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Case Note: Administrative Law- Renegotiation Board v. Bannercraft Clothing, Co., 415 U.S. 1 (1974)

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CASE NOTES

ADMINISTRATIVE LAW—Freedom of Information Act—Renegotiation Procedures Will Not Be Temporarily Stayed While a Controversy Over the Status of Documents Under the Information Act is Settled. *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974).

Under authority of the Renegotiation Act of 1951,[1] the federal government commenced renegotiation of defense contracts made with three respondent contractors[2] for the purpose of recapturing allegedly excess profits. In order to negotiate intelligently with the Renegotiation Board and discover the reasons for the Board's initial finding of excess profits,[3] respondents, pursuant to the Freedom of Infor-

1. Renegotiation Act of 1951, 50 U.S.C. §§ 1211-33 (1970), *as amended*, (Supp. III, 1973). Under the authority of section 1215, the Renegotiation Board promulgated numerous regulations governing the procedure determining excess profits. 32 C.F.R. § 1472.3 (1974) states that the first step is a conference between the contractor and personnel from a Regional Renegotiation Board in an attempt to reach an agreement on the amount of excess profits. If the contractor disagrees with the determination of the representative of the Regional Board, a second conference is held with a panel of the Regional Board. This panel meets with the contractor and submits its recommendations to the Regional Board as to the amount of excess profits. This recommendation may be more or less than the original determination. The Regional Board then makes its recommendation. If the contractor remains dissatisfied he can make a third appeal to the Renegotiation Board itself. A division of the Board conducts a de novo study of the case and gives its recommendations to the Board. The Board then makes its determination of the amount of excess profits, which again may be more or less than any of the previous determinations. One more attempt is made to persuade the contractor to accept this determination voluntarily. If the contractor refuses, a final order is made as to the extent of excess profits. The contractor has a right to yet one more appeal, to the Court of Claims. 50 U.S.C. § 1218 (1970), *as amended*, (Supp. III, 1973). The Court of Claims examines the controversy de novo and issues its determination as to the amount of excess profits, which again may be more or less than any of the previous determinations. *Id.*

2. The respondent contractors were Bannercraft Clothing Co., Astro Communication Laboratory, and David P. Lilly Co. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974).

3. The contractors claimed the documents were crucial if they were to bargain intelligently at the outset of the administrative process. *Id.* at 5.

mation Act,[4] requested disclosure of the various relevant documents relied upon by the Board. Citing four specific exemptions in the Information Act, the Board withheld most of the information requested.[5] Respondents successfully sued in the District Court of the District of Columbia to enjoin further renegotiation proceedings until the status of the requested documents was determined.[6] Upon

4. Freedom of Information Act, 5 U.S.C. § 552 (1970), *as amended by* (Supp. III, 1973), *and* 5 U.S.C.A. § 552 (Pamphlet Feb. 1975), makes available to the public various documents under the control of government agencies. Documents are basically divided into three groups. Under section 552(a)(1), descriptions of organization, methods, procedures, forms, instructions as to the scope of all papers, reports, substantive rules of general applicability adopted as authorized by law, and statements of general policy must be published in the Federal Register. Section 552(a)(2) states that final opinions, statements of policy, administrative staff manuals, and instructions to staff that affect the public are to be made available for public inspection. The agencies are required to keep a current index of their orders and opinions open to the public. Section 552(a)(3) provides that the remaining agency records be made available to the public upon request for "identifiable records." There are nine expressly exempt categories in the Act. *See* note 5 *infra*.

5. 415 U.S. at 6 n.4. The Board relied upon four of the nine expressly exempt categories under 5 U.S.C. § 552(b) (1970), which states in pertinent part: "This section does not apply to matters that are . . . (3) specifically exempted from disclosure by statute; (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 . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . . ." The other five exemptions in the Freedom of Information Act are for those documents that are "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of an agency. . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . (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." *Id.*

6. Bannercraft Clothing Co. v. Renegotiation Board, Civ. No. 1340 (D.D.C. 1970), *aff'd*, 466 F.2d 345 (D.C. Cir. 1972), *rev'd and remanded*, 415 U.S. 1 (1974).

