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Richard A. Kaba
University of Michigan Law School

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Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act

INTRODUCTION

The Freedom of Information Act (FOIA) was signed into law on July 4, 1966.¹ The FOIA gives “any person” the statutory right of access to government information.² Upon signing the new law, President Johnson wrote: “No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.”³ The general purpose of FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”⁴ This policy is furthered by placing the burden of proof on the agency seeking to prevent disclosure.⁵

By the early seventies, critics suggested “that the act ha[d] become

1. 5 U.S.C. § 552 (1966). The FOIA has been amended substantively twice in its history — in 1974, *see* notes 6-16 *infra* and accompanying text & Part I.B *infra*, and 1986, *see* notes 24-26 *infra* and accompanying text & Part I.C *infra*. For an exhaustive listing of both published and unpublished cases and law review articles dealing with the FOIA, *see* UNITED STATES DEPT. OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (1987).

2. 5 U.S.C. § 552(a)(3) (1982).

3. STAFF OF THE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK (Comm. Print 1974), 1 [hereinafter 1974 SOURCE BOOK].

4. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 38; S. REP. NO. 1219, 88th Cong., 2d Sess. 8 (1964), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 93.

The current Exemption 7, 5 U.S.C. § 552(b)(7) (Supp. IV 1986), provides:

[The Freedom of Information Act] does not apply to matters that are —

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosures could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5. 5 U.S.C. § 552(a)(3) (1982); S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 43. The withholding of information under one of the statutory exemptions is merely permissive. An agency may, if it so chooses and is not forbidden by other law, disclose such information. S. REP. NO. 854, 93d Cong., 2d Sess. 6 (1974), *reprinted in* HOUSE COMM. ON GOVT. OPERATIONS & SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCE BOOK 158 (J. Comm. Print 1975) [hereinafter 1975 SOURCE BOOK]; 120 CONG. REC. 17,016 (1974) (statement of Sen. Kennedy), *reprinted in* 1975 SOURCE BOOK, *supra*, at 286-87.

a 'freedom from information' law, and that the curtains of secrecy still remain[ed] tightly drawn around the business of our government."⁶ Congress in 1974 amended the FOIA over President Ford's veto and attempted to close some of the "loopholes" in the original FOIA.⁷

One "loophole" closed by the 1974 amendment was Exemption 7.⁸ This exemption, as amended in 1974,⁹ exempts from disclosure "investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records," if the disclosure of the information would create one of the harms specified by the exemption.¹⁰ Exemption 7 (1974 version) permitted an agency to withhold information which, if disclosed, would endanger pending investigations¹¹ or judicial proceedings,¹² personal privacy,¹³ confidential sources,¹⁴ investigatory techniques,¹⁵ or the life or physical safety

6. 1974 SOURCE BOOK, *supra* note 3, at 1 (emphasis added). See generally Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

7. 120 CONG. REC. 6804 (1974) (statement of Rep. Matsunaga), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 236 ("The aim of the [1974 amendment to FOIA] . . . is to correct the dangerous inadequacies [of the original FOIA] . . . as well as . . . frustrating personal experiences of many [House members] . . . in their dealings with Federal agencies."); 120 CONG. REC. 6807 (1974) (statement of Rep. Erlenborn), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 245 ("[O]ur subcommittee has discovered many instances of failure to respond to the dictates of this act and many efforts to frustrate them by delaying release of public material. The bill before us now is intended to remedy [these] problems . . ."); 120 CONG. REC. 6812 (1974) (statement of Rep. Moss), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 258 ("[I]t is the intent . . . that the Federal courts be free to employ whatever means they find necessary to discharge their responsibilities [under the FOIA]. . . . I ask for your unanimous support for this legislation which is intended to close such loopholes and make the right to know more meaningful to the American people."); 120 CONG. REC. 17,016 (1974) (statement of Sen. Kennedy), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 287 (The 1974 amendments were designed to close loopholes in the 1966 FOIA.).

8. See notes 39-40 *infra* and accompanying text.

The original Exemption 7 in the 1966 FOIA provided that the Freedom of Information Act "does not apply to matters that are . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1966).

9. Exemption 7 was further amended in 1986. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). See note 4 *supra* (text of current Exemption 7); note 10 *infra* (text of 1974 Exemption 7).

10. 5 U.S.C. § 552(b)(7) (1982). The 1974 amended Exemption 7 provided:

[The Freedom of Information Act] does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that 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, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

11. 5 U.S.C. § 552(b)(7)(A) (1982).

12. 5 U.S.C. § 552(b)(7)(B) (1982).

13. 5 U.S.C. § 552(b)(7)(C) (1982).

14. 5 U.S.C. § 552(b)(7)(D) (1982).

of law enforcement agents.¹⁶

The Supreme Court in *FBI v. Abramson*¹⁷ determined that information could be withheld under Exemption 7 (1974 version) only if a two-pronged test could be satisfied by the agency seeking to prevent disclosure. "First, a requested document must be shown to have been an investigatory record 'compiled for law enforcement purposes.' If so, the agency must demonstrate that release of the material would have one of the six results [*i.e.*, harms] specified in the Act."¹⁸

The federal courts of appeals disagree over the application of the first prong of the *Abramson* test when applying Exemption 7 to law enforcement agencies such as the FBI,¹⁹ but they generally agree on the application of the second prong of the *Abramson* test, which addresses the issue of specific harms resulting from release of the material.²⁰

The First, Second, and Eighth Circuits have held that Exemption 7 applies to *all* investigative files of the FBI regardless of whether they were compiled for law enforcement purposes (hereinafter called the "per se rule").²¹ Under the per se rule, the first prong of the *Abramson* test is automatically satisfied with respect to FBI records; the court must only determine whether their disclosure would cause one of the six harms specified in the statute. Accordingly, if the court finds that one of the specified harms will occur, the information can be withheld whether or not it was compiled for law enforcement purposes. In effect, the per se rule reads the statutory language "compiled for law enforcement purposes" out of Exemption 7 for FBI information.

The District of Columbia Circuit requires that the FBI show that the information was *actually* "compiled for law enforcement pur-

15. 5 U.S.C. § 552(b)(7)(E) (1982).

16. 5 U.S.C. § 552(b)(7)(F) (1982). The current Exemption 7(F), *supra* note 4, allows information to be withheld if the release would endanger the life or safety of any individual.

17. 456 U.S. 615 (1982). See also Note, *Administrative Law — Freedom of Information Act — Law Enforcement Exemption May Prevent Disclosure of Records Not Compiled for Law Enforcement Purposes*, 57 TUL. L. REV. 1564 (1983).

18. 456 U.S. at 622.

19. Other courts considering the first prong of the *Abramson* test have refused to choose between the two alternative interpretations. See *Doherty v. United States Dept. of Justice*, 775 F.2d 49 (2d Cir. 1985); *Friedman v. FBI*, 605 F. Supp. 306 (N.D. Ga. 1984). The Second Circuit's refusal to adopt a specific rule in 1985 is inconsistent with its adoption of the per se rule one year earlier. See *Williams v. FBI*, 730 F.2d 882 (2d Cir. 1984).

20. See generally J. FRANKLIN & R. BOUCHARD, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* §§ 1.10[1]-[6] (1987); 2 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* ch. 17 (1986); C. MARWICK, *YOUR RIGHT TO GOVERNMENT INFORMATION* 98-110 (1985). See also note 76 *infra*.

21. See *Irons v. Bell*, 596 F.2d 468 (1st Cir. 1979); *Williams v. FBI*, 730 F.2d 882 (2d Cir. 1984); *Kuehnert v. FBI*, 620 F.2d 662 (8th Cir. 1980). The First Circuit has reaffirmed its use of the per se rule in light of the 1986 amendment to Exemption 7, see notes 24-26 *infra* and accompanying text, in *Curran v. Department of Justice*, 813 F.2d 473, 474 n.1, 475 (1st Cir. 1987).

Several district courts have also applied the per se rule. See *Abrams v. FBI*, 511 F. Supp. 758 (N.D. Ill. 1981); *LaRouche v. Kelley*, 522 F. Supp. 425 (S.D.N.Y. 1981).

poses" before Exemption 7 applies (hereinafter called the "threshold rule").²² Under this threshold rule each prong of the *Abramson* test must be satisfied before the information can be withheld. In theory, if the court determines that the information was not "compiled for law enforcement purposes," it would not even reach the second prong of the test, thereby foregoing consideration of whether disclosure would cause any of the six specified harms. The standard required for the threshold test has been expressed in varying language, all of which is generally deferential towards the FBI.²³

In 1986, Congress again amended Exemption 7 of the FOIA.²⁴ Although Congress made minor language modifications to the first prong, it remains virtually unchanged so far as the threshold requirement is concerned: disclosure may still be denied for "records or information compiled for law enforcement purposes."²⁵ Congress did not offer any advice on the proper standard for the first prong of the *Abramson* test.²⁶ Therefore, the conflict among the federal courts of appeals over the first prong remains.²⁷

It is likely that most FBI investigations are for proper "law enforcement purposes" and are carried out using proper means.²⁸ There are, however, numerous examples of potentially improper law enforcement activities. The most common might include investigations motivated by political advantage or revenge, investigations directed at silencing or harassing critics, investigations employing illegal entry, illegal wiretapping, or other illegal activities, and general domestic

22. *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982); *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). The District of Columbia Circuit has reaffirmed its use of the threshold rule in light of the 1986 amendments to Exemption 7, see notes 24-26 *infra* and accompanying text, in *Keys v. United States Dept. of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987).

