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Restraint Of Agency Proceedings Under The Freedom Of Information Act

RESTRAINT OF AGENCY PROCEEDINGS UNDER THE FREEDOM OF INFORMATION ACT

In 1966 Congress passed the Freedom of Information Act[1] (FOIA) in order to increase the general public's access to documents and

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[1] § 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall

be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except 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.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters 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;

(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;

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

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(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

information held by federal agencies.[2] The legislative history of the FOIA clearly shows that Congress intended the increased availability of information to facilitate the electoral process by promoting voter awareness of the functioning and efficiency of federal agencies.[3] It is not clear from the legislative history, however, whether Congress intended the FOIA to be used by a party engaged in federal agency proceedings to restrain those proceedings and force the agency deciding the case to disclose relevant materials which might not be available to the party under agency regulations. In short, Congress gave no clear directive whether the FOIA could be used as a discovery tool in agency proceedings.

Dealing with this issue for the first time, the Supreme Court, in the recent case of *Renegotiation Board v. Bannercraft Clothing Co.*,[4] split 5-4[5] in finding that the FOIA could not be used as a discovery tool in proceedings of the Renegotiation Board,[6] a federal agency

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

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

5 U.S.C. § 552 (1970).

[2]The FOIA provides "a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions." H.R. REP. No. 1497, 89th Cong., 2d Sess. 1 (1966).

[3] Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain [information] . . . . But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information . . . .

. . . .

It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . .

S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

[4]415 U.S. 1 (1974).

[5]Mr. Justice Blackmun delivered the decision of the Court in which Mr. Chief Justice Burger and Justices Brennan, White, and Rehnquist joined. Mr. Justice Douglas filed a dissenting opinion in which Justices Stewart, Marshall, and Powell joined.

[6]"We hold . . . that in a *renegotiation* case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not attain its ends through the route of judicial interference." Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1974). *See* text accompanying notes 3-4 *supra*.

which reviews the profits of government contractors. The Court held that although contractors could file FOIA suits while engaged in renegotiation proceedings,[7] they could not obtain restraints of those proceedings during court resolution of their FOIA claims,[8] even though the FOIA specifically grants equitable powers to district courts hearing such claims.[9] The *Bannercraft* contractors had requested the Renegotiation Board to turn over materials which they claimed were important to the determination of excess profits in their cases, and when the Board refused, they filed FOIA suits in district courts.[10] The contractors sought not only injunctions to force disclosure of the materials which they had requested, but also restraints of renegotiations while their claims were being adjudicated.[11] They argued that if the proceedings were not halted, a court order requiring the disclosure of the materials would be of little value because renegotiations would have passed the stage at which the materials would be useful to them in dealing with the Board.[12] The district courts granted the requested restraints[13] and the court of appeals affirmed.[14]

The Supreme Court reversed[15] for two reasons. First, the Court found that Congress did not specifically intend for the FOIA to provide parties engaged in agency proceedings with a new discovery tool.[16] Absent such clear intent, the Court refused to permit the restraint of the renegotiation process which, according to earlier Supreme Court rulings, Congress had clearly intended to proceed without court interruption[17] and which was designed to promote informal Board-contractor negotiations.[18] Second, no injunctive relief could be granted these contractors because they had failed to show that they

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[7]The Court remanded the case for a determination of the merits of the contractors' FOIA claims. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. at 26. Had the contractors not been able to file FOIA suits while engaged in renegotiations, presumably the Supreme Court would have required dismissal of the contractors' claims. *See also* text accompanying notes 73-75 *infra*.

[8]*Id.* at 20.

[9]*Id.* at 19-20.

[10]*Id.* at 3-9.

[11]*Id.* at 6, 8, 9.

[12]Brief for Respondent Bannercraft Clothing Co. at 27-28. Brief for Respondent David B. Lilly Co. at 20-23, Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974).

[13]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 6, 8, 9 (1974).

[14]Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 351 (D.C. Cir. 1972).

[15]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 26 (1974).

[16]*Id.* at 24.

[17]*Id.* at 21.

