyed, that the CIA had refused to act in classifying the identities of the researchers under section (b)(1), and that some of the details of the experiments suggest that the CIA might indeed fear public disclosure. *Id.* at 101 n.13.

Bork concluded that if he were able, he would adopt a definition of the phrase "intelligence sources and methods" that would focus "not solely on the need for secrecy in gathering information but also on the need for secrecy about what information is sought." *Id.* at 103 (Bork, J., concurring in part, dissenting in part).

98. *Id.* at 100.

99. The Supreme Court granted the CIA's petition in *CIA v. Sims*, 465 U.S. 1078 (1984) and Sims' petition in *Sims v. CIA*, 467 U.S. 1240 (1984).

100. *CIA v. Sims*, 471 U.S. 159, 174 (1985).

101. *See supra* note 50.

102. *Sims*, 471 U.S. at 173.

Chief Justice Burger conceded that “the mandate of the FOIA calls for broad disclosure of Government records”¹⁰³ but concluded that “[t]he 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.”¹⁰⁴

The Court’s affirmance of the CIA’s decision to include the names of MKULTRA researchers and affiliated institutions as CIA “intelligence sources,” protected by the National Security Act and exempt from FOIA disclosure, was premised on a fear of CIA disclosure of any kind.¹⁰⁵ The Court was concerned that public access to CIA information would chill the Agency’s intelligence gathering effectiveness.¹⁰⁶ Potential intelligence sources would have little faith in the competence of the judicial system to determine wisely whether or not to release the name of an intelligence source.¹⁰⁷

The Court in *Sims* defined an “intelligence source” broadly, as one who “provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations.”¹⁰⁸ Under this definition, the fact that the researcher provided the CIA with information relating to the “Agency’s intelligence function,”¹⁰⁹ and that fact alone, permits the Director of CIA to prevent disclosure of the researcher’s name,¹¹⁰ regardless of whether an individual researcher was promised confidentiality.

In a concurring opinion, Justice Marshall stated that the majority’s broad definition of “intelligence source” is “mandated neither by

103. *Id.* at 166 (footnote omitted).

104. *Id.* at 168-69.

105. *Id.* at 173-74.

106. *Id.* at 174-75. Chief Justice Burger offered—“[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.* at 175.

107. Chief Justice Burger stated:

We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information.

Id. at 176.

108. *Id.* at 177.

109. *Id.*

110. *Id.* The Court’s definition is not as expansive as the CIA’s (*see infra* note 113), but it is broader than the court of appeals’ and certainly broader than Justice Marshall’s. In order to come under Chief Justice Burger’s definition, there must be some relationship between the source and the CIA and that relationship must be over a national security issue.

the language or legislative history of any congressional Act, nor by legitimate policy considerations, and in fact thwarts congressional efforts to balance the public's interest in information and the Government's need for secrecy."¹¹¹ Characterizing the majority's holding as "substitut[ing] its own policy judgments for those of Congress"¹¹² Justice Marshall supplied an alternative definition of "intelligence source": those "who contribute[] information on an implicit understanding or explicit assurance of confidentiality"¹¹³ Believing that "the exemption [section (b)(3)] protects such information and material that would lead to disclosure of such information"¹¹⁴ Justice Marshall argued that only those who were promised confidentiality should come within the organic statutes.¹¹⁵

Justice Marshall also explained that the information sought by Sims and Wolfe could have been classified pursuant to an executive order and, therefore, properly withheld under section (b)(1) of the FOIA.¹¹⁶ In fact, he stated that this reading is a true reflection of the statutory scheme of the FOIA.¹¹⁷

III. ANALYSIS OF THE COURT'S DEFINITION OF "INTELLIGENCE SOURCES"

The *Sims* definition of "intelligence source" as one who "provides, or is engaged to provide information the [CIA] needs to fulfill its statutory obligations"¹¹⁸ is broad. Anyone who supplies the CIA with information may be an "intelligence source," whose identity is confidential and exempt from disclosure under the FOIA, regardless of whether the person has requested or been promised confidentiality.¹¹⁹ Although difficult to state with certainty given Congress' imprecision

111. *Id.* at 182 (Marshall, J., concurring).

112. *Id.* at 193.