Several district courts have also applied the threshold rule. See *Wilkinson v. FBI*, 633 F. Supp. 336 (C.D. Cal. 1986); *Silets v. FBI*, 591 F. Supp. 490 (N.D. Ill. 1984); *King v. United States Dept. of Justice*, 586 F. Supp. 286 (D.D.C. 1983); *Founding Church of Scientology v. Levi*, 579 F. Supp. 1060 (D.D.C. 1982), *affid. sub nom. Founding Church of Scientology v. Smith*, 721 F.2d 828 (D.C. Cir. 1983); *Demetracopoulos v. FBI*, 510 F. Supp. 529 (D.D.C. 1981); *Dunaway v. Webster*, 519 F. Supp. 1059 (N.D. Cal. 1981); *Malizia v. United States Dept. of Justice*, 519 F. Supp. 338 (S.D.N.Y. 1981); *Lamont v. Department of Justice*, 475 F. Supp. 761 (S.D.N.Y. 1979); *Ramo v. Department of the Navy*, 487 F. Supp. 127 (N.D. Cal. 1979).

23. See notes 79-84 *infra* and accompanying text.

24. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). The actual amendment was contained in Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49 (1986). See note 4 *supra* (text of current Exemption 7).

25. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). The requirement for specified harms remains, although the specific language has been changed. See note 4 *supra*.

26. See notes 96-102 *infra* and accompanying text.

27. See *Curran v. Department of Justice*, 813 F.2d 473, 474 n.1, 475 (1st Cir. 1987) (reaffirming *per se* rule); *Keys v. United States Dept. of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (reaffirming threshold rule).

28. This hypothesis is probably more true today than before such legislation as the FOIA because, in part, of the increased tendency to disclose publicly improper investigations. But it is also likely that if attempts to decrease the amount of law enforcement disclosure are successful, the number of improper investigations may well increase. See also note 111 *infra*.

surveillance.²⁹

This Note examines Exemption 7 of the FOIA as it relates to FBI³⁰ information and seeks to determine the appropriate rule for the first prong of the *Abramson* test. Part I of this Note examines Exemption 7 in the 1966, 1974, and 1986 FOIAs, the judicial opinions interpreting this exemption, and the legislative histories of the 1966, 1974, and 1986 FOIAs as they relate to Exemption 7. Part II compares the per se and threshold tests in view of their practical effects and concludes that neither test is clearly superior. Part III proposes adoption of a per se rule with significant procedural changes. This modified per se rule provides that all "records or information" of the FBI are presumed "compiled for law enforcement purposes" under Exemption 7. However, when the requestor can show a "reasonable likelihood under the circumstances" that the investigation was for political or other improper purposes or was carried out by improper means, the court *must* examine the requested documents in camera³¹ to insure, if possible, that the political or other improper purpose or the use of improper means is disclosed.

I. THE 1966, 1974, AND 1986 FREEDOM OF INFORMATION ACTS

A. *The 1966 Freedom of Information Act*

The general purpose of the FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language"³² As Representative Laird pointed out, the FOIA "helps to shred the paper curtain of bureau-

29. Note, *FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations*, 65 MINN. L. REV. 1139, 1149-53 (1981). See, e.g., J. DEAN, *BLIND AMBITION* 33, 55, 135 (1976); F. MANKIEWICZ, *U.S. v. RICHARD NIXON: THE FINAL CRISIS* 92 (1975); R. NIXON, *THE MEMOIRS OF RICHARD NIXON* 388-89, 472-76, 872 (1978); D. RATHER & G. GATES, *THE PALACE GUARD* 293 (1974); B. WOODWARD & C. BERNSTEIN, *THE FINAL DAYS* 34, 51-53 (1976). See also, Shenon, *F.B.I. Papers Show Wide Surveillance of Reagan Critics*, N.Y. Times, Jan. 28, 1988, at 1, col. 3 (FBI involved in extensive surveillance over a five-year period of "hundreds of American citizens and groups opposed to the Reagan Administration policies in Central America"; FBI asserts that investigations were proper.).

30. This Note is generally limited to the application of Exemption 7 to the FBI. Agencies that have mixed purposes (*i.e.*, both law enforcement and administrative functions) must generally show, in order to employ Exemption 7, that the information requested was actually "compiled for law enforcement purposes" and that one of the specified harms would occur or would reasonably be expected to occur. Thus, such "mixed-purpose" agencies must meet the threshold standard. See, e.g., *Church of Scientology v. United States Dept. of the Army*, 611 F.2d 738, 748 (9th Cir. 1979); *Rural Hous. Alliance v. United States Dept. of Agric.*, 498 F.2d 73, 80 (D.C. Cir. 1974); *Birch v. United States Postal Serv.*, 803 F.2d 1207, 1209-10 (D.C. Cir. 1986). See also J. FRANKLIN & R. BOUCHARD, *supra* note 20, at 1-114.

31. In camera inspection of documents under the FOIA is authorized by 5 U.S.C. § 552(a)(4)(B) (1982). Such inspections are currently at the discretion of the court. See, e.g., *EPA v. Mink*, 410 U.S. 73, 93 (1973) ("Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic.").

32. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 38.

cracy that covers up public mismanagement with public misinformation, and secret sins with secret silence.”³³ The FOIA is, therefore, intended not only to give the public access to government information but also to allow the public to see how the government and public servants operate, including their mistakes and errors of judgment.³⁴

The original 1966 FOIA required the disclosure of government information unless the government agency could show that the requested information was exempt under at least one of the nine FOIA statutory exemptions.³⁵ Under the 1966 Act, Exemption 7 allowed for nondisclosure of “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.”³⁶ The interpretation of the threshold requirement of Exemption 7 was at issue in only a few cases. These cases can be divided into two groups. In the first, the courts generally applied a two-part threshold test to determine if the information was “compiled for law enforcement purposes” and, if so, examined the information to determine if disclosure would harm³⁷ the government. Only if a specific harm to the government could be found was the file exempted from disclosure.³⁸

In the second group of cases, some of which were specifically overruled³⁹ by the 1974 amendment of FOIA, the courts generally applied

33. 112 CONG. REC. 13,648 (1966) (statement of Rep. Laird), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 58.

34. *See* 120 CONG. REC. 17,038 (1974) (statement of Sen. Weicker), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 344-46 (“None of the abuses that we have seen come out of [the Watergate and related tragedies] . . . would have happened if more people, more eyes, more ears, had been on the scene.”); 112 CONG. REC. 13,650-51 (1966) (editorial from Memphis Commercial Appeal, June 16, 1966, quoted by Rep. Gridler), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 64 (“The new [FOIA] law would protect necessary secrecy but the ways of the transgressor against the public interest would be much harder.”). *See also* note 93 *infra*.

35. 5 U.S.C. § 552(b) (1966). The exemptions of the FOIA are to be narrowly construed with ambiguities to be resolved in favor of disclosure. *Weisberg v. United States Dept. of Justice*, 489 F.2d 1195, 1204-05 (D.C. Cir. 1973) (Bazelon, C.J., dissenting), *cert. denied*, 416 U.S. 993 (1974); *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); *Stern v. Richardson*, 367 F. Supp. 1316, 1319 (D.D.C. 1973); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972). *Cf.* *LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971).

36. 5 U.S.C. § 552(b)(7) (1966).

37. This second prong of the test was not specifically included in the 1966 version of Exemption 7. *See* 5 U.S.C. § 552(b)(7) (1966). Both the 1974 and 1986 versions of Exemption 7 included specific harms for which nondisclosure was appropriate. *See* notes 4 & 10 *supra*.

38. *Stern v. Richardson*, 367 F. Supp. 1316 (D.D.C. 1973). *See also* *Weisberg v. United States Dept. of Justice*, 489 F.2d 1195, 1203 (D.C. Cir. 1973) (en banc) (Bazelon, C.J., dissenting), *cert. denied*, 416 U.S. 993 (1974).

39. 1975 SOURCE BOOK, *supra* note 5, at 349. The 1974 amendment of Exemption 7 was specifically intended to overrule the following cases: *Weisberg v. United States Dept. of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 974 (1974); Center for Natl. Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). Although the legislative history does not mention

a one-part threshold test to determine if the file was "compiled for law enforcement purposes"; if the file was "compiled for law enforcement purposes," it was exempt from disclosure without further inquiry.⁴⁰ Thus under the 1966 FOIA, much government information may have been kept secret even when disclosure would not harm the government or its ability to function. It was in such an environment that the effort to amend Exemption 7 arose in 1974.

B. *The 1974 Freedom of Information Act*

The 1974 amendments to the FOIA were designed to correct various problems associated with the 1966 Act.⁴¹ Most of these amendments were directed towards procedural reform rather than substantive changes.⁴² There were, however, some substantive changes made to the FOIA, including the adoption of an amended Exemption 7, which allows nondisclosure of "investigatory records compiled for law enforcement purposes" only if disclosure would result in specific, statutory harms.⁴³

The 1974 amendment to Exemption 7 specifically overruled⁴⁴ four District of Columbia Circuit cases⁴⁵ that applied Exemption 7 in a so-called "wooden[] and mechanical[]" manner.⁴⁶ During the Senate floor debate, Senator Hart of Michigan offered the amendment to Exemption 7,⁴⁷ emphasizing that "material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes."⁴⁸ Referring to the four Dis-

Rural Hous. Alliance v. United States Dept. of Agric., 498 F.2d 73 (D.C. Cir. 1974), it seems clear that it was also overruled by the 1974 amendment. The court in *Rural Housing* indicates that its standard follows directly from the *Weisberg* and *Aspin* decisions. 498 F.2d at 79.