[18]*Id.* at 21-22.

would suffer irreparable harm without a restraint.[19] Essential to the Court's holding was its consideration of the nature of the Renegotiation Act and the FOIA, and its interpretation of the congressional intent behind each statute. An understanding of the decision, therefore, requires an examination of the two Acts.

The original renegotiation legislation[20] was passed during World War II to prevent profiteering on war contracts.[21] At the end of the War, Congress allowed the Renegotiation Act to expire, but because the Cold War required increasing procurement, the legislature reactivated renegotiation on a limited scale in 1948.[22] In response to the Korean conflict, Congress further expanded the review of profits in the Renegotiation Act of 1951.[23]

The 1951 Act and the regulations which it authorized[24] established complex renegotiation proceedings. Contractors subject to the statute[25] must file annual financial statements with the Board,[26]

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[19] *Id.* at 23-24.

[20] Act of Oct. 21, 1942, ch. 619, § 801, 56 Stat. 982, *as amended,* Act of July 14, 1943, ch. 239, § 1, 57 Stat. 564, Act of Feb. 25, 1944, ch. 63, § 701, 58 Stat. 78, Act of June 30, 1945, ch. 210, § 1, 59 Stat. 294.

[21] "The American people are united in their resolution to prevent war profiteering. Taxation alone is not enough. One of the most constructive attempts ever made to reduce profiteering at the expense of the Government in wartime was the renegotiation law . . . ." 90 CONG. REC. 145 (1944) (message to the Congress from the President).

[22] Act of May 21, 1948, ch. 333, § 3, 62 Stat. 260.

[23] Act of March 23, 1951, ch. 15, §§ 101-13, 65 Stat. 7. This Act has been extended 10 times, the latest extension in 1973. Act of July 9, 1973, Pub. L. No. 93-66, § 1, 87 Stat. 152.

[24] 50 U.S.C. APP. § 1217(e) (1970).

[25] Contractors having contracts with the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Maritime Administration, the Federal Maritime Board, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Agency, and the Atomic Energy Commission, 50 U.S.C. APP. § 1213(a) (1970), or other agencies in time of a national emergency, *id.,* and receiving or accruing from these contracts more than $1,000,000 during the fiscal year are subject to renegotiation. 50 U.S.C. APP. §§ 1212(a), 1215(f) (1970). These general provisions governing the Act's application are limited by certain mandatory exemptions. *Id.* § 1216(a)-(c), (e) (1970), *as amended,* 50 U.S.C. APP. § 1216(a)(6) (Supp. III, 1973) and certain Board-authorized exemptions. 50 U.S.C. APP. § 1216(d) (1970); 32 C.F.R. § 1470.3 (1973).

[26] Every person who holds contracts or subcontracts, to which the provisions of this title are applicable, shall, in such form and detail as the Board may by regulations prescribe, file with the Board on or before the first day of the fourth calendar month following the close of his fiscal year, a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this title.

50 U.S.C. APP. § 1215(e)(1) (1970). This filing is the Standard Form of Contractor's Report, 32 C.F.R. § 1470.3 (1973).

which screens these filings to determine whether a contractor might have received or accrued excess profits during the previous year.[27] If the Board decides that profits are reasonable, it sends the contractor a notice of clearance;[28] however, if it finds profits to be excessive, it begins multi-stage proceedings which allow the contractor to confer with various Board personnel at different levels of the renegotiation process.[29] At each level, the Board officials make a finding of the amount of excess profits, if any,[30] and then attempt to reach an agreement with the contractor to eliminate any excesses.[31] If the contractor reaches the last level of proceedings without either reaching an agreement or convincing the Board that his profits are not excessive,[32] the Board may enter a determination of the amount which the contractor must refund to the Government.[33] This determination becomes final

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[27] After receipt of a Standard Form of Contractor's Report from a contractor, the Board will assign the case to a Regional Board [a subdivision of the Renegotiation Board, 32 C.F.R. § 1451.32 (1973)] for renegotiation if it determines that further proceedings in the matter are warranted. . . . No assignment will be made when the Board can readily decide on the basis of the information contained in the Standard Form of Contractor's Report that the contractor has not realized excessive profits for the fiscal year and that no purpose would be served by making an assignment to a Regional Board. If the Board decides not to make an assignment, the Board will notify the contractor to this effect.