113. *Id.* at 187. Justice Marshall felt that the majority's decision "adopt[ed] wholesale the Agency's definition." *Id.* at 182. Justice Marshall's statement is not accurate. The majority's definition that an "intelligence source" is one who "provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations" is not the same as the CIA's definition. *Id.* at 177. The Agency's definition is as follows: "An 'intelligence source' generally is any individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security." *Sims v. CIA*, 642 F.2d 562, 576 n.1 (D.C. Cir. 1980).

114. *Sims*, 471 U.S. at 187 (Marshall, J., concurring).

115. *Id.* at 187.

116. *Id.* at 188-89.

117. *Id.* at 188.

118. *Id.* at 177.

119. See *supra* notes 105-107 and accompanying text for the Court's discussion on the effects of intelligence gathering.

and ambivalence in the national security area, this broad definition appears contrary to the information disclosure policies of the FOIA.¹²⁰

The facts underlying the *Sims* litigation do not compel a broad reading of the term "intelligence source." The researchers were paid employees rather than volunteers. They were not covert agents operating in the field but were instead researchers in American laboratories as much as thirty-three years ago;¹²¹ they were certainly not facing "deadly peril."¹²²

Prior to the litigation, the CIA already had released the names of many of the researchers and institutions involved in, and various documents pertaining to, the MKULTRA project.¹²³ Compliance with the request for information would not realistically have exposed the MKULTRA researchers to danger,¹²⁴ nor seriously damaged national

120. See S. REP. NO. 813, 89th Cong., 2d Sess. 3, reprinted in *Freedom of Information Source Book: Legislative Materials, Cases, Articles, Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 38 (1974) [hereinafter *Freedom of Information Source Book*] which states:

It is the purpose of the present bill [FOIA] . . . to establish a general philosophy of full agency disclosure. . . .

It is not an easy task to balance the opposing interests, [full government disclosure v. agency required secrecy] but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

Id. See also *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exceptions are to be narrowly construed"); *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"); *EPA v. Mink*, 410 U.S. 73, 80 (1973) ("without question, the Act is broadly conceived").

121. The courts do not recognize the premise once an intelligence source, always an intelligence source. *Fitzgibbon v. CIA*, 578 F. Supp. 704, 719-20 (D.D.C. 1983); *Times Newspapers of Gr. Brit., Inc., v. CIA*, 539 F. Supp. 678, 683 (S.D.N.Y. 1982); *Dunaway v. Webster*, 519 F. Supp. 1059 (N.D. Cal. 1981).

122. *Sims*, 471 U.S. at 187 (Marshall, J., concurring).

123. The CIA has released 40,000 pages of material on its behavior control experiments. Copies of the documents are available for inspection at the Center for National Security Studies. *The Freedom of Information Act: Central Intelligence Agency Exemptions, Hearings on H.R. 5129, H.R. 7055, H.R. 7056, Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 125 (1980). The CIA has been urged by individual members of Congress to release the names of all of the institutions involved in the MKULTRA project. Senator Kennedy has stated: "I feel that . . . [the failure to release all of the names of the universities involved] is an incredible disservice to the innocent individuals and, I think, a disservice to the integrity of the universities unless they are notified" *Hearings on Project MKULTRA*, *supra* note 6, at 37.

124. Many of the MKULTRA researchers have not sought confidentiality. *Sims v. CIA*, 642 F.2d 562, 565 (D.C. Cir. 1980). It is noteworthy that the project ran twenty to

security.¹²⁵ Further, by permitting the CIA to withhold from the public virtually any information it obtains, the Court's overbroad definition disregards the important public interest in acquiring information necessary to review the propriety or legality of CIA operations.¹²⁶

Given the overall lack of direction by Congress, it is impossible to prove that the Court's definition incorrectly construed the Congressional intent. While its application yields a strained result in the instant case,¹²⁷ one can readily imagine situations where the Court's analysis would be entirely appropriate.¹²⁸ Given the Court's limited expertise in the national security area, one can understand, if not agree with, the caution that underlay the Court's deferential definition.

The CIA Act of 1984 would have been an excellent vehicle with which to resolve the "intelligence source" problem. Congress did not, however, address the issue or provide the needed clarifying language. The Court therefore was left largely to its own devices in its attempt to

thirty years ago and is no longer viable. *Id.* at 563-64. Therefore the effects, if any, of disclosing the researchers' names would be minimal.