40. In *Weisberg v. United States Dept. of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974), the plaintiff sought to obtain FBI files concerning the assassination of President Kennedy. The court found that the FBI's files were "investigatory in nature" and "compiled for law enforcement purposes," and then added "[w]hen that much shall have been established, . . . such files are exempt from compelled disclosure." 489 F.2d at 1198. Senator Edward Kennedy later characterized this application of the standard as "wooden[] and mechanical[]" and "in direct contravention of congressional intent." 120 CONG. REC. 17,034 (1974) (statement of Sen. Kennedy), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 335.

41. See note 7 *supra*.

42. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226-34 (1978).

43. 5 U.S.C. § 552(b)(7) (1982). See note 10 *supra* (text of 1974 version of Exemption 7).

44. 120 CONG. REC. 17,039-40 (1974) (statements of Sen. Kennedy and Sen. Hart), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 349.

45. See note 39 *supra*.

46. See note 40 *supra*.

47. 120 CONG. REC. 17,033 (1974) (statement of Sen. Hart), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 332-33.

48. 120 CONG. REC. 17,033 (1974) (statement of Sen. Hart), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 333.

The Hart amendment also clarified congressional intent. Substituting the word "records" for "files" suggests that courts should consider the nature and content of the files, rather than the "label" attached to them by the agency, in applying the Exemption. 120 CONG. REC. 17,034

trict of Columbia Circuit cases,⁴⁹ Senator Hart indicated that the court's interpretation of Exemption 7 erected a "stone wall" against public access to any material in an investigative file.⁵⁰ Significantly, the specific harms for which nondisclosure would be appropriate are included in the statutory language of the 1974 amended Exemption 7. Thus, the court in applying Exemption 7 is "require[d] . . . to 'loo[k] to the reasons' for allowing withholding of investigatory files before making [its] decisions."⁵¹

The 1974 amendment made other substantive changes in the FOIA that are useful in considering Exemption 7. A new sentence, explicitly allowing for the disclosure of a "segregable portion" of documents, was added to the FOIA section containing the nine statutory exemptions. This addition allows documents to be released after subject matter falling within the nine statutory exemptions is deleted.⁵² Furthermore, the use of in camera inspection of documents by the examining court was explicitly made available for Exemption 1, which relates to national security-related information.⁵³ Before 1973, Congress intended that in camera inspection be available for *all* documents sought under the FOIA regardless of the exemption claimed by the agency.⁵⁴ But in 1973 the Supreme Court held, in *EPA v. Mink*,⁵⁵ that in camera inspection was not permissible for documents falling within Exemption 1.⁵⁶ The 1974 amendment specifically overruled *Mink* and

(1974) (statement of Sen. Kennedy), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 336 ("[I]t is Congress[ional] intention for courts to look behind classification markings . . . [or] investigation mark[s] stamped on a file folder."). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 229-30; Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 800, 807 (1967).

49. *See* note 39 *supra*.

50. 120 CONG. REC. 17,033 (1974) (statement of Sen. Hart), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 332.

51. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 230 (1978). *See* 5 U.S.C. § 552(b)(7) (1982); 120 CONG. REC. 17,034 (1974) (statement of Sen. Hart), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 334 ("Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and . . . we wish to reinstall it as the basis for access to information.").

52. 5 U.S.C. § 552(b) (1982); S. REP. NO. 854, 93d Cong., 2d Sess. 31 (1974), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 183.

53. 5 U.S.C. § 552(b)(1) (1982).

54. 120 CONG. REC. 17,019 (1974) (statement of Sen. Kennedy), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 294; S. REP. NO. 854, 93d Cong., 2d Sess. 28-29 (1974), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 180-81.

55. 410 U.S. 73, 81 (1973) (request was for documents classified as "secret" or "top-secret," relating to an underground nuclear test; court held that Exemption 1 did not allow in camera inspection of the classified documents to "sift out . . . 'non-secret components'").

Amended Exemption 1 now allows the court to inquire into whether the documents were properly classified. 5 U.S.C. § 552(b)(1) (1982).

56. H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 8-9, 12 (1974), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 225-26, 229; 120 CONG. REC. 6816 (1974) (statement of Rep. Drinin), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 270; 120 CONG. REC. 17,017 (1974) (statement of Sen. Kennedy), *reprinted in 1975 SOURCE BOOK*, *supra* note 5, at 287-88.

confirmed congressional approval of the general use of in camera inspection where appropriate.⁵⁷ Both of these changes support the proposition that the basic congressional intent concerning the FOIA is to ensure that the emphasis is on disclosure.

As discussed earlier, the Supreme Court in *FBI v. Abramson* adopted a two-pronged test for the 1974 Exemption 7: a requested document must "have been an investigatory record 'compiled for law enforcement purposes,' " and the release of the material must result in one of the six specified harms.⁵⁸ However, the issue in *Abramson* was whether FBI information originally compiled for "law enforcement purposes" loses its Exemption 7 status when it is later reproduced or summarized in a new document prepared for political purposes.⁵⁹ The issue of interest to this Note, the proper standard for the first prong of the *Abramson* test when the FBI file is not originally compiled for law enforcement purposes, was not before the Court in that case.

1. *Judicial Interpretation of the First Prong of the Abramson Test* — *The Per Se Rule*

The lower courts have differed in their application of the first prong of the *Abramson* test. Some courts have followed the per se rule in applying Exemption 7 to FBI files, holding that all "investigatory records" of the FBI, whether *actually* compiled for "law enforcement purposes" or not, are assumed to be "compiled for law enforcement purposes" in applying Exemption 7 to FBI files.⁶⁰ The first prong of the *Abramson* test therefore is not even considered under the per se rule; the court's only inquiry relates to whether disclosure would result in one of the six specified harms. At least when dealing with government agencies such as the FBI, courts applying the per se rule generally believe that the phrase "law enforcement purpose" in Exemption 7 is "a description of the type of agency [to which] the exemption is aimed."⁶¹

In *Irons v. Bell*,⁶² the leading per se rule case, the plaintiff (a student activist, civil rights organizer, and draft resister during the 1960s)

57. S. REP. NO. 854, 93d Cong., 2d Sess. 17 (1974), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 169 (The amendment was to "make clear the congressional intent — implied but not expressed in the original FOIA — as to the availability of in camera examination in *all* FOIA cases.").

58. *FBI v. Abramson*, 456 U.S. 615, 622 (1982).

59. The Supreme Court held that such information "continues to meet the threshold requirements" of being "compiled for law enforcement purposes." 456 U.S. at 632.

60. This standard was first proposed under the 1974 version of Exemption 7. Courts applying the per se rule under the current exemption would likely hold that all "records or information" of the FBI, whether *actually* "compiled for law enforcement purposes" or not, are to be considered "compiled for law enforcement purposes" in applying Exemption 7 to FBI information. See *Curran v. Department of Justice*, 813 F.2d 473, 474 n.1, 475 (1st Cir. 1987).

61. *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979). See also note 30 *supra*.

62. 596 F.2d 468.

sued to obtain FBI documents relating to himself.⁶³ The district court ruled that the documents represented “routine monitoring of various activities . . . [and were] unfocused domestic monitoring for purposes deemed generally prophylactic and were not generated ‘for law enforcement purposes’ within the meaning of [Exemption 7]”⁶⁴ and, therefore, were not covered by Exemption 7.⁶⁵ The First Circuit reversed, noting that the failure of the FBI “to establish such a [law enforcement] purpose was not a germane factor.”⁶⁶ The court of appeals suggested that the documents were compiled without “even a colorable claim to law enforcement purpose”⁶⁷ but concluded that the lack of law enforcement purpose did not make Exemption 7 inapplicable. The court remanded the case to determine if disclosure “would tend to reveal the identity of a confidential source,”⁶⁸ and strongly suggested in camera inspection because “[w]here available facts tend to show the existence of the very overreaching [by the FBI that] Congress intended to expose by amending Exemption 7 [in 1974], a court should use special caution to insure that the limited exemptions from exposure are not used to defeat Congressional purpose.”⁶⁹

Courts have articulated four policy arguments supporting the per se rule. First, the FBI would be seriously harmed if information, fitting within one of the six specified criteria or harms, was disclosed because the information was compiled for purposes other than law enforcement. For example, in *Irons v. Bell* the court pointed out that disclosure of an informer’s identity, which normally would be exempt under Exemption 7, would be an “‘unwarranted invasion of personal privacy’ . . . [and] would harm innocent individuals who had no way to test the legality of an FBI investigation.”⁷⁰ Furthermore, such disclosures “would cost . . . society the cooperation of those [informers] who give the FBI information under an express [or implied] assurance of confidentiality.”⁷¹ Second, these courts assert, generally without supporting empirical data, that the unlawful purposes of the FBI in such cases will be made public whether or not the actual, detailed information is disclosed.⁷² Third, the FOIA should not “define and pro-

63. 596 F.2d at 469. The FBI actually released most of the requested documents prior to the suit; however, everything except the plaintiff’s name was blacked out. 596 F.2d at 470.

64. 596 F.2d at 470.

65. 596 F.2d at 469.

66. 596 F.2d at 471.