Id. § 1471.1; *id.* § 1498.6 (clearance form).

[28] *See* note 27 *supra.*

[29] *See* note 27 *supra.*

[30] The Standard Form of Contractor's Report, supplemented with information gathered in meetings with the contractor, 32 C.F.R. § 1472.3(a) (1973), forms the basis for an Accounting Report, *id.* § 1472.3(e), which then serves as a basis for a Renegotiation Report which makes a recommended finding of excess profits. *Id.* § 1472.3(i). These reports may later be presented to the Regional Board, *id.* § 1472.3(k)(1)-(3), but this Board may make its own determination of excess profits. *Id.* § 1472.3(k)(4), (m). The Renegotiation Board itself may also make an independent determination of excess profits. *Id.* § 1472.4(b)(1), (c)(1).

[31] The contractor may meet with Regional Board personnel, 32 C.F.R. § 1472.3(j) (1973), a panel of the Regional Board, *id.* § 1472.3(1), or the Renegotiation Board or a division of it, *id.* § 1472.4(b)(2).

[32] A renegotiator, 32 C.F.R. § 1472.3(f) (1973), the Regional Board or the Renegotiation Board, *id.* § 1473.4(c)(2), may set in motion procedures leading to a notice of clearance to the contractor. *Id.* §§ 1473.1-.4.

[33] If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits . . . . In the absence of the filing of a petition with the Court of Claims . . . such order shall be final and conclusive . . . .

50 U.S.C. APP. § 1215(a) (Supp. III, 1973), *amending* 50 U.S.C. APP. § 1215 (1970).

unless the contractor brings his case before the Court of Claims which, in a de novo proceeding, examines the evidence and makes a new determination of excess profits.[34]

Renegotiation proceedings are not subject to the usual rules of agency procedure set out in the Administrative Procedure Act except those of section 3 of that Act dealing with the disclosure of information to the public.[35] The original section 3,[36] although intended by Congress to require the publication or release of most agency-held information,[37] provided that some materials should be exempt from disclosure.[38] The exempting language of the section was so vague,[39] however, that many agencies used the section to authorize the withholding of information which Congress had intended to be made available to the public.[40] Congress sought to correct this abuse by passing the FOIA, which replaced the original section 3. The language of the exemptions in the FOIA is clearer and narrower than that of the old section 3[41] and the Act expressly states that the specific

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[34]"A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." 50 U.S.C. APP. § 1218 (Supp. III, 1973), *amending* 50 U.S.C. APP. § 1218 (1970).

[35]"The functions exercised under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof." 50 U.S.C. APP. § 1221 (1970).

[36]Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

[37]"The section has been drawn upon the theory that administrative operations and procedures are public property which the general public . . . is entitled to know or have the ready means of knowing with definiteness and assurance." S. REP. No. 752, 79th Cong., lst Sess. 12 (1945). "The purpose of this section is to make access to public records generally applicable, uniform and more readily determinable." H.R. REP. No. 1980, 79th Cong., 2d Sess. 23 (1946).

[38]"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency . . . ." Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

"Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." *Id.* § 3(c).

[39]*See* note 38 *supra*.

[40] Section 3 of the Administrative Procedure Act . . . is full of loopholes which allows agencies to deny legitimate information to the public. Innumerable times, it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 . . . as—"requiring secrecy in the public interest," or "required for good cause to be held confidential."