consolidation of the cases, the court of appeals affirmed, the doctrine of exhaustion of administrative remedies being considered inapplicable.[7] The Supreme Court reversed and remanded,[8] holding that the Freedom of Information Act could not be used to interfere with a Renegotiation Board proceeding prior to termination of its administrative hearings and all further administrative remedies.[9]

The Freedom of Information Act of 1966 was enacted to close many of the gaps that had previously existed in the public information provisions of the Administrative Procedure Act (APA).[10] The APA had become ineffective due to its vague exemptions[11] and lack of any remedy when information was wrongfully withheld.[12] The purpose of the Information Act is to give the public prompt access to identifiable records[13] of federal administrative agencies with min-

7. Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 360 (D.C. Cir. 1972).

8. 415 U.S. 1 (1974) (5-4 decision).

9. *Id.* at 24-25.

10. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946) (codified at 5 U.S.C. § 552 (1970), *as amended by* (Supp. III, 1973), *and* 5 U.S.C.A. § 552 (Pamphlet Feb. 1975)).

11. For representative cases on the vagueness of the exemptions, see *Symposium—Access to Government Information*, 68 NW. U.L. REV. 184, 188-89 (1974). H. R. REP. No. 1497, 89th Cong., 2d Sess. (1965) stated: "In a sense, 'public information' is a misnomer for 5 U.S.C. § 1002, since the section permits withholding of Federal agency records if secrecy is required 'in the public interest' or if the records relate 'solely to the internal management of an agency.' Government information also may be held confidential 'for good cause found.' Even if no good cause can be found for secrecy, the records will be made available only to 'persons properly and directly concerned.' Neither in the Administrative Procedure Act nor its legislative history are these broad phrases defined, nor is there a recognition of the basic right of any person—not just those special classes 'properly and directly concerned'—to gain access to the records of official Government actions. Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records. The present statute, therefore, is not in any realistic sense a public information statute."

12. *See* EPA v. Mink, 410 U.S. 73 (1973).

13. 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973) states: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records . . . shall make the records promptly available to any person." *See* Long

imal difficulty.[14]

When an agency fails to produce requested documents, the party seeking production may commence an action in district court to compel disclosure.[15] The agency has the burden of proving that the documents fall within one of nine statutory exemptions.[16] Proceedings to compel disclosure are given preference in a court's docket and are to be expedited in every practical way, except as to causes the court considers of greater importance.[17]

Despite the Act's policy of requiring exemptions to be narrowly construed,[18] several courts have broadened their scope or even cre-

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v. IRS, 349 F. Supp. 871 (W.D. Wash. 1972): "The purpose of the Freedom of Information Act is to expand citizen access to government information with a minimum of difficulty." *Id.* at 873.

14. 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973) provides that if the documents are refused, a district court can order their production, and "[e]xcept as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

15. *Id.* Cognizant of the adamancy of administrative agencies in protecting their documents that substantially prevent people from "arm[ing] themselves with the power knowledge gives," Congress clearly recognized that "a government of secrecy benefits no one." S. REP. No. 813, 89th Cong., 1st Sess. 2-3, 10 (1965), *excerpt reprinted in* 111 CONG. REC. 26821-23 (1965).

16. 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973). The exemptions are to be narrowly construed. Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Tennessean Newspapers Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972); Consumers Union of the United States, Inc. v. Veterans Admin., 301 F. Supp. 786 (S.D.N.Y. 1969).

17. 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973).

18. Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971).

19. *See* Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) where it was held that documents collected for investigation purposes were exempt under 5 U.S.C. § 552(b)(7) (1970) even after the investigation was closed, and EPA v. Mink, 410 U.S. 73 (1973), where the Supreme Court denied judicial inspection of documents classified as secret.

ated new ones.[19] In *EPA v. Mink*,[20] documents prepared for the President concerning a scheduled underground nuclear test were claimed to be exempt under executive order.[21] The Supreme Court held that Congress had specifically provided for the Executive to classify documents as "Top Secret and Secret" and thus prevent judicial review.[22] Previously, a document classified as secret by executive order could be examined by a court so that factual material would be disclosed while material on questions of law and policy was exempt.[23] *Mink* held that *in camera* inspection by the court of the requested material was no longer automatic.[24] An agency now would be given "the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency."[25] The Court thus expanded the exemption which had been

20. 410 U.S. 73 (1973).