67. 596 F.2d at 472 (“Those documents lacking even a colorable claim to law enforcement purpose present us with a difficult and novel issue.”).

68. 596 F.2d at 476.

69. 596 F.2d at 476. This approach is similar to the modified per se rule proposed in Part III *infra*.

70. 596 F.2d at 474.

71. 596 F.2d at 474.

72. This argument is difficult to either support or refute since it is impossible to determine just how many instances where the unlawful purpose or activity occurs but is not made public.

vide sanctions" for improper FBI activities. Rather, congressional action should provide the necessary sanctions.⁷³ Finally, it would be difficult to define workable standards to distinguish between a "colorably justifiable investigation" and a bogus investigation.⁷⁴

2. *Judicial Interpretation of the First Prong of the Abramson Test — The Threshold Rule*

Under the threshold rule of Exemption 7, the FBI must first show that the "investigatory records" were "compiled for law enforcement purposes."⁷⁵ If the FBI can meet this threshold requirement *and* can then show that one of the six specific harms would occur or "could reasonably be expected"⁷⁶ to occur, the information is exempt from disclosure under the FOIA. If, however, the FBI cannot meet this threshold requirement, the presence of one of the six specific statutory harms is, in theory, immaterial and the information must be disclosed (unless it can properly be exempted under one of the other FOIA exemptions⁷⁷). In applying this threshold rule, courts look to the *purpose* of the investigation and not to the *methods* of the investigation. Thus if the investigation was for a proper "law enforcement purpose," the fact that illegal methods were employed is of no significance in applying the threshold requirement of Exemption 7.⁷⁸

Society is only aware of those cases that are made public. The court in *Irons v. Bell* notes that the "questionable character of FBI practices has been made public through the disclosures already made." 596 F.2d at 474. Although the "questionable character of the FBI practices" was disclosed in *Irons v. Bell*, there is no assurance that the *per se* rule, as currently implemented, would routinely expose such illegal or questionable activities. The requirement of *in camera* inspection in cases where the plaintiff could show a "reasonable likelihood in view of the circumstances" of the investigation being for political or other improper purposes or employing improper means would substantially increase the probability of the questionable character being disclosed. *See* text at notes 126-30 *infra*.

73. *Irons v. Bell*, 596 F.2d at 474 n.13.

74. 596 F.2d at 474.

75. This standard was first proposed under the 1974 version of Exemption 7. Courts applying the threshold rule under the current exemption would require that the FBI first show that the "records or information" were "compiled for law enforcement purposes." *See Keys v. United States Dept. of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987).

76. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). The addition of the "could reasonably be expected" language in the specific harms tests for several of the subsections of Exemption 7 may not represent a significant change in the standard for each specific harm. *See* 132 CONG. REC. S14299-300 (daily ed. Sept. 30, 1986) (the second of two letters labeled "Exhibit 1" from R. Ehlke, Congressional Research Service, Library of Congress, analyzing the substitution of "could reasonably be expected to" for "would" in several subsections of Exemption 7); J. FRANKLIN & R. BOUCHARD, *supra* note 20, at 1-117; Reporters Comm. for Freedom of the Press v. United States Dept. of Justice, 816 F.2d 730, 738 (D.C. Cir. 1987) ("The 1986 amendment to FOIA, which substituted 'could reasonably be expected to' for 'would' in Exemption 7(C), relieves the agency of the burden of proving to a certainty that release will lead to an unwarranted invasion of personal privacy, but does not otherwise alter the test."). *See also* note 85 *infra*.

77. 5 U.S.C. § 552(b)(1)-(6), (8), (9) (1982).

78. *Pratt v. Webster*, 673 F.2d 408, 422 (D.C. Cir. 1982). *See* text at note 149 *infra* for treatment of both purpose and methods of the investigation under the new, proposed standard for the threshold requirement.

Numerous statements of the standard used in the threshold rule have been presented. In general, they are very deferential to the FBI.⁷⁹ For example, in *Pratt v. Webster* the standard required that the FBI's investigatory activities be "related to the enforcement of federal laws or to the maintenance of national security"⁸⁰ and that this relationship be "based on information sufficient to support at least 'a colorable claim' of its rationality."⁸¹ The standard used in *Lamont v. Department of Justice* required only a "good faith belief that the subject may violate or has violated federal law."⁸² A "sufficient connection between the conduct of the investigation and legitimate concerns for maintaining national security" was required to meet the threshold rule in *Ramo v. Department of the Navy*.⁸³ Not only do these cases show that the threshold rule, as currently applied, is deferential to the FBI, but also that it is in fact difficult to set out standards for distinguishing between proper and improper investigatory purposes.⁸⁴

C. The 1986 Freedom of Information Act

Congress recently complicated this debate by further amending the FOIA, including Exemption 7, in 1986. As amended, Exemption 7 now provides that an agency can withhold "records or information compiled for law enforcement purposes" if one of six listed harms would occur or "could reasonably be expected" to occur.⁸⁵ These and other changes in the 1986 FOIA are generally rather minor.⁸⁶ Most

79. The legislative histories of both the 1966 Act and the 1974 amendments tend to support this deferential approach. See note 90 *infra*. At least one court has employed a less deferential standard. In *Stern v. FBI*, where the FBI was investigating its own employees, the investigation was required to focus "directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanction." 737 F.2d 84, 89 (D.C. Cir. 1984) (quoting *Rural Hous. Alliance v. United States Dept. of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1974)).

80. 673 F.2d at 420.

81. 673 F.2d at 421.

82. 475 F. Supp. 761, 773 (S.D.N.Y. 1979).

83. 487 F. Supp. 127, 131 (N.D. Cal. 1979). Other courts have also employed deferential standards for the first prong. Only "a minimal showing that the activity which generated the documents was related to the agency's function" was required in *Dunaway v. Webster*, 519 F. Supp. 1059, 1076 (N.D. Cal. 1981). And, the law enforcement agency had to "demonstrate at least 'a colorable claim of a rational nexus' between activities being investigated and violations of federal laws" in *Malizia v. United States Dept. of Justice*, 519 F. Supp. 338, 347 (S.D.N.Y. 1981). The standard was satisfied in all of the cases cited in notes 80-83 *supra*.

84. See note 74 *supra* and accompanying text.

85. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). See note 4 *supra* (complete text of the current Exemption 7). In the current Exemption 7 only subsections 7(A), 7(C), 7(D), and 7(F) contain the "could reasonably be expected to [occur]" language; subsections 7(B) and 7(E) retain the "would [occur]" language from the 1974 version. See also J. FRANKLIN & R. BOUCHARD, *supra* note 20, at §§ 1.10-1.10[6]; note 76 *supra*.

86. The six specific harms included in the current Exemption 7 include the following: interference with an enforcement proceeding; deprivation of the right to a fair trial; "unwarranted invasion of personal privacy"; disclosure of "the identity of a confidential source"; disclosure of "techniques and procedures for law enforcement investigations"; and endangerment of "the life

significantly, the 1986 amendment to Exemption 7 does not appear to have changed the two-pronged *Abramson* test.⁸⁷

D. *The Legislative History*

Although the legislative histories of the 1966 Act and the 1974 amendment are extensive, neither specifically discusses the threshold requirement of Exemption 7. And the legislative history of the 1986 amendment⁸⁸ specifically indicates that the latest amendment was not intended to change the two-pronged test under *Abramson*, although it does not indicate which test is actually appropriate for the first prong.⁸⁹ There are, however, some general principles and guidelines evident in the histories that aid the analysis of the threshold requirement.

While Congress was concerned about disclosure of sensitive FBI information, it nonetheless intended the maximum possible disclosure of nonsensitive FBI documents. The legislative histories of the 1966 Act and, especially, the 1974 and 1986 amendments suggest that FBI records should receive special consideration under Exemption 7 because of the nature of the information and the FBI's legitimate law enforcement role. Congress recognized that at least some government operations required secrecy; and the FBI was given as an example of an agency that required some level of secret operation.⁹⁰ This defer-

or physical safety of any individual." 5 U.S.C. § 552(b)(7) (Supp. IV 1986). The changes in the specific harms listed in Exemption 7 do not affect the analysis presented in this Note.

The 1986 amendment also changed "investigatory records" to "records or information" in the threshold language of Exemption 7. Compare Exemption 7 (1974 version), *supra* note 10, with Exemption 7 (1986 version), *supra* note 4; see notes 99-102 *infra* and accompanying text. The 1986 amendment also made several additions that directly impact law enforcement agencies such as the FBI. These changes effectively allow the FBI to indicate that no record exists where the acknowledgment of the record's existence "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(c)(1) (Supp. IV 1986). See generally J. FRANKLIN & R. BOUCHARD, *supra* note 20, at §§ 1.10-1.10[6]; Note, *Developments Under the Freedom of Information Act — 1986*, 1987 DUKE L.J. 521, 524-29.

There were also changes made to the fee and fee waiver structure of the FOIA in the 1986 amendments. 5 U.S.C. § 552(a)(4)(A) (Supp. IV 1986). See also J. FRANKLIN & R. BOUCHARD, *supra* note 20, at § 1.13; Note, *supra*, at 529-34.