S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

[41]"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory

exemptions are the only authorizations for withholding information sought under the Act.[42] To ensure agency compliance with the disclosure policy of the FOIA, Congress provided any person improperly denied information by an agency the right to court review of the denial, and provided the district courts with equitable powers to enjoin the agency from withholding the information sought.[43] To help prevent the destruction of the right to disclosure by agency or court delay, the Act specifically provided that the district courts should expedite the hearing of FOIA cases.[44]

In *Bannercraft,* however, the congressional intent to provide equitable relief to parties improperly denied information did not appear strong enough to the Court to make appropriate a district court restraint of renegotiations. In coming to this conclusion, the majority began with the proposition that pre-FOIA Supreme Court decisions had established that contractors could not obtain a court restraint of renegotiations pending court resolution of any claim, whether the claim was statutory, constitutional, or procedural.[45] As an important reason for barring restraints, these decisions had stressed that the congressional desire for speed in the determination of excess profits would be frustrated if courts were allowed to restrain renegotiations.[46] The *Bannercraft* Court reasoned that a restraint in an FOIA case would have the same delaying effect and, moreover, would encourage contractors to file FOIA cases merely to postpone the determination of the amount of their excess profits.[47] Apparently, the Court con-

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language. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies." *Id.*

[42]5 U.S.C. § 552(c) (1970).

[43]*Id.* § 552(a)(3).

[44]*Id.* Commenting on this provision, the Senate Report to S. 1666, 89th Cong., 2d Sess. (1964), stated that unless the courts had the power to expedite FOIA cases, the court remedy provided by the statute "might be of little practical value." S. REP. No. 1219, 88th Cong., 2d Sess. 7 (1964). S. 1666 was the basis for the FOIA. S. REP. No. 813, 89th Cong., 1st Sess. 4 (1965).

[45]Lichter v. United States, 334 U.S. 742 (1948); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947); Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946).

[46]The Renegotiation Act's "entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded." Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 770 (1947).

"To countenance short-circuiting of Tax Court [now Court of Claims] proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm." *Id.* at 781.

[47]*See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 23 (1974).

cluded that the pre-FOIA rule should govern the *Bannercraft* case unless Congress clearly intended that contractors use the FOIA to obtain Board-held information during renegotiation proceedings, thereby creating a specific exception to the general rule prohibiting court interruption of renegotiations.[48]

A review of the FOIA's legislative history convinced the majority that Congress' main concern in passing the Act was to increase disclosure of agency-held information to the general public and not to provide new rules of discovery in agency proceedings for financially interested parties.[49] Furthermore, the court found that Congress intended that renegotiation promote informal bargaining between the Board and the contractor and include all the normal risks of pure bargaining, and that these qualities would be destroyed by allowing contractors to obtain restraints of renegotiations during adjudication of FOIA claims.[50] These findings of congressional intent, when considered with the inability of the *Bannercraft* contractors to show that the denial of restraints would irreparably defeat their rights to information,[51] led the majority to conclude that the pre-FOIA rule prohibiting court restraints of renegotiations governed post-FOIA renegotiation cases as well.[52]

In contrast the *Bannercraft* dissent's examination of the legislative history of the FOIA led it to the conclusion that Congress intended to provide not only the general public, but also agency litigants, with the disclosure of government-held information.[53] Further, the dissent accepted the contractors' arguments that unless their FOIA rights were enforced at the stage of agency proceedings at which they were improperly denied, the rights would be irretrievably lost due to the lack of authority at higher levels of renegotiation to correct errors made at lower levels.[54] The dissent concluded that if the contractors did not receive a restraint of proceedings pending the resolution of their claims to information, the FOIA would be useless to them, a result which the dissent viewed as contrary to congressional intent.[55]

Although the dissent was vigorous, the majority decision has firmly established that restraints of agency proceedings will not be

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[48]*See id.* at 22.
[49]*Id.* at 22, 24.
[50]*Id.* at 21-22, 25.
[51]*Id.* at 23-24.
[52]*Id.* at 22.
[53]*Id.* at 30.
[54]*Id.* at 31-32.
[55]*Id.* at 26, 30, 33.

available to contractors in future FOIA-renegotiation cases.[56] The decision was very narrow, however, for the Court was careful to state that the prohibition of restraint applies only to renegotiations.[57] *Bannercraft* leaves undecided whether a district court, while considering a party's FOIA claim, may restrain the proceedings of an agency other than the Renegotiation Board.[58] An analysis of the reasoning behind *Bannercraft* may offer litigants in future FIOA-agency cases an indication of what courts following the *Bannercraft* decision may require before allowing a restraint of agency proceedings.