Furthermore, the researchers who sought confidentiality would not face danger under either Marshall's or the *Sims II* definition. Marshall's definition calls for withholding the names of only those sources who request confidentiality. *Sims*, 471 U.S. at 186 (Marshall, J., concurring). The definition developed in *Sims I* and affirmed in *Sims II* stated that an "intelligence source" is "a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." *Sims v. CIA*, 709 F.2d 95, 97 (D.C. Cir. 1983), *cert. granted*, 465 U.S. 1078 (1984); 467 U.S. 1240 (1984). Those researchers who may have felt that they needed confidentiality, and who requested confidentiality, would have had their identities withheld under either definition.

125. Exposing CIA operatives to danger was a primary concern of the drafters of the CIA Act of 1949. *See supra* note 58.

126. *See supra* notes 68-70 and accompanying text.

127. The Court's ruling was precedent for the cases to follow, as well as a decision for the sympathetic plaintiffs in the *Sims* case. Discussing the complexity of judicial decisionmaking and the value of precedents, Justice Cardozo has written that:

It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. . . . The sentence of today will make the right and wrong of tomorrow.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

128. Assume that the CIA had contracted with a scientist in Vietnam, Iran or Libya for a number of years for work that was not "intelligence" information, and the researcher never requested nor even thought of confidentiality. As the political situation changed, it would be entirely reasonable for the CIA to protect the identity of the researcher. *See CIA v. Sims*, 471 U.S. 159, 177 (1985) ("[D]isclosure of the fact that the Agency [CIA] subscribes to an obscure but publicly available Eastern European technical journal could thwart the Agency's efforts to exploit its value as a source of intelligence information.").

define "intelligence source."¹²⁹ This case presents an instance where all three branches of government—legislative, executive, and judiciary—avoided making a clear policy choice. While the complex and varied world of intelligence gathering today¹³⁰ may make specific guidelines impractical, greater precision is both warranted and possible.

IV. THE COURT'S FAILURE TO ASSESS THE VALUE OF SECTION (B)(1)

Given the difficulties in deriving a general definition of "intelligence sources," the Court could have used section (b)(1) of the FOIA to provide a sharper, more particularized analysis of the problem before it. Designed to permit withholding of information properly classified pursuant to an executive order, section (b)(1) is the "key-stone of a congressional scheme that balances deference to the Executive's interest in maintaining secrecy with continued judicial and congressional oversight."¹³¹

Judicial review of an agency's classification decision in a section (b)(1) case is *de novo*, with the burden of demonstrating proper classification on that agency.¹³² In order to meet this burden, the agency submits affidavits discussing the nature of the requested documents and reasons for non-disclosure.¹³³ The court accords these affidavits "substantial weight"¹³⁴ when "the description in the affidavits demon-

129. Justice Marshall noted the lack of congressional guidance. *Sims*, 471 U.S. at 187 (Marshall, J., concurring).

130. See generally Laquer, *The Future of Intelligence Gathering*, SOC. SCI. & MOD. SOC'Y, Nov./Dec. 1985, at 3. The Tower Commission (see *infra* note 146), on the problems of modern covert operations, stated:

Covert activities place a great strain on the process of decision in a free society. Disclosure of even the existence of the operation could threaten its effectiveness and risk embarrassment to the Government. As a result, there is strong pressure to withhold information, to limit knowledge of the operation to a minimum number of people. . . . [I]n many respects the best test of a system is its performance under stress. The conditions of greatest stress are often found in the crucible of covert activities.

E. MUSKIE, J. TOWER & B. SCOWCROFT, REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD II-5 (1987).

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

132. *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980) (citing *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 480-81 (D.C. Cir. 1980); *Hayden v. National Security Agency/Central Security Service*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980)).

133. *Baez*, 647 F.2d at 1335 (citing *Lesar*, 636 F.2d at 481; *Ray v. Turner*, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978); *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977)).

134. *Baez*, 647 F.2d at 1335 (footnote omitted).

strates that the information logically falls within the claimed exemption and [when] the information is neither controverted by contrary evidence in the record nor by evidence of agency bad faith"¹³⁵ If the affidavits are inadequate, then the court may review the documents *in camera*.¹³⁶

A section (b)(1) analysis would have illuminated the issues in *Sims*. If undertaken, the Court would have seen that the CIA originally classified the names and institutions under this section, but later chose to declassify them.¹³⁷ The Court would have observed further that the district court gave the CIA the opportunity to reclassify the material under the relevant executive order¹³⁸ and that the CIA chose not to do so.¹³⁹

The section (b)(1) approach to the disclosure of the researchers would have focused the Court's attention on how the CIA, acting in accordance with established executive policy, has treated the information. This approach would have yielded a different result in *Sims*, where the Agency itself did not regard the information as classified, but would protect non-disclosure where the Agency has classified the documents. More important than the results in any particular case, however, is that the section (b)(1) approach has the Court and the executive branch performing more appropriate institutional roles. The executive branch makes the classification decision, based on its own expertise and information and in accordance with the procedures and standards in the executive order. The Court has the more defined and traditional role of assuring that the CIA followed the proper procedure and applied the correct standards.