21. 5 U.S.C. § 552(b)(1) (1970) exempts documents "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy . . . ."

22. 410 U.S. at 84. The Court's broad construction of the exemption is especially surprising in view of New York Times v. United States, 403 U.S. 713 (1971), which upheld the appellants' right under the first amendment to publish the contents of a classified study entitled "History of United States Decision-Making Process on Viet Nam Policy" (commonly known as the Pentagon Papers). The Court stated that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.* at 723, *quoting* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The government thus carries a heavy burden of showing justification for the enforcement of such a restraint. *Id.* *See also* note 25 *infra.* But, freedom of the press does not specifically confer upon these people a "right to know." Johnson & Marmoek, *Classification and the Right to Know*, 17 N.Y.L.F. 814, 818 (1971).

23. Soucie v. David, 448 F.2d 1067, 1079-80 (D.C. Cir. 1971).

24. 410 U.S. at 89.

25. *Id.* at 93. Perhaps the Supreme Court has finally recognized the dangers of the "executive order" exemption being expanded too far, and has started narrowing its interpretation of it—at least in criminal cases. In United States v. Nixon, 418 U.S. 683 (1974), the President sought to withhold from a grand jury tape recordings and documents relating to his conversations with aides and advisors. He claimed an absolute privilege, absent an executive order, to withhold confidential communications be-

narrowed in earlier cases.[26] More properly, the Court should have placed a heavy burden of proof on the agency or executive branch to justify "secrecy" for national defense or foreign affairs purposes.[27] This possibly would have satisfied the narrow construction of the exemptions requirement of the Information Act.

The Supreme Court, in *Renegotiation Board v. Bannercraft Clothing Co.*,[28] continued this protective policy by requiring exhaustion of administrative remedies under the Renegotiation Act before the Information Act could be invoked.[29] The Court first considered whether the district courts had jurisdiction under the Act to enjoin agency proceedings pending resolution of an Information Act claim.[30] The court of appeals had answered affirmatively, justifying the use of the equitable power as a procedural tool to implement the

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tween high government officials and their aides and advisors, and a privilege based on separation of powers. *Id.* at 702-16. The Court rejected both claims, ruling that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide." *Id.* at 706. The same political environment prompted Congress to act. On Nov. 21, 1974, Congress overrode President Ford's veto and amended the Information Act to allow for *in camera* review by judges of national security claims, further limited investigatory-agency exemptions to ongoing technicians and cases only, and required the agency to pay the attorney fees of a successful litigant. 5 U.S.C.A. § 552 (Pamphlet Feb. 1975), *amending* 5 U.S.C. § 552 (1970).

26. 410 U.S. at 89 n.16.

27. Federal courts have been less timid when confronted with executive claims of privilege, and have used mandamus to obtain documents and *in camera* inspection to separate national secrets from national scandals. In Nixon v. Sirica, 487 F.2d 700 (1974), it was stated: " 'Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.' " *Id.* at 714, *quoting* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793 (D.C. Cir. 1971).

28. 415 U.S. 1 (1974).

29. *Id.* at 20.

30. *Id.* at 16.

Act.[31] The dissent in the court of appeals had argued that "the narrow, specific remedy" of the injunction was authorized only in Information Act cases against an agency improperly withholding nonexempt material.[32] This "narrow remedy," however, could not be expanded to enjoin agency proceedings.[33] The dissent further noted the lack of case authority in a situation where:

> [A] civil suit seeking enforcement of a statutory right wholly independent of and unrelated to any issues involved in an ongoing administrative proceeding has resulted in an order in the course of that litigation staying or otherwise interfering with the agency's proceedings.[34]

Consequently, the dissent concluded that the resolution of an Information Act claim was unrelated to the issues in the agency proceeding.[35]

The Supreme Court in *Bannercraft* discussed the general rules for determining a court's remedial jurisdiction.[36] The first line of cases cited by the Court[37] limited courts' jurisdiction and stood for the proposition that "where a statute creates a right and provides a special remedy, that remedy is exclusive."[38] The leading case is *United States v. Babcock*.[39] There, two military officers made claims against the United States under the authority of a statute which waived sovereign immunity when private property belonging to military personnel was "lost or destroyed in the military serv-

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31. Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 353 (D.C. Cir. 1972).