In deciding whether the administrative procedure set up under the Renegotiation Act could be interrupted for court adjudication of FOIA claims, the *Bannercraft* majority applied the reasoning process usually adopted by courts in administrative cases involving restraints and embodied in the doctrine of exhaustion of administrative remedies.[59] In general terms, the doctrine provides that "no one is

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[56] *See* note 57 *infra*.

[57] With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

IV

We find it unnecessary, however, to decide in these cases, whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim. We hold only that in a *renegotiation* case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not obtain its ends through the route of judicial interference.

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1974).

[58] *Id.*

[59] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 (1958).

It should be noted that *Bannercraft* does not fit into the usual pattern of cases which require the exhaustion of administrative remedies. A typical case is Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) where the petititioner applied to the court for an injunction of NLRB proceedings claiming that it was not subject to the Board's jurisdiction because its business was not in interstate commerce. The Supreme Court refused to allow an injunction, finding that Congress had placed jurisdiction in the NLRB to decide whether certain labor practices affected interstate commerce. *Id.* In essence, the petitioner was seeking to substitute an unauthorized court proceeding for the authorized agency proceeding. The *Bannercraft* case is more complex, however, because, though the Renegotiation Board is authorized to determine excess profits, the district court is empowered to hear FOIA claims. If a restraint of renegotiations is needed to prevent the irreparable loss of a contractor's right to the timely disclosure of information, the problem arises of determining which congressionally authorized procedure should be allowed to disrupt the other.

The *Bannercraft* contractors argued, in effect, that each procedure should be considered independently of the other. Thus if a contractor had demanded materials

entitled to judicial relief for a supposed or threatened injury until the prescribed administrative procedure has been exhausted."[60] The reasons for applying this doctrine are varied. First, Congress has usually established an administrative procedure to resolve a particular type of question or to regulate a specific class of individuals or businesses. If the agency is allowed to decide questions or cases within its jurisdiction in the first instance without court interference, it can both utilize the expertise which it has acquired in considering similar cases and promote consistency of results by applying the same standards in all similar cases. Judicial resolution of these cases at intermediate stages of agency proceedings could destroy uniformity and dilute the advantages of agency expertise.[61] Second, considerations of efficiency generally favor a requirement of exhaustion of administrative procedures because the agency process will usually move more rapidly without court interruption.[62] Moreover, court review might become unnecessary if agency proceedings are allowed to run their full course because errors made at an early stage may be corrected at a later stage.[63] Third, if court review does become necessary, the agency, if allowed to finish its consideration of a case, will have created a record

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of the Renegotiation Board and had been refused, he had exhausted the *administrative procedure for acquiring the materials* and was entitled to full court relief, including a restraint of renegotiations if this would protect his FOIA rights. *See* Brief for Respondent David B. Lilly Co. at 17-18, Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974). Though this conceptualization of the problem is neat, it overlooks the problem that the policy of disclosure behind the FOIA might conflict with a congressional intent that renegotiation involve informal bargaining without court interruption.

The *Bannercraft* majority's approach of looking at the case as a typical exhaustion of remedies case, though it strains the usual conceptualization of exhaustion cases, has the advantage of balancing the apparently conflicting congressional policies in deciding which will govern. This approach seems more nearly to carry out one of the main reasons for applying the exhaustion doctrine—to follow congressional intent. *See* text accompanying note 65-66 *infra*.

[60]Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[61]"[I]t was thought desirable to preface all judicial action by a resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of administrative interpretation." Yakus v. United States, 321 U.S. 414, 433 (1944). *See also* Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185, 193-94 (1969); FCC v. Schrieber, 381 U.S. 279, 290-91 (1965); Far East Conference v. United States, 342 U.S. 570, 574 (1952).

[62]McKart v. United States, 395 U.S. 185, 194 (1969).