87. See notes 96-102 *infra* and accompanying text.

88. There were no Senate or House Reports issued with the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986), which contained the 1986 amendment to Exemption 7. 1986 U.S. CODE CONG. & ADMIN. NEWS 5393. But Senator Leahy indicated on the Senate floor during passage of the Anti-Drug Abuse Act that

[t]he language of these amendments [to Exemption 7] is identical to that proposed in section 10 of S[enate Bill] 774. . . . The meaning and intended effect of the amendments was carefully explained in the report of the Senate Judiciary Committee on S[enate Bill] 774: Senate Report 98-221. This report sets out the legislative history which should be consulted to determine the scope of the section we are adopting in this bill.

132 CONG. REC. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

89. See note 102 *infra* and accompanying text.

90. In discussing the 1966 FOIA, it was noted in at least two Senate reports that, although the FOIA reflects "a broad philosophy of 'freedom of information,'" the Act "is also necessary for the very operation of our Government to allow it to keep confidential certain material, such

ence to FBI records could be accomplished under either the per se rule, with its complete deference to the FBI on the first prong of the *Abramson* test,⁹¹ or the threshold rule, with its deferential standards.⁹² But not *all* FBI activities were to be kept secret. Congress also wished to expose overreaching and illegal activities of the FBI while at the same time preserving the effectiveness of the FBI in carrying out its legitimate law enforcement role. At the time of the 1974 amendment to Exemption 7, Congress was clearly aware of, and concerned about, Watergate and related activities.⁹³ Furthermore, Congress believed that the amended Exemption 7 would at least help prevent such occurrences.⁹⁴ As a general principle, Congress intended that the exemp-

as the investigatory files of the Federal Bureau of Investigation." S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 38; S. REP. NO. 1219, 88th Cong., 2d Sess. 8 (1964), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 93. During debate in the House it was also noted that the 1966 FOIA "prevents the disclosure . . . of 'sensitive' Government information such as FBI files . . ." 112 CONG. REC. 13,659 (1966) (statement of Rep. Gallagher), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 82.

In discussing the 1974 Hart amendment to Exemption 7, *see* note 48 *supra*, a general concern was apparent for the FBI and its legitimate law enforcement role. Senator Weicker noted that the amended Exemption 7 did not throw "the FBI open to the mob . . . [as the amendment] is very restrictive and specific." 120 CONG. REC. 17,039 (1974) (statement of Sen. Weicker), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 348. Senator Kennedy indicated that the amended Exemption 7 was "specific about safeguarding the legitimate investigations that would be conducted by the Federal agencies and also the investigative files of the FBI." 120 CONG. REC. 17,039 (1974) (statement of Sen. Kennedy), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 349. Senator Hart, the sponsor of the amended Exemption 7, noted that it "was carefully drawn to preserve every [conceivable] reason the [FBI] might have for resisting disclosure of material in an investigative file . . . [M]y amendment more than adequately safeguards against any problem which might be raised for the [FBI]." 120 CONG. REC. 17,040 (1974) (statement of Sen. Hart), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 351.

The 1986 FOIA amendment also spoke to congressional concern for the FBI. *See* note 102 *infra* and accompanying text.

See also Binion v. United States Dept. of Justice, 695 F.2d 1189, 1193 (9th Cir. 1983); Pratt v. Webster, 673 F.2d 408, 417-19, 421 (D.C. Cir. 1982); Irons v. Bell, 596 F.2d 468, 474-75 (1st Cir. 1979); Wilkinson v. FBI, 633 F. Supp. 336, 342-43 (C.D. Cal. 1986); Ramo v. Department of the Navy, 487 F. Supp. 127, 131 (N.D. Cal. 1979).

91. *See* notes 60-61 *supra* and accompanying text.

92. *See* notes 79-84 *supra* and accompanying text.

93. *See, e.g.*, 120 CONG. REC. 17,016 (1974) (statement of Sen. Kennedy), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 285 ("We have seen too much secrecy in the past few years: . . . secret campaign contributions, secret domestic intelligence operations, . . . secret White House spying operations . . ."); 120 CONG. REC. 17,038 (1974) (statement of Sen. Weicker), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 344 (An effective FOIA might have prevented "many of the abuses which we place under the heading of Watergate . . ."); 120 CONG. REC. 34,168 (1974) (statement of Rep. Thompson), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 393-94 (The 1974 FOIA is "the first major step forward in helping to restore the confidence of the American people in the institutions of government by purging the body politic of the secrecy excesses which marked the sordid Watergate coverup during the Nixon administration."); 120 CONG. REC. 36,867 (1974) (statement of Sen. Kennedy), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 440 ("[N]ot even the FBI should be placed beyond . . . the freedom of information law. Watergate has shown us that unreviewability and unaccountability in Government agencies breeds [sic] irresponsibility of Government officials.").

94. *See generally* note 34 *supra*; S. REP. NO. 1219, 88th Cong., 2d Sess. 8 (1964), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 93 (One of the purposes of the FOIA was to prevent information from being withheld "only to cover up embarrassing mistakes or irregularities.");

tions be narrowly construed in order to encourage disclosure.⁹⁵

In 1986 Congress further amended Exemption 7,⁹⁶ but it did not clarify which test courts should apply to determine the appropriate balance between disclosure and nondisclosure. The primary purpose of this amendment was to "fine-tune"⁹⁷ Exemption 7 to address concerns that "the confidentiality of informants and sensitive law enforcement investigations is jeopardized by FOIA disclosures."⁹⁸ The 1986 amended Exemption 7 does contain new language for the threshold requirement — "records or information" has replaced the "investigatory records" language of the 1974 amendment;⁹⁹ but the language associated with the threshold rule remains essentially unchanged,¹⁰⁰ so that any "records or information" withheld under Exemption 7 must still have been "compiled for law enforcement purposes."¹⁰¹ Not only

120 CONG. REC. 17,038 (1974) (statement of Sen. Weicker), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 344 (An effective FOIA, as amended in 1974, might have prevented "many of the abuses which we place under the heading of Watergate" by bringing such activities to the attention of Congress and the American public at an earlier date.); 120 CONG. REC. 17,038 (1974) (statement of Sen. Hart), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 346 ("[T]here is an obligation and a duty and a right of a government to survive. But survival for a society such as ours hinges very importantly on the access that a citizen can have to the performance of those he has hired."); 120 CONG. REC. 17,039 (1974) (statement of Sen. Weicker), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 347-48 (The 1974 amendment of Exemption 7 was designed, in part, to "deal . . . with the lawless elements within the Federal Bureau of Investigation . . ."). See also note 93 *supra*.

95. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 38; S. REP. NO. 1219, 88th Cong., 2d Sess. 8 (1964), *reprinted in* 1974 SOURCE BOOK, *supra* note 3, at 93; S. REP. NO. 854, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1975 SOURCE BOOK, *supra* note 5, at 158. See, e.g., *Kuehnert v. FBI*, 620 F.2d 662, 665 (8th Cir. 1980); *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949-50 (D.C. Cir. 1979); *Diamond v. FBI*, 532 F. Supp. 216, 220 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984).

96. See note 24 *supra*.

97. S. REP. NO. 221, 98th Cong., 1st Sess. 2 (1983). Senate Report No. 221, printed in 1983, became the legislative history for the 1986 amendment by incorporation by reference. See note 88 *supra*.

98. S. REP. NO. 221, 98th Cong., 1st Sess. 1 (1983). The stated purpose of the amendment was "to modify the scope of the exemption for law enforcement records . . . and clarify congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure." 132 CONG. REC. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

99. This change in the threshold language was intended to "resolve any doubt that law enforcement manuals and other non-investigatory materials can be withheld under (b)(7) [*i.e.*, Exemption 7] if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests set forth in the subparagraphs of the exemption." S. REP. NO. 221, 98th Cong., 1st Sess. 23 (1983) (emphasis added). Assistant Attorney General Rose noted, in testimony concerning Senate Bill 774, that the change in the threshold language "would expand the categories of documents eligible for protection under Exemption 7 to include certain types of background information, law enforcement manuals, procedures and guidelines." *Freedom of Information Reform Act, 1983: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 57 (1984) (prepared statement of Jonathan C. Rose, Assistant Attorney General).

100. Compare the threshold language in the 1974 Exemption 7, note 10 *supra*, with the language in the 1986 version, note 4 *supra*.

101. The amended language in the threshold section of Exemption 7 merely broadens the materials (from "investigatory records" to the more general "records and information") to which

did Congress leave the relevant language essentially intact, but it explicitly avoided clarifying which rule (threshold or per se) is appropriate for Exemption 7 under the first prong of the *Abramson* test.¹⁰² Significantly, therefore, the legislative history associated with the 1966 FOIA and its subsequent amendments does not favor either the per se or the threshold rule.

II. COMPARISON OF THE PER SE AND THRESHOLD RULES

A. *The Threshold Rule*

The threshold rule as currently employed may lead to absurd results clearly not intended by a rational Congress. For example, under the threshold rule, if a "law enforcement purpose" is not found then, in theory, the inquiry is over and the information must be disclosed *even if one of the six specified harms will actually occur upon disclosure*.¹⁰³ This would still be the case if the non-law enforcement purpose could be exposed without disclosing the specific information leading to one of the six specific harms of Exemption 7.¹⁰⁴ For example, under Exemption 7(D), an informer who wishes to remain anonymous cannot reasonably be expected, when deciding whether to give information to the FBI, to determine if the FBI investigation is for

Exemption 7 might apply. This change was "intended to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which the record is maintained." S. REP. NO. 221, 98th Cong., 1st Sess. 23 (1983).

