

The Burger Court Opinion Writing Database

Environmental Protection Agency v. Mink
410 U.S. 73 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1973

Re: 71-909 - Environmental Protection Agency v. Mink

Dear Byron:

Please join me.

Regards,

WBB

Mr. Justice White

Copies to the Conference

Walt Jr
4/1/73

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-909

Circulated: 12-28-72

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. } On Writ of Certiorari ~~to the~~ circulated: _____
United States Court of Appeals for the District of Columbia Circuit.

[December —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executives branch."

While "classified information or material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4 (A). And it goes on to say "Material containing references to classified materials, which references do not reveal classified information, shall not be classified." *Ibid.*

The Freedom of Information Act, 5 U. S. C. § 552, does not clash with the Executive Order. Indeed the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552 (a)(3) of the Act gives the District Court "juris-

Ibid Footnote
appendix p. 5-7

4th DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas, J.

No. 71-909

Circulated:

Environmental Protection Agency et al., Petitioners, v. Patsy T. Mink et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Recirculated: 1-3-73

[December —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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Supreme Court of the United States
Washington 25, D. C.CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 18, 1973

MEMORANDUM TO THE CONFERENCE:

Re: No. 71-909 - E P A v. Mink

I am adding a new paragraph on page 1 of my dissent in this case as follows:

Henry Steele Commager, our noted historian, recently wrote: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President (witness the 'unauthorized' bombing of the North last fall and winter) are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

W. O. D.

1/2/4

5th DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas, J.

No. 71-909

Circulated:

Environmental Protection Agency et al., Petitioners, v. Patsy T. Mink et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

JAN 19 1973
Re-distributed:

[December —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U. S. C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

"The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the 'unauthorized' bombing of the North last fall and winter] are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1972

RE: No. 71-909 - Environmental Protection
Agency v. Mink et al.

Dear Byron:

In due course I shall circulate a dissent
in the above.

Sincerely,



Mr. Justice White
cc: The Conference

Please join me
JMK

1st DRAFT

SUPREME COURT OF THE UNITED STATES

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

No. 71-909

From: Brennan, J.

Circulated: 1/18/73

Environmental Protection Agency et al., Petitioners, v. Patsy T. Mink et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Recirculated: _____

[February —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U. S. C. § 552 (1970), authorizes the District Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history which distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552(a)(3)—“the court shall determine the matter *de novo* and the burden is on the agency to sustain its action”—is the procedure that Congress prescribed for both Exemptions. /5

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 27, 1972

71-909 - EPA v. Mink

Dear Byron,

I am glad to join your opinion for the Court in this case. I may write something in concurrence, but, if so, it will be very short.

Sincerely yours,

P. S.
P.

Mr. Justice White

Copies to the Conference

2nd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 71-909

Circulated: JAN 2 1973

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Recirculated:

[January —, 1973]

MR. JUSTICE STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U. S. C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552 (b)(1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense.

1 2
File
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: *Stewart, J.*
Circulated:

No. 71-909

Recirculated: JAN 19 1973

Environmental Protection Agency et al., Petitioners,
v.
Patsy T. Mink et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

MR. JUSTICE STEWART, concurring.

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One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

1st DRAFT

Circulated: 12-26-72

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U. S. C. § 552, provides that government agencies shall make available to the public a broad spectrum of information but exempts from its mandate certain specified categories of information including matters that are "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy," § 552 (b)(1), or are "interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency," § 552 (b)(5). It is the construction and scope of these exemptions that are at issue here.

I

Respondents' lawsuit began with an article that appeared in a Washington, D. C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy

minor changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
 Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

2nd DRAFT

Circulated: _____

Recirculated: 1-5-72

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

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10: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

W.H. 1/19
J. 1/19

3rd DRAFT

From: White, J.

Circulated: _____

Recirculated: 1-11-73

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

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pp 11, 19

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
✓Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

4th DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Circulated: 1-19-73

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 18, 1973

Re: No. 71-909 - Environmental Protection v. Mink

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1973

Re: No. 71-909 - Environmental Protection Agency
v. Mink

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

December 27, 1972

Re: No. 71-903 EPA v. Mink

Dear Byrd:

Please join me.

It is possible that I may write a brief concurrence on one related issue.

Sincerely,

T. F. P.

Mr. Justice White

cc: The Conference