[63]Parisi v. Davidson, 405 U.S. 34, 37 (1972); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772-73 (1947); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 311 (1937).

to be used as a basis for court review.[64] Fourth, judicial respect for congressional policy usually requires a court to refrain from adjudicating questions which Congress intended the agency to decide in the first instance.[65] Court interruption and substitution of judicial proceedings for those of the agency might frustrate a congressional desire that certain cases be resolved by procedures which are different from those used in a court or that agency proceedings move along undelayed.[66]

Though in a future FOIA-agency case all four factors could be relevant to the decision of the case, the *Bannercraft* Court relied on the fourth,[67] congressional policy, in deciding that the contractors had to exhaust the renegotiation procedure and could not receive a restraint while presenting their FOIA claims in district courts. In reaching this decision, the *Bannercraft* Court balanced the congressional policies behind the two statutes involved in the case.[68] On one side

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[64]Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185, 194 (1969).

[65] Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own. . . . To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination.

Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947); *accord,* McKart v. United States, 395 U.S. 185, 194 (1969).

[66]Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 770, 781 (1947). *See* note 46 *supra.*

[67]Both in *Bannercraft* and in most future FOIA-agency cases the first three reasons for requiring exhaustion of administrative remedies (see text accompanying notes 61-64 *supra*) would not apply. The first reason, court deference to agency judgment to promote expertise and consistency, was congressionally overruled in FOIA cases, because Congress made the district courts the enforcement arm of the Act. 5 U.S.C. § 552(a)(3) (1970). The second reason, promotion of efficiency, would also not be apposite in most FOIA-agency cases. When the *Bannercraft* Court indicated that contractors engaged in renegotiations could file FOIA suits (see note 7 *supra*), it impliedly rejected the argument that administrative procedures should be allowed to proceed unhindered so that earlier errors could be corrected later. Further, if courts may hear FOIA cases at all before the conclusion of agency action, arguably it would be more efficient to stay agency proceedings pending court decision of the claim to avoid the wasteful exhausting of erring procedures. *Cf.* McKart v. United States, 395 U.S. 185, 194 (1969).

The third reason for requiring exhaustion—allowing the agency an opportunity to build a record for court review—is inapplicable because the district court proceeding in an FOIA case is de novo, 5 U.S.C. § 552(a)(3) (1970), and a restraint pending the resolution of the claim would not prevent the agency from compiling a record for review when agency proceedings resumed after the settlement of the FOIA suit.

[68]"Success lies in providing a workable formula which encompasses, balances, and

of the balance was the FOIA, which the Court viewed as not expressly intended to provide agency litigants with a new tool of discovery.[69] On the other side of the balance was the Renegotiation Act, which the majority found to embody a clear congressional policy requiring expeditious renegotiation proceedings in which the Board and the contractor attempt to negotiate an agreement to eliminate excessive profits.[70] The Court's balancing of the policy interests favored prompt and informal negotiations which a restraint would destroy.[71] However, in other cases, a change in the congressional policy to be considered could shift the balance and aid in leading a court to grant a restraint. In future cases involving other agencies, the two policy interests involved will be Congress' purpose behind the FOIA and the congressional intent expressed in the act creating the agency whose proceedings the litigant seeks to have restrained.

Because the congressional purpose behind the FOIA was a factor in the *Bannercraft* Court's balancing of congressional policy, the effect of the FOIA on the balance in a future case can be judged by determining the *Bannercraft* majority's finding as to the nature of the congressional policy embodied in the FOIA. The Court's statement that the FOIA was not designed to provide a tool of discovery for financially interested parties in agency proceedings[72] can be read in two ways, each leading to a different result. If Congress meant to bar agency litigants from using the FOIA to obtain materials, the balance in a future case would probably not favor the granting of a restraint of agency proceedings. If, however, Congress intended neither to prohibit nor to promote agency litigant use of the FOIA, the tipping of the balance in a future case would depend on the nature of the congressional policy behind the statute setting up the agency proceedings to be restrained. The proper reading of the *Bannercraft* opinion seems to be the latter: Congress intended neither to prohibit nor to promote agency litigant use of the FOIA.