135. *Baez*, 647 F.2d at 1335 (quoting *Lesar*, 636 F.2d at 481; *Hayden*, 608 F.2d at 1386-87; *Ray*, 587 F.2d at 1194-95; *Weissman*, 565 F.2d at 696-98).

136. *Baez*, 647 F.2d at 1335 (citing *Lesar*, 636 F.2d at 481; *Hayden*, 608 F.2d at 1387).

137. *Sims v. CIA*, 479 F. Supp. 84, 88 (D.D.C. 1979).

138. Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978). *Sims*, 479 F. Supp. at 88.

139. The CIA may have declined to re-classify the material because of the limit on the duration of the classification order. Normally the duration for classification is six years. However, when national security requires, the duration will be twenty years with an opportunity for extension. §§ 1-4, Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978). On the other hand, the Agency may have declined to classify because it thought that the information was not classifiable. Section 1-601 of the Executive Order states: "Classification may not be used to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization or agency, or to restrain competition." *Id.* Further, § 1-602 states: "Basic scientific research information not clearly related to the national security may not be classified." *Id.* More probably, the CIA preferred an exemption under section (b)(3) in order to forgo the procedural requirements established by section (b)(1) and by the executive order.

V. INSTITUTIONAL CONFLICT—DOES *SIMS* RESOLVE OR HEIGHTEN?

The Court's decision in *Sims* is both the product of, and a contributor to, conflicting views of the decisionmaking process among the three branches of government¹⁴⁰ with respect to foreign policy issues in general and "intelligence sources" in particular. This section of the note argues that the Court is not the proper body to provide the final definition as to who or what constitutes an "intelligence source."

The legislative branch established a broad information disclosure policy on the one hand,¹⁴¹ and insulated national security issues and agencies, on the other.¹⁴² The executive branch had at its disposal a readily available and appropriate solution of classifying information—section (b)(1). Instead of using section (b)(1), it turned to the courts for a broad definition of "intelligence source" that would exempt the CIA from most FOIA actions.¹⁴³ The Supreme Court, for its part, gave "great deference"¹⁴⁴ to the executive branch and formulated on its own an extremely broad definition of "intelligence source."¹⁴⁵

The executive branch now lacks the incentive to use the more restrained section (b)(1) for the classification of information. Because it is intimately involved in sensitive, and at times questionable activity,¹⁴⁶ this branch is institutionally biased towards the broadest read-

140. See generally Dorsen & Shattuck, *Executive Privilege, The Congress and The Courts*, 35 OHIO ST. L.J. 1 (1974).

141. S. REP. NO. 813, 89th Cong., 1st Sess. 10, reprinted in *Freedom of Information Source Book*, supra note 120, at 45.

142. For a discussion on the CIA Act of 1984, see supra Section I.C.

143. The CIA's proposed definition of "intelligence source" is "any individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security." *Sims v. CIA*, 642 F.2d 562, 576 n.1 (D.C. Cir. 1980).

144. *CIA v. Sims*, 471 U.S. 159, 179 (1985).

145. Justice Marshall claimed that the Court adopted "wholesale" the Executive-CIA's definition. *Id.* at 182 (Marshall, J., concurring).

146. The recent Iran-Contra affair provides an example of the connection between the White House's National Security Office and the CIA. The *New York Times* reported that a Mr. Clarridge of the CIA assisted Colonel North of the NSC "to circumvent the Congressional ban on aid to the Contras, well before the Administration began its secret arms deal with Iran . . ." Butterfield, *Senior Official in C.I.A. Is Linked To North's Effort on Contra Arms*, N.Y. Times, Jan. 21, 1987, at A1, col. 6. As a result of the Iran-Contra affair, President Reagan created a special review board, headed by former Senator John Tower. The board issued a report which was critical of the way the executive branch handled national security issues. Roberts, *Tower Panel Portrays the President as Remote and Confused Man*, N.Y. Times, Feb. 27, 1987, at A1, col. 6.