102. Senate Report No. 221 states:

The Committee amendment [of Exemption 7], however, does not affect the threshold question of whether "records or information" withheld under (b)(7) [Exemption 7] were "compiled for law enforcement purposes." This standard *would still have to be satisfied* in order to claim the protection of the (b)(7) exemption. See, e.g., *FBI v. Abramson* . . .

S. REP. NO. 221, 98th Cong., 1st Sess. 23 (1983) (emphasis added).

Congressional concern for law enforcement agencies, especially the FBI, appears to have been the major driving force behind the 1986 amendments to the FOIA. 132 CONG. REC. S14,299 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy); S. REP. NO. 221, 98th Cong., 1st Sess. 2, 23 (1983). See generally *Freedom of Information Reform Act, 1983: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 431-501 (1984) (prepared statement, testimony, and related exhibits of William H. Webster, Director, Federal Bureau of Investigation). Congress was concerned with three general problems that Exemption 7 was thought to have created for federal law enforcement agencies in their *legitimate* law enforcement roles: (1) "disclosure of sensitive non-investigative law enforcement materials," (2) "premature disclosure of investigative activities," and (3) "the protection of confidential sources." S. REP. NO. 221, 98th Cong., 1st Sess. 23 (1983). These concerns do not speak to the threshold issue.

103. A strict application of the threshold rule would mandate disclosure even if a specific harm would occur.

104. This potential problem appears to cause significant difficulties in four major areas: Exemptions 7(B) (depriving a person of the right to a fair trial), 7(C) (unwarranted invasion of personal privacy), 7(D) (disclosing confidential sources), and 7(F) (endangering life or physical safety of an individual). See note 4 *supra*. Under Exemptions 7(B) or 7(C), Congress probably did not intend that an innocent third party be deprived of his right to a fair trial or suffer an unwarranted invasion of his personal privacy because of improper activities of the FBI over which he has no control. And under Exemption 7(F), it seems unlikely Congress intended to endanger the "life or physical safety of any individual" because of improper activities of the FBI.

"law enforcement purposes." The informer's decision may be based on the FBI's ability to keep his identity secret. Thus, some confidential sources may dry up and the legitimate work of the FBI may be impaired.¹⁰⁵ In general, it is unlikely Congress intended that if FBI information was not "compiled for law enforcement purposes" then *complete disclosure must occur even when it would cause harm* to the FBI itself, third parties, or law enforcement personnel. This is especially true where the improper activity could be disclosed by deleting that information that would lead to the specific harm. Upon reflection it seems reasonable that Congress did not intend such harsh results. The purpose of the FOIA was to make as much information as possible available to the public. It was not intended to punish innocent third parties or law enforcement personnel because of possible excesses of the FBI.

Although a major advantage of the threshold rule is that it focuses the inquiry on the issue of whether the purpose of the FBI's activities is lawful or proper, it is unlikely that this focus would in practice significantly increase the probability that any illegal or improper activity

105. There does not appear to be any direct, empirical evidence to support this proposition. Critics of the 1974 Exemption 7 have, however, forcefully advanced this as a logical result of disclosing informers' identities. See, e.g., 120 CONG. REC. 17,036 (1974) (statement of Sen. Hruska), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 340 ("The net result [of Exemption 7] will be a crippling effect on the FBI's ability to garner information and obtain successful prosecution in criminal cases."); 120 CONG. REC. 17,037 (1974) (statement of Sen. Thurmond), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 343 ("Disclosure of this type of information can only hinder the investigative responsibilities of the FBI . . ."); see also *National Security, Law Enforcement, and Business Secrets Under the Freedom of Information Act*, 38 BUS. LAW. 707, 709-12 (1983) (edited transcript of ABA panel discussion Aug. 10, 1982; comments of William H. Webster, director FBI).

Numerous examples of the problems the FOIA posed for law enforcement agencies, especially the FBI, were presented in congressional testimony during Senate Bill 774 consideration. FBI Director Webster was a leading critic of the FOIA in these hearings. See, e.g., *Freedom of Information Reform Act, 1983: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 62-93, 432-44 (1984). Many of the examples suggest problems with law enforcement's application of the FOIA rather than with the FOIA itself. For example, a convicted loan shark was able to identify a government informant "because the suspected informant's name was *not completely redacted*" from the released documents. *Id.* at 67 (example 31, emphasis added). Failure to remove an informant's name should not be blamed on the FOIA. In still another example, an FBI informant was identified because the FBI released information detailing a meeting to discuss criminal activities attended by only three individuals; only the informant's name was removed from the released document. As Director Webster pointed out, the "name of the missing person also must be the name of the informant." *Id.* at 440, 452. Director Webster did not indicate why this was not simply a misapplication of the 1974 version of Exemption 7(D). Other examples indicate that potential informants refuse to assist law enforcement agencies because they fear that information that might identify them might "be given out by mistake." See, e.g., *id.* at 83 (example 136). Other law enforcement agencies have expressed similar fears in disclosing certain information to the FBI. *Id.* at 86, 88 (examples 153, 157, and 163). But fear of such mistakes will persist under any system allowing some disclosure of information possessed by law enforcement agencies; the only "failsafe" solution (which would still be subject to politically motivated leaks, see, e.g., *id.* at 510 (statement of Sen. Leahy) ("The FBI has in the past been able to develop the art of leaking to a level of excellence which is the envy of most other agencies . . .")) would be to provide a *blanket* exemption to law enforcement agencies.

will be made public. The showing required for "law enforcement purposes" under the threshold rule is minimal under any of the statements of the existing standard.¹⁰⁶ To date there are apparently no cases where the FBI was actually forced to disclose significant information because of a lack of a proper law enforcement purpose.¹⁰⁷ Therefore, the practical effect of the threshold rule appears to be the same as the per se rule relative to the actual information disclosed.¹⁰⁸

Moreover, it may be extremely difficult to set out a workable standard for determining which investigations are for proper law enforcement purposes. It may be particularly difficult to distinguish between an investigation that lacks a law enforcement purpose and one that simply turns out to be a blind alley.¹⁰⁹ Further, in cases where there was clearly no "law enforcement purpose" but disclosure would result

106. See notes 79-84 *supra* and accompanying text.

107. Several courts have found that the government had not met the Exemption 7 threshold test of "compiled for law enforcement purposes" but allowed the government additional time to satisfy the requirement. *Wilkinson v. FBI*, 633 F. Supp. 336, 340 (C.D. Cal. 1986); *Silets v. FBI*, 591 F. Supp. 490, 498 (N.D. Ill. 1984); *Lamont v. Department of Justice*, 475 F. Supp. 761, 775-76 (S.D.N.Y. 1979).

108. For example, in *Pratt v. Webster* the trial court held that the FBI documents, generated by the FBI's Counter-Intelligence Program against the Black Panther Party using illegal FBI practices, were not the result of "any legitimate law enforcement purpose" and ordered the documents disclosed. The appellate court reversed, holding that, although illegal methods might have been employed, the information was "derived at least in part from a purpose to enforce and prevent violations of the criminal laws." 673 F.2d 408, 410 (D.C. Cir. 1982).

In *Stern v. FBI* the trial court ordered the disclosure of the names of three FBI employees investigated in connection with a possible FBI "cover-up" of the FBI's "wide-spread illegal surveillance of political activists through the use of surreptitious entries and wiretappings." 737 F.2d 84, 86 (D.C. Cir. 1984). The appellate court reversed, holding that the investigation was for law enforcement purposes because the investigation focused "directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proven, result in civil or criminal sanctions." 737 F.2d at 89 (quoting *Rural Hous. Alliance v. United States Dept. of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1974)). The court further held, under an Exemption 7(C) balancing test, that the higher-level employee's name must be disclosed because he had "knowingly" participated in the cover-up. 737 F.2d at 93.

King v. United States Department of Justice held that FBI documents, pertaining to an individual "in close association with individuals and organizations that were of investigative interest to the FBI" during the "McCarthy era," met the threshold requirement of Exemption 7. 586 F. Supp. 286, 293-94 (D.D.C. 1983). The FBI asserted that the information was gathered "pursuant to Title 18, U.S.C. Section 2383 (Rebellion or Insurrection), . . . Title 18 U.S.C. Section 2384 (Seditious Conspiracy), . . . Title 18 U.S.C. Section 2385 (Overthrow of the Government) . . ." 586 F. Supp. at 293. While refusing to comment on "the 'McCarthy era' climate during which part of the FBI investigation occurred," the court held that the threshold test had been met because there was a "colorable claim" of a federal law violation. 586 F. Supp. at 294.

Dunaway v. Webster involved a FOIA suit to obtain FBI documents gathered during 1940-1962 on several singing groups associated with folksinger Pete Seeger. 519 F. Supp. 1059, 1064 (N.D. Cal. 1981). After four years of litigation the court found that the government had failed to meet its burden but was unwilling to force disclosure of the documents because the privacy interests of those investigated should "not be ridden over roughshod because of the government's dilatory tactics." 519 F. Supp. at 1066. The court, however, found a showing of an "internal security" investigation was "barely sufficient" to meet Exemption 7 threshold requirement. 519 F. Supp. at 1075-76.