32. *Id.* at 364 (dissenting opinion).

33. *Id.*

34. *Id.*

35. *Id.*

36. 415 U.S. at 18-19. The language in the Information Act that was under inspection was "the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint." 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973). The Board's position was that only this specific remedy—ordering production—was available to the courts. The plaintiffs argued the inherent equitable powers of the court were in no way impaired by this language. 415 U.S. at 18-19.

37. 415 U.S. at 18-19.

38. United States v. Babcock, 250 U.S. 328, 331 (1919).

39. 250 U.S. 328 (1919).

ice . . . ."[40] The statute provided that accounting officers of the Treasury Department were to determine the amount of such loss. Their decision, in the words of the statute, was to be "held as finally determined, and shall never thereafter be reopened or considered."[41] Accordingly, the Supreme Court held that the court of claims lacked jurisdiction to hear the case since the remedy was with the Treasury Department, not the courts.[42] This rule has been continually applied where a right created by statute granted a specific remedy and where a statute limited public suits to specific cases.[43]

The Court also cited a second principle—that the district courts have full equitable powers to protect a right created by statute when there is no limitation put on that power by the statute.[44] In *Porter*

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40. *Id.* at 330. The accounting officers had ruled that Babcock's losses were "not caused by any exigency of the service, nor from a cause incident to or produced by the military service," and hence denied relief. *Id.* at 329.

41. *Id.* at 331.

42. *Id.*

43. *See* Switchman's Union of North America v. National Mediation Bd., 320 U.S. 297 (1943), where a dispute arose over which labor organization was to represent the employees of a carrier for collective bargaining purposes. After holding an election the National Mediation Board certified one organization. The other union sought a cancellation of the certification in a federal court. The Supreme Court ruled the district court lacked jurisdiction to review the Board's action. The right created by the statute granted a specific remedy for its protection in the Board. Consequently, a review by federal courts was not necessary to protect that "right." *Id.* at 301. Similarly, in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), a statute provided that the Attorney General would prosecute any violations of the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. §§ 501-644 (1970). Standing for public suits was "explicitly limited to a 'case involving a labor agreement.'" 414 U.S. at 457. While the Court in *Babcock* and *Switchman* had no jurisdiction, the Court in *National Railroad* had jurisdiction to decide any case brought by the Attorney General, but had jurisdiction to decide cases brought by members of the public only in cases involving labor disputes.

44. The broad equitable powers are usually seen as historic in nature and inherent in the power of the courts. However, some cases find justification in the All Writs Act. 28 U.S.C. § 1651(a) (1970) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See* FTC v. Dean Foods Co., 384 U.S. 597 (1966).

v. Warner Holding Co.,[45] a suit was brought under the Emergency Price Control Act of 1942[46] to enjoin the defendant from collecting excess rents and to gain restitution for rents that had already been paid in excess of the legal maximums.[47] The Supreme Court held that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[48] Here, the statute provided that the court could issue "a permanent or temporary injunction, restraining order, or other order . . . ."[49] The term "other order" was deemed to have anticipated the use of the courts' equitable jurisdiction in fashioning remedies.[50]

The Supreme Court went a step further in *Scripps-Howard Radio, Inc. v. FCC*,[51] where the power of the court of appeals to issue a stay under the Communications Act of 1934[52] was challenged, the statute being silent as to the courts' jurisdiction. The Supreme Court refused to infer a denial of the general grant of auxiliary powers to the federal courts.[53] "Where Congress wished to deprive the courts of this historic power, it knew how to use apt words."[54] Moreover, when a limitation was put on a court's equitable power, it was narrowly construed.[55] In *Mitchell v. Robert DeMario Jewelry, Inc.*,[56] the Su-