On the CIA's involvement in the affair, the Tower Commission stated:

Some aspects of the Iran arms sales raised broader questions in the minds of members of the Board regarding the role of CIA. . . . It is critical that the line

ing of "intelligence source."¹⁴⁷ The *Sims* definition allows the executive branch to ignore section (b)(1) and overuse section (b)(3).

The Court's decision can be interpreted as contrary to the tripartite of government. Echoing the intentions of the drafters of the Constitution,¹⁴⁸ Raoul Berger has opposed vesting the executive branch with complete control over information disclosure.¹⁴⁹ The impetus for establishing the FOIA in 1966 was the fact that the former system had been used by the executive branch to keep information from the public.¹⁵⁰ By altering the statutory scheme of section (b)(1),¹⁵¹ the Court now allows the CIA to rely solely on section (b)(3).¹⁵² Ironically, in relation to national security issues, the *Sims* decision places the executive in its pre-FOIA position.

Although it should not be so deferential to the executive branch, neither should the Court be the branch to strike the balance between

between intelligence and advocacy of a particular policy be preserved if intelligence is to retain its integrity and perform its proper function. In this instance, the CIA came close enough to the line to warrant concern.

E. MUSKIE, J. TOWER & B. SCOWCROFT, *supra* note 130, at V-6.

147. To the extent that the executive branch has an implied power to maintain confidentiality, it should be identical to the authority of the judicial and legislative branches to protect their internal decisionmaking processes. Certainly no branch of government can perform its assigned constitutional function unless employees freely voice opinions without fear of external scrutiny. It does not follow, however, that the executive power to maintain secrecy is inherently greater than that of the two other coordinate branches of government"

Dorsen & Shattuck, *supra* note 140, at 19.

148. "If we advent to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." James Madison, 4 ANNALS OF CONG. 934 (1794) (quoted in R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 265 (1974)). See generally D. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROL (1981).

149. R. BERGER, *supra* note 148, at 232-34. Berger has testified before Congress a number of times on the dangers of a too powerful Executive. *Contempt of Congress: Hearings before the House Subcomm. on Oversight and Investigations and the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 183 (1982); *Executive Privilege: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 95th Cong., 1st Sess. 36 (1975); *Congressional Review of International Agreements: Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 68 (1976).

150. See *supra* note 18.

151. Justice Marshall, in his concurrence, stated that the majority's holding "enables the Agency to avoid making the showing required under the carefully crafted balance embodied in" section (b)(1). *CIA v. Sims*, 471 U.S. 159, 189 (1985) (Marshall, J., concurring). He reasoned that under Chief Justice Burger's definition, "[n]o court may consider whether . . . information is properly classified, or whether it fits the categories of the Executive Order. By choosing to litigate under . . . [section (b)(3)], and by receiving this Court's blessing, the Agency has cleverly evaded . . . carefully imposed congressional requirements." *Id.* at 190 (footnote omitted).

152. See *supra* section IV.

disclosure and secrecy. The Court lacks the expertise to decide complex or sensitive foreign policy and national security issues¹⁵³ and decisions in these cases may involve considerations similar to political questions.¹⁵⁴ Additionally, the Court's attempt of imposing a definition tends to ignore the statutory framework of the FOIA which was "carefully crafted" by Congress.¹⁵⁵ Instead of defining "intelligence sources" under section (b)(3), the more appropriate judicial response would have been to require the CIA to utilize section (b)(1).

The branch in the best position to strike the appropriate balance is Congress.¹⁵⁶ In the past, when the Court has ruled on a FOIA issue, and when such a ruling was in conflict with the goals of Congress, that body was willing to amend legislation to effect its policies.¹⁵⁷ As the source of the FOIA, the National Security Act of 1947, the CIA Act of 1949 and the CIA Act of 1984, Congress is the branch most

153. Chief Justice Burger stated: "[J]udges . . . have little or no background in the delicate business of intelligence gathering . . ." *Sims*, 471 U.S. at 176.

154. The Court always has been reluctant to become involved in what can be termed a "political question." Speaking on the role of the Court in such issues, Chief Justice Taney stated: "And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." *Luther v. Borden* 48 (7 How.) U.S. 1, 15 (1849).

Justice Powell outlined factors for determining what constitutes a political question: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move *beyond areas of judicial expertise*? (iii) Do prudential considerations counsel against judicial intervention? *Goldwater v. Carter*, 444 U.S. 966, 998 (Powell, J., concurring) (emphasis added).