109. *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979). A probable cause or reasonable suspicion standard would not be appropriate in the threshold rule because a legitimate FBI investigation may be undertaken to seek evidence sufficient to show probable cause or reasonable

in significant harm, there may be a tendency to broaden the interpretation of "law enforcement purpose" to bring the activity into Exemption 7 and thus avoid the harm. The threshold rule in actual practice, therefore, tends to move closer to the per se rule.¹¹⁰

B. *The Per Se Rule*

The per se rule treats all "records or information" of the FBI as being "compiled for law enforcement purposes." The major advantage of the per se rule is its ease of application. The rule promotes judicial efficiency; the court is not required to determine if the record was "compiled for law enforcement purposes." If it is true that most FBI investigations are in fact for "law enforcement purposes,"¹¹¹ this inquiry into the law enforcement purpose can often be eliminated without defeating the goals of the FOIA.¹¹² If it is determined that one of the specific harms might occur (or might reasonably be expected to occur) by disclosure, then the information may be withheld.¹¹³

A disadvantage of the per se rule is that the FBI is more likely, without close judicial supervision, to "cover-up" improper activities.¹¹⁴ Even in cases where the disclosure of the illegal activity is ultimately made, the disclosure may be significantly delayed.¹¹⁵ This problem arises because the per se rule does not focus on the "law enforcement purpose" of the investigation. The possibility of such

suspicion. Furthermore, the legislative histories of the 1966, 1974, and 1986 FOIAs suggest a deferential approach to the FBI relative to Exemption 7. See Part I.D *supra*.

110. For possible examples, see *Wilkinson v. FBI*, 633 F. Supp. 336 (C.D. Cal. 1986); *King v. United States Dept. of Justice*, 586 F. Supp. 286 (D.D.C. 1983); *Demetracopoulos v. FBI*, 510 F. Supp. 529 (D.D.C. 1981).

111. The use of the modified per se rule should allow this assumption to be tested. Further, the deterrent effect of the modified per se rule should provide an inducement to the FBI to avoid investigations which are not for law enforcement purposes. See also note 28 *supra*.

112. For the vast majority of legitimate FBI investigations, the judicial inquiry into the "law enforcement purpose" issue would likely be insignificant. Only at the margins, where the "law enforcement purpose" could not readily be determined from the record, would significant judicial resources be required. But these would be the very cases where some type of FBI oversight is most needed and would be most helpful.

113. S. REP. NO. 854, 93d Cong., 2d Sess. 6 (1974), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 158 (Information "may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate — as well as that the intent of the exemption relied on allows — that the information *should* be withheld.") (emphasis in original). See generally J. FRANKLIN & R. BOUCHARD, *supra* note 20, § 1.10; 2 J. O'REILLY, *supra* note 20, ch. 17; C. MARWICK, *supra* note 20, at 98-110.

114. This problem may be alleviated to some extent by increased congressional oversight of the intelligence agencies. See generally AMERICAN BAR ASSOCIATION, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES: AN EVALUATION (1985).

115. The threshold rule may also have this problem. See *Dunaway v. Webster*, 519 F. Supp. 1059, 1064 (N.D. Cal. 1981). However, it may be an even greater problem when the per se rule is employed because the focus of the initial inquiry is not on the proper or improper "law enforcement purpose."

“cover-ups” is clearly contrary to congressional intent.¹¹⁶

Both the threshold and the per se rules have significant advantages and disadvantages, and neither is clearly superior to the other. A new rule, proposed in Part III, attempts to combine the major advantages of both the threshold and per se rules in the spirit of the congressional intent of animating the FOIA.

III. EXEMPTION 7 PROPOSED RULE: THE MODIFIED PER SE RULE

Courts should adopt the per se rule for the first prong of the *Abramson* test¹¹⁷ but with significant changes in its implementation. This new rule, termed the “modified per se rule,” provides that all “records or information” of the FBI are presumed “compiled for law enforcement purposes” when applying Exemption 7. This is equivalent to the current per se rule. But when the plaintiff can show¹¹⁸ a “reasonable likelihood in view of the circumstances”¹¹⁹ of the investigation being for political or other improper purposes (that is, not for “law enforcement purposes”) or being carried out by improper means, the court must examine the documents in camera¹²⁰ in order to assure, if at all possible,¹²¹ that the political or improper purpose of the investigation or the improper means are disclosed.¹²² The standards currently em-

116. See note 94 *supra* and accompanying text.

117. See notes 17-18 *supra* and accompanying text.

118. This test clearly places the burden on the plaintiff to show “a reasonable likelihood in view of the circumstances” that the investigation was not for legitimate law enforcement purposes. It may be argued that this is inconsistent with the congressional decision to place the burden on the agency seeking to prevent disclosure. See note 5 *supra* and accompanying text. However, placing the burden on the FBI to show that the “record or information” was gathered for “law enforcement purposes” would essentially reinstate the threshold rule. Furthermore, the burden placed on the plaintiff is not significant. Generally the plaintiff need only suggest in some credible manner that the investigation was more likely than not carried out for some reason other than a legitimate law enforcement purpose. The plaintiff should then be entitled to have the court inspect the records in camera. In most cases, the investigation will clearly be for law enforcement purposes; for example, one indicted for bank robbery will not be able to convince a court that the FBI investigation was for an improper purpose.

119. See text following note 128 *infra*.

120. 5 U.S.C. § 552(a)(4)(B) (1982). See note 31 *supra*.

121. Even under this test it may not be possible to release information concerning the improper purpose of the investigation. The court must still determine if exposing the actual unlawful purpose of the investigation would “reasonably be expected” to cause one of the specific harms listed in Exemption 7. See notes 126-27 *infra* and accompanying text.

122. Senator Muskie in Senate Bill 1142 offered an amendment to Exemption 1 of the FOIA that would have required in camera inspection of documents the government wished to withhold on grounds of national security classifications. This was considered an “excessive response” to *EPA v. Mink*, see note 55 *supra*, and was rejected. 120 CONG. REC. 17,022 (1974) (statement of Sen. Muskie), reprinted in 1975 SOURCE BOOK, *supra* note 5, at 303. Senator Muskie’s amendment would have required in camera inspection for all documents coming under Exemption 1. The proposed per se rule only requires in camera inspection when the plaintiff can show a “reasonable likelihood” that the investigation was not for “law enforcement purposes.” Therefore, in camera inspection will only be required for Exemption 7 cases on an infrequent basis. See notes 28 & 111 *supra* and accompanying text.

ployed in applying Exemption 7 relative to the six specific criteria or harms would remain unchanged under the modified per se rule.¹²³ Whereas the per se rule reads the statutory language "compiled for law enforcement purposes" out of Exemption 7,¹²⁴ the modified per se rule proposed here effectively reads the language back into the exemption during the in camera inspection.

The primary purpose of the modified per se rule is to *increase the likelihood of exposing the political or improper investigation or the use of improper investigatory means*. It is important to note that under this modified per se rule the court cannot do anything that it does not currently have the power to do under the existing per se rule. In camera inspection is currently available at the court's discretion.¹²⁵ The modified per se rule only adds the *requirement* of in camera inspection in cases where the plaintiff can show the "reasonable likelihood under the circumstances" of the information being compiled for purposes other than law enforcement or the investigation being carried out by improper means.

It is also important to note that the modified per se rule does not allow disclosure of sensitive information¹²⁶ that could not be disclosed under the current per se rule because it would cause, or reasonably be expected to cause, one of the specified harms. But the modified per se rule increases the probability that the improper conduct will *actually be disclosed*. Assume that the FBI had compiled a file on John Doe strictly for political reasons and the disclosure of that information would cause one or more of the harms specified in Exemption 7. Under the current per se rule the information could not be disclosed because of the specified harms; the lack of "law enforcement purpose" would never be an issue.¹²⁷ Under the modified per se rule the information still could not be disclosed for the same reasons; however, the court, upon an appropriate showing by the plaintiff, would inspect the documents to determine if the *improper nature* of the investigation could be disclosed *without causing any of the specified harms*. If disclosure of the improper nature of the investigation could be disclosed

123. See, e.g., J. FRANKLIN & R. BOUCHARD, *supra* note 20, at §§ 1.10[1]-[6].

124. See text following note 21 *supra*.

125. See note 31 *supra*.

126. The amount of information disclosed will vary in each case. In some cases it may be possible to release the actual documents disclosing the improper purpose or method of the investigation if such disclosure does not result in the specific harms that Exemption 7 attempts to avoid. In other cases the court may only be able to indicate the improper purpose or method by releasing a conclusory statement giving only minimal details of the actual transgression. But such a conclusory statement would be better than simply ignoring the transgression. In still other cases even such a conclusory statement could be inappropriate because its mere release might result in one of the specific harms noted in Exemption 7.

127. Under the threshold rule, once it has been determined that the investigation was not for a "law enforcement purpose," the information should be disclosed without regard to any harm caused by the disclosure. See note 22 *supra* and accompanying text.

without causing one of the six specified harms, such disclosure would be mandated. If, however, disclosure of the improper nature would also result in one of the specified harms, the disclosure of the improper nature itself must also be forbidden. In the latter case, the final outcome under the current and the modified per se rule would be identical. In the former case, however, the outcome might be very different. Under the current per se rule, the FBI might be able to hide or “cover-up” the improper purpose of the investigation at the same time it was allowed to withhold information that would result in one of the six specific harms. With increased judicial involvement under the modified per se rule, such a “cover-up” would be much more difficult.