45. 328 U.S. 395 (1946).
46. 56 Stat. 23, 33 (1943).
47. 328 U.S. at 396-97.
48. *Id.* at 398. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.*
49. *Id.* at 397.
50. *Id.* at 399.
51. 316 U.S. 4 (1942).
52. 48 Stat. 1064, 1093 (1935) (codified in scattered sections of 5, 47 U.S.C.), granted review of appeals of orders granting or denying applications for or the renewal of licenses for the construction of radio stations, including the power to issue stays. In some cases, however, appeals went directly to the District of Columbia Circuit. The statute was silent as to the remedial jurisdiction of the appellate court. 316 U.S. at 8.
53. *Id.* at 11.
54. *Id.* at 17.
55. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960).
56. *Id.*

preme Court was confronted with a provision in the Fair Labor Standards Act of 1938 which deprived the courts of jurisdiction "in any action brought by the [Secretary of Labor] . . . to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquated damages in such action."[57] The employees were obligated to bring a separate civil action.[58] The Supreme Court stated that when Congress authorizes equity courts to enforce a regulatory statute, it must be assumed that Congress has "acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[59] The quoted provision was thus held to apply only to underpayments of the statutory rates to those still employed, and not to lost wages incident to a wrongful discharge.[60] Thus, the Court has insisted on exercising its broad equitable powers when a statute is broadly worded, as in *Porter*, when it is silent, as in *Scripps-Howard*, and when it is possible to read around the limitation, as in *Mitchell*. In *Bannercraft*, the Renegotiation Board argued that the language of the Information Act[61] limited the jurisdiction of the courts.[62] The Supreme Court disagreed, finding "little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."[63] But the Justices rendered this statement dictum by deciding the case on a different issue.[64]

The district courts may not interrupt a proceeding of the

57. *Id.* at 289, *quoting* Act of Oct. 26, 1949, ch. 736, § 15, 63 Stat. 919, *as amended*, 29 U.S.C. § 217 (1970).

58. 361 U.S. at 292.

59. *Id.* at 292. "The court below took as the touchstone for decision the principle that to be upheld the jurisdiction here contested 'must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.' In this the court was mistaken." *Id.* at 290 (citation omitted).

60. *Id.* at 294-95. The employees in the *Mitchell* case had been wrongfully discharged. As a result of the Court's narrow interpretation of the the statute the Secretary of Labor was allowed to collect the lost wages for the employees. Otherwise, the employees would have had to bring a separate suit.

61. Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 n.22 (1963).

62. *See* note 36 *supra*.

63. 415 U.S. at 20.

64. *Id.*

Renegotiation Board, regardless of the Information Act.[65] The Court decided that because it had never allowed interruptions of the Board's proceedings in the past, it would not allow them now.[66] The Information Act would not be permitted to affect the operation of the Renegotiation Board for any reason.[67]

For the proposition that district courts could not interfere with proceedings of the Renegotiation Board, the Court relied on a trilogy of cases, decided in the first years of the Renegotiation Act.[68] They were *Aircraft & Diesel Equipment Corp. v. Hirsch*,[69] *Lichter v. United States*,[70] and *Macauley v. Waterman Steamship Corp.*[71]

In *Aircraft*, plaintiff sought a declaratory judgment that the Renegotiation Act was unconstitutional and an injunction against further proceedings.[72] The action was dismissed because plaintiff failed to exhaust its administrative remedies (the renegotiation process) and had an adequate remedy at law (suits against its customers).[73] In *Lichter*, plaintiff failed to make a timely appeal to the Tax Court.[74] Appeal to the Supreme Court, without first appealing to the Tax Court, was prohibited.[75] In *Macauley*, plaintiff sought an injunction against further proceedings and a declaratory judgment that the contracts in dispute were not subject to the Renegotiation Act. The Supreme Court affirmed dismissal on the grounds that " 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' "[76]

All three cases found support for their holdings in the language and legislative history of the Renegotiation Act.[77] The Act provided

65. *Id.*
66. *Id.* at 22-23.
67. *Id.* at 22.
68. *Id.*
69. 331 U.S. 752 (1947).
70. 334 U.S. 742 (1948).
71. 327 U.S. 540 (1946).
72. 331 U.S. at 754.
73. *Id.* at 756.
74. 334 U.S. at 791-93. Appeal to the Tax Court has now been replaced by an appeal to the court of claims. 50 U.S.C. § 1218 (Supp. III, 1973).
75. 334 U.S. at 790.
76. 327 U.S. at 543,
77. Lichter v. United States, 334 U.S. 742, 790 (1948); Aircraft & Diesel

that the court of claims "shall have exclusive jurisdiction, by order, to determine the amount, if any, of such excessive profits . . . ."[78] The legislative history of the Act also demonstrated that the court of claims had exclusive jurisdiction to decide questions of fact and law concerning excess profits.[79] In *Aircraft* and *Macauley*, the parties attempted to use the courts to bypass and terminate administrative hearings.[80] In *Lichter*, the plaintiff attempted to appeal to a court which lacked jurisdiction when his time to appeal to the proper court had expired.[81]