The Court has viewed many issues in the area of foreign affairs as political questions: "There are many illustrations in the field of our conduct of foreign relations, where there are 'considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.'" *Coleman v. Miller*, 307 U.S. 433, 455 (1939) (quoting *Ware v. Hylton*, 3 (3 Dall.) U.S. 164, 204 (1796)). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 109-20 (2d ed. 1983).

While the definition of "intelligence source" does not present a political question per se, it does involve similar considerations and such concerns may have influenced the Court's decision in *Sims*.

155. *Sims*, 471 U.S. at 189 (Marshall, J., concurring); see *supra* section IV.

156. From the time of the founding of the Republic, when the Court has handed down a decision contrary to the wishes of Congress, that body has responded with legislation to counter the Courts decision. During the period of 1945-1957 Congress passed new laws to overrule Court decisions at least twenty-one times. Note, *Congressional Reversal of Supreme Court Decisions*, 71 HARV. L. REV. 1324, 1336 (1958). Congress twice has amended FOIA legislation to counter Court decisions that restricted the application of the Act. See *supra* note 38.

157. See *supra* note 38 and accompanying text.

responsive to public desire for a more open government.¹⁵⁸ As drafters of the legislation which first utilized the term "intelligence source," the legislative branch is institutionally best suited to determine its meaning.

Congress should take the opportunity presented by the overbroad definition established in *Sims* to clarify the standards for information disclosure.¹⁵⁹ An amendment to the FOIA could change either section (b)(3), or the definitional section of the Act.¹⁶⁰ Such amendments, however, may be broader than necessary. The more appropriate change would be an amendment to section 403a of the CIA Act of 1949, "Definitions relating to Central Intelligence."¹⁶¹ A new paragraph defining "sources and methods" could read:

(d) "Intelligence sources and methods" means any individual, institution, or medium that provides information to the Central Intelligence Agency under an express grant of confidentiality when such grant is necessary to protect the source from danger and is mandated by the national security.

This proposed definition would give continued protection to those sources who require it, while providing access to information concerning individuals for whom confidentiality is not a necessity. It would eliminate an unnecessary veil of secrecy over the CIA and subject it to a proper measure of public accountability, while ensuring those sources who have requested confidentiality, and who require confidentiality, that their identities will not be disclosed.

158. When there was a need for more open access to government, the proponents went to Congress and not to the executive branch. See generally J. O'REILLY, *supra* note 20, at §§ 2.01-06.

159. Congress has been chastised before for its failure to act in information disclosure areas. Dr. Harold Cross, whose study on government information disclosure policies led to the formation of the FOIA states:

Congress is the primary source for relief. In *its preoccupation* with other problems it has left the field wide open for executive occupation. The time is ripe for an end to ineffectual sputtering about executive refusals of access to official records and for Congress to begin exercising effectually its function to legislate freedom of information for itself, the public, and the press. The powers of Congress to that end are not unlimited but they are extensive.

H. CROSS, *supra* note 18, at 246 (emphasis in original).

160. This tactic would amend 5 U.S.C. § 552(e), which defines only agency. The approach would not be new. As recently as the 1984 Freedom of Information Reform Act Congress proposed that an expanded definitional section be added to the Act. *The Freedom of Information Reform Act Hearings*, *supra* note 48, at 26-28.

161. This section is used as the definitional section for the CIA Act. Section 403a now defines (a) Agency, (b) Director, and (c) Government Agency. 50 U.S.C. § 403a(a), (b), & (c) (1982).

CONCLUSION

By adopting the proposed amendment, Congress would articulate explicitly an appropriate balance between the National Security Act, the CIA Acts of 1949 and 1984, and the FOIA. It would define the information that the public could obtain. The amendment would declare to those sources who do not legitimately require confidentiality that they will not be entitled to it, while continuing to assure to CIA sources that confidentiality can be obtained if desired.

The Court in *Sims* had a minimal amount of guidance in formulating its decision. The legislative history was sparse and, although the MKULTRA researchers were far from ideal "intelligence sources," the Court clearly felt the need to look beyond the facts of this case and towards future intelligence disclosure cases. It did so, as the Court tells us, with great deference to the Agency but also with the realization that, if it disagreed with the result, Congress would have the opportunity to create new legislation to reflect its policy. It is clearly now up to Congress to resolve this information disclosure conflict and restore the FOIA process.

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