Like most reasonableness standards, the proposed “reasonable likelihood” standard is not capable of precise definition.¹²⁸ The mere allegation by the plaintiff that the FBI investigation was not for “law enforcement purposes” would generally not be sufficient to satisfy this “reasonable likelihood” standard. The “reasonable likelihood” standard should be satisfied when the plaintiff can show, by either allegations or testimony, that the FBI investigation was more likely than not carried out for some reason other than legitimate “law enforcement purposes.”¹²⁹ This standard does, however, require a case-by-case analysis. Therefore, the necessary showing will depend in large part on the particular plaintiff and the surrounding circumstances. Other factors, such as the timing and type of investigation, may play a significant role in particular cases. Nor should the plaintiff be required to show that the improper purpose was the *only* purpose of the investigation. The plaintiff’s burden should only be to demonstrate with a “reasonable likelihood” that an improper purpose existed. Once the plaintiff makes such a showing, the court must subject the documents to in camera inspection. If in camera inspection confirms that the investigation was improper, such information should be disclosed if at all possible.¹³⁰

The modified per se rule can, perhaps, be illustrated best by an example. In *Demetracopoulos v. FBI*¹³¹ the plaintiff asserted that his FBI investigation “was ‘bogus from the beginning,’ and [was] designed solely to discredit him as an opponent of State Department policy toward Greece.”¹³² The plaintiff further claimed that the FBI conducted its investigation for political purposes in order “to ‘get’ something on an embarrassing opponent of the State Department pol-

128. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 32 (5th ed. 1984).

129. See note 118 *supra*.

130. See note 126 *supra*.

131. 510 F. Supp. 529 (D.D.C. 1981).

132. 510 F. Supp. at 530.

icy favoring the Greek dictatorship.”¹³³ The FBI asserted that the investigation was strictly for law enforcement purposes including possible violations of the Foreign Agents Registration Act,¹³⁴ and possible deportation.¹³⁵ The court found that the plaintiff’s allegations were “not frivolous on their face” and, over the FBI’s strong objections, ordered the documents inspected in camera.¹³⁶ After examination of the documents and applying the threshold test, the court found “the investigation was not a mere sham designed to intimidate or embarrass him in his role of critic of Greek or American policy.” The court further found that a “reasonably prudent government official” could have found a sufficient law enforcement purpose.¹³⁷ The court then examined the documents in view of the six specific harms of Exemption 7 and concluded that the majority of the information in dispute could be withheld.¹³⁸

Demetracopoulos is an example where, under the modified per se rule, the court would be *required* to conduct an in camera inspection. The plaintiff was able to show¹³⁹ that his opposition to State Department policy towards Greece was, with “reasonable likelihood,” the basis for the FBI investigation. Only by an in camera inspection could this allegation be tested if the FBI wished to “cover-up” any improper purpose. Although the actual information disclosed in *Demetracopoulos* under the court’s threshold rule and the modified per se rule would likely be very similar in this particular case,¹⁴⁰ the thrust of the court’s opinion might be very different. Under the threshold rule, the court, if it wished to protect sensitive information under Exemption 7, must find some legitimate law enforcement purpose.¹⁴¹ Under the modified per se rule, such a “strained” finding¹⁴² is not required. The specific harm test of Exemption 7 would be applied in the normal manner¹⁴³ regardless of the purpose of the investigation. But the court, if it found that the FBI was attempting to silence a government

133. 510 F. Supp. at 531.

134. 22 U.S.C. §§ 611-621 (1982).

135. 510 F. Supp. at 531. The immigration status of the plaintiff is not clear from the opinion.

136. 510 F. Supp. at 530.

137. 510 F. Supp. at 531.

138. 510 F. Supp. at 532-34.

139. See text at note 136 *supra*.

140. The information disclosed under the court’s threshold rule and the modified per se rule presented here would likely be the same because the court in *Demetracopoulos* employed in camera inspection of the documents, using its discretion under 5 U.S.C. § 552(a)(4)(B) (1982).

141. See text at note 110 *supra*.

142. In *Demetracopoulos* the court may have relied on just such a “strained” finding in order to invoke Exemption 7. The court found that “the investigation of plaintiff by the FBI was not a mere sham designed to intimidate or embarrass him in his role of critic of Greek or American policy.” 510 F. Supp. at 531 (emphasis added).

143. See note 123 *supra*.

critic, could have exposed the improper purpose of the investigation without disclosing sensitive information. Exposure of such improper activities could have a strong deterrent effect.¹⁴⁴ Further, such findings could help Congress carry out its oversight responsibility.¹⁴⁵

There are many and varied reasons for adoption of the modified per se rule; some are illustrated in the above example. In most cases the judicial efficiency of the original per se rule will be retained because "most" FBI investigations are for "law enforcement purposes." And like the threshold rule, the focus of the inquiry will be on the potentially improper purpose of the investigation. The new rule also avoids the possibility, present in the threshold rule, that complete disclosure of FBI investigations not for "law enforcement purposes" will be required regardless of the injury to innocent third parties, law enforcement personnel, or to the ability of the FBI to carry out its legitimate function.¹⁴⁶ Also, courts will not be tempted to strain to find a proper "law enforcement purpose" to avoid disclosing "harmful" information as they might under the current threshold rule.¹⁴⁷

The modified per se rule, with its required in camera inspection in certain cases, may actually assure more disclosure than the threshold rule because it will be more difficult for the FBI to "cover-up" its improper activities due to the increased judicial inspection of documents in cases where the possibility of a "cover-up" is most likely.¹⁴⁸

The modified per se rule appears to be consistent with the legislative intent of the FOIA. In applying Exemption 7 to FBI investigations, the modified per se rule helps assure full disclosure except for information causing the six specified criteria or harms. It helps assure that improper FBI activities will be disclosed. And the modified per se rule respects and protects legitimate FBI activities; the FBI's ability to carry out its legitimate mandate is not impaired.

This proposed rule also has several additional advantages that neither of the current rules possess. Under the modified per se rule, the difference between an "improper purpose" and an "improper method"¹⁴⁹ loses its significance. The modified per se rule is triggered by a showing of "reasonable likelihood under the circumstances" of either an improper purpose or the use of an improper method. The modified per se rule can also be applied to related issues. For example, where an investigation is started for legitimate law enforcement purposes but is later continued for improper purposes, the modified per se

144. See notes 93-94 *supra*.

145. See note 114 *supra*.

146. See notes 104-05 *supra* and accompanying text.

147. See notes 110 & 142 *supra* and accompanying text.

148. See, e.g., *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984) (possible "cover-up" of illegal FBI surveillance activities).

149. See note 78 *supra* and accompanying text.

rule could be employed to help assure that the improper nature of the continued investigation was disclosed.¹⁵⁰

The primary disadvantage of the modified per se rule is that the in camera procedure will require more judicial resources. But in camera inspection will only be required in a limited number of cases where the plaintiff can make a showing of "reasonable likelihood under the circumstances" of an improper purpose for the investigation.¹⁵¹ When there are large numbers of documents, a random sampling of documents could be examined.¹⁵² Furthermore, Congress, by specifically allowing in camera inspection for all nine FOIA exemptions, doubtless intended that such inspection be employed where appropriate to avoid improper withholding of information.¹⁵³ In *Weisberg v. United States Department of Justice*,¹⁵⁴ Chief Judge Bazelon of the District of Columbia Circuit stated: "[T]he purpose of the [Freedom of Information] Act should not be defeated if there is available a judicial technique for advancing it and at the same time ensuring that no harm comes to the interests Congress intended to protect. *In camera* inspection . . . is such a technique."¹⁵⁵

CONCLUSION

Neither the threshold rule nor the per se rule, as applied to the first prong of the *Abramson* test, is clearly superior based on the legislative history of the FOIA or the practical effects of the two rules.

Courts should adopt a modified per se rule in applying Exemption 7 to information gathered by the FBI. Like the current per se rule, the proposed modified per se rule provides that *all* "records or information" of the FBI are presumed "compiled for law enforcement purposes" when applying Exemption 7. But when the plaintiff can show a "reasonable likelihood in view of the circumstances" that the investigation was for political or other improper purposes or that the investi-

150. This issue was raised by the facts in *Wilkinson v. FBI*, 633 F. Supp. 336, 343-44 (C.D. Cal. 1986), but was not addressed by the court.

151. See notes 130-31 *supra* and accompanying text.

152. See, e.g., *EPA v. Mink*, 410 U.S. 73, 93 (1972) ("A representative document of those sought may be selected for in camera inspection."); *Meeropol v. Meese*, 790 F.2d 942, 945, 948, 958 (D.C. Cir. 1986) (In what was "perhaps the most extensive FOIA request ever made," the FBI was required to submit every one-hundredth page, out of more than 20,000 pages requested, for the court's in camera inspection.); *Weisberg v. United States Dept. of Justice*, 745 F.2d 1476, 1490 (D.C. Cir. 1984) ("[S]ampling procedure is appropriately employed, where as here the number of documents is excessive and it would not realistically be possible to review each and every one.").

153. See notes 53-57 *supra* and accompanying text.

154. 489 F.2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974) (held that FBI files concerning the assassination of President Kennedy were compiled for law enforcement purposes and, therefore, were exempt from disclosure under Exemption 7). This case was specifically overruled by the 1974 amendment to Exemption 7. See note 38 *supra*.

155. 489 F.2d at 1206 (Bazelon, C.J., dissenting), *cert. denied*, 416 U.S. 993 (1974).

gation was carried out by improper means, the court must examine the documents in camera to assure that the political or improper purpose or means is disclosed. The modified per se rule will help assure that the FBI cannot “pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.”¹⁵⁶

—*Richard A. Kaba*

156. See note 3 *supra*.