In *Bannercraft*, plaintiffs were not trying to avoid or terminate administrative proceedings. Nor were they trying to appeal a final decision. Rather, respondents were attempting to stay the administrative proceedings temporarily while their rights under the Information Act were determined.[82] The Supreme Court, however, held that the Information Act was subordinate to the Renegotiation Act's "purposeful design of negotiation without interruption for judicial review."[83] Interpreting *Mink* as holding that the Information Act's purpose was disclosure to the "public,"[84] the Court curiously narrowed that term to exclude the "negotiating self-interested contractor."[85] Thus, the Court excluded private party plaintiffs and would require agency disclosure only when it will enable the "public" to become a more educated electorate.[86]

It appears that the Supreme Court incorrectly relied on the *Aircraft-Lichter-Macauley* cases as forbidding any interference by the judicial branch in Board proceedings.[87] These earlier cases had

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Equip. Corp. v. Hirsch, 331 U.S. 752, 766 (1947); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 544 (1946).

78. 50 U.S.C. § 1218 (1970), *cited in* Macauley v. Waterman S.S. Corp., 327 U.S. 540, 544 (1946).

79. Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 766 (1947); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 544 (1946).

80. *See* text accompanying notes 72-73, 76 *supra*.

81. *See* text accompanying notes 74-75 *supra*.

82. *See* text accompanying note 6 *supra*.

83. 415 U.S. at 22.

84. *Id.*; *see* EPA v. Mink, 410 U.S. 73 (1973).

85. 415 U.S. at 22.

86. *Id.* at 20. *But cf.* Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972).

87. 415 U.S. at 22.

come years before passage of the Information Act.[88] Furthermore, they were concerned with whether federal courts had jurisdiction to interfere in the Renegotiation Board's administrative proceedings to settle the question of excess profits on the merits.[89] In *Bannercraft*, however, plaintiffs were not asking for a decision on the merits. Rather, plaintiffs were willing to abide by the requisite administrative procedures. They merely sought information that would allow them to negotiate intelligently in the early stages of the administrative proceedings, and to evaluate the merits of the Board's position and the desirability of prolonging the administrative procedures (and eventually court proceedings).[90]

Having decided that the Renegotiation Act's procedures were exclusive on both the merits of the case and the collateral issues of discovery, the Supreme Court in *Bannercraft* ruled that failure to exhaust the administrative remedies of the Renegotiation Act barred judicial intervention.[91] It ignored the fact that the administrative remedies under the Information Act had been exhausted[92] and that the action was brought under the Information Act, not the Renegotiation Act.[93] Focusing on the wrong statute, the Court applied a strict version of the exhaustion doctrine. This doctrine has its exceptions.[94] To apply it in a rigid fashion is to do an injustice not only to the rule, but to the parties to the suit.[95] The purpose of allowing an agency proceeding to continue without judicial interference is to allow it to develop the necessary factual background and apply its particular expertise to the situation. By allowing the agency to continue unmolested, it is given a chance to discover and correct its own errors.[96] None of these purposes was served by denying a stay in this case. The Board had refused to produce the re-

88. *Id.* at 30 (dissenting opinion).
89. *See* text accompanying notes 68-76 *supra*.
90. 415 U.S. at 30-31 (dissenting opinion).
91. *Id.* at 20.
92. *Id.* at 30-31 (dissenting opinion).
93. *Id.*
94. *See* McGee v. United States, 402 U.S. 479 (1971); McKart v. United States, 395 U.S. 185 (1969); Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954).
95. McKart v. United States, 395 U.S. 185, 193 (1969).
96. *Id.* at 193-94.

quested documents. Whether or not there has been an unjustified refusal was a question properly raised under the Information Act.[97] Since the courts, and not the Board, have developed an expertise in implementing the Information Act,[98] it cannot be said that the courts are interfering in the exclusive jurisdiction of the Board.[99]

Unable to find any irreparable injury to respondents, the Court believed that, in general, contractors could incur only two disadvantages. Neither disadvantage would justify granting injunctive relief. The first is uncertainity in the process of negotiating.[100] Far from constituting irreparable injury, this was seen as an inherent part of the renegotiation process.[101] The other disadvantage would be increased litigation expenses if contractors appeal.[102] But the mere expense of litigation has been held not to constitute irreparable injury.[103] The Court failed to resolve the question of how the contractors were initially expected to formulate an intelligent bargaining position in the negotiations without benefit of the requested documents. The Court felt that the series of de novo reviews provided for by the Renegotiation Act, culminating with the court of claims, was sufficient protection from any injury the plaintiffs might suffer due to their lack of information. In the court of claims, where ordinary rules of discovery applied, plaintiffs might eventually be able to obtain some of the information sought.[104] Therefore, the Court reasoned, plaintiffs had an adequate remedy at law.[105]

Four Justices joined in the *Bannercraft* dissent.[106] While agreeing with the majority's dictum that the courts could fashion the neces-

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97. 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. III, 1973).

98. *Id.* It is the district courts and not the administrative agencies which implement the Information Act.

99. 415 U.S. at 31-32 (dissenting opinion).

100. *Id.* at 24.

101. *Id.* at 25.

102. *Id.* at 24.

103. Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Clark v. Lindeman & Hoverson Co., 88 F.2d 59 (7th Cir. 1937); Bradley Lumber Co. v. NLRB, 84 F.2d 97 (5th Cir. 1936).

104. 415 U.S. at 23.

105. *Id.*

106. *Id.* at 26 (dissenting opinion of Justice Douglas, with Justices Marshall, Powell, and Stewart concurring).

sary equitable remedies in enforcing the Information Act,[107] they disagreed with the view that courts could not stay agency proceedings pending settlement of an Information Act claim.[108]

The dissent argued that the *Aircraft-Lichter-Macauley* cases had been modified by the Information Act.[109] It criticized the majority's insulation of the Renegotiation Act from Information Act intrusions.[110] The purpose of the lawsuit was to resolve an Information Act problem, not a Renegotiation Act problem.[111] Because administrative remedies under the Information Act had been exhausted, the courts now had the right to enforce the Information Act to protect respondents' rights.[112] Use of the Information Act to determine the status of the documents would further the purpose of the Renegotiation Act—to resolve disputes in the appropriate agency, not the courts:

> If we take Congress' declaration of purpose seriously, then the parties are supposed to *negotiate* over excess profits at the lower administrative levels. The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiation process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law.[113]

According to the dissent, both the Renegotiation Act and the Information Act mandated a stay while the status of the documents was determined. The Renegotiation Act required the Board to "endeavor to make an agreement with the contractor . . . ."[114] Refusing to allow respondents to know the basis of the Board's position was inconsistent with this mandate. Likewise, it was the clear purpose of the Information Act to "prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or

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107. *Id.* at 29.
108. *Id.* at 30.
109. *Id.*
110. *Id.*
111. *Id.* at 26.
112. *Id.* at 30-31.
113. Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 357 (D.C. Cir. 1972).
114. 50 U.S.C. § 1215(a) (1970).

opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it."[115]

By failing to allow enforcement of the Information Act in this case, the Court limited the effect of the Act and expanded an agency exemption.[116] As a result, the Information Act applies only to certain members of the public, and can only be used after exhaustion of administrative remedies under the Renegotiation Act.[117] This makes the Information Act a "dead letter"[118] in cases involving renegotiation proceedings. If there are many more decisions like *Bannercraft*, it is likely that the entire Information Act will become a "dead letter."

James P. Donohue, Jr.

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115. S. REP. No. 813, 89th Cong., 1st Sess. 7 (1965).
116. *See* text accompanying notes 84-86 *supra*.
117. *See* text accompanying notes 91-99 *supra*.
118. 415 U.S. at 26 (dissenting opinion).