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protects all interests, yet places emphasis on the fullest responsible disclosure." S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

The Supreme Court adopted this flexible approach in EPA v. Mink, 410 U.S. 73, 80 (1973), where the Court commented: "It is in the context of the Act's attempt to provide a 'workable formula' that 'balances, and protects all interests,' that the conflicting claims over documents in this case must be considered."

It would seem that the Bannercraft Court adopted the balancing approach to avoid frustrating the congressional policies which it found embodied in the Renegotiation Act and the FOIA.

[69]*See* note 49 *supra* and accompanying text.

[70]*See* notes 46-47, 50 *supra* and accompanying text.

[71]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1974).

[72]*Id.* at 22, 24.

This reading of the *Bannercraft* decision is supported by the somewhat confusing paragraph of the majority opinion[73] which states that a restraint of renegotiations, relief not specifically provided by the FOIA, would allow the contractors to discover materials which would not be disclosable under Board regulations, a use of the FOIA which Congress did not expressly approve.[74] At the same time, however, the Court also indicated that a contractor involved in renegotiations could file an FOIA suit and could receive the Act's specifically-mentioned relief requiring agency disclosure.[75] Thus the majority seemed to find that in view of both the rule prohibiting restraints of renegotiations and the lack of irreparable harm to the contractors if renegotiations continued, the absence of a congressional intent to broaden agency discovery rules in the FOIA meant that the district courts could not expand the relief specifically mentioned in the Act to include a restraint. However, the district courts could hear a contractor's FOIA claim while renegotiations continued uninterrupted and could order agency disclosure of materials if proper. In short, while congressional policy did not prohibit agency litigants from using the FOIA to obtain agency-held materials, it did not promote such use of the FOIA and, therefore, did not justify the granting of a restraint to further the discovery of agency-held documents.

The conclusion that Congress did not intend to prohibit use of the FOIA to obtain agency-held information is supported by the legislative history of two of the Act's provisions. One, exemption 7 of the FOIA, excludes from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[76] Explaining this language, the House Report stated that the FOIA was "not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly."[77] In this context, investigatory files include not only those compiled for the enforcement of criminal laws, but also files

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[73] Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery . . . over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings. . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act. Protection for the contractor in the renegotiation process is afforded through the injunctive power specifically bestowed by 5 U.S.C. § 552(a)(3).

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (citations omitted).

[74] *Id.*

[75] *See id.* at 24, 26.

[76] 5 U.S.C. § 552(b)(7) (1970).

[77] H.R. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966).

prepared in connection with agency regulation under statutes such as the labor and securities laws.[78] Thus, one of the purposes of the exemption seems to be to prevent parties being investigated by agencies from using the FOIA to discover the agencies' files before they would normally be available. Apparently, therefore, Congress foresaw that parties engaged in agency proceedings would attempt to use the FOIA as a discovery tool and took specific precautions to prevent disclosure of materials which it found should be withheld. Conversely, it would seem that materials which Congress did not expressly exempt from disclosure under the FOIA were not intended to be withheld from agency litigants.

If in general Congress did not intend to prohibit agency litigants from obtaining materials disclosable under the FOIA, the question arises whether Congress intended that such materials be obtained in those instances when agency rules of discovery barred disclosure. The effect of agency rules of discovery could be important, for example, in applying exemption 5 of the FOIA,[79] which prohibits the obtaining of "inter-agency and intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[80] The availability of these memoranda and letters under exemption 5, therefore, depends on the rules of discovery applicable in litigation. If, in this context, "litigation" means not only court adjudication but also agency proceedings, then agency rules of discovery could limit the disclosure of inter- and intra-agency materials. However, the Supreme Court impliedly rejected a reading of "litigation" to include agency proceedings in *EPA v. Mink*[81] where it interpreted exemption 5 as a congressional adoption of court rules of discovery regarding intra-agency materials.[82] Relying on this case, a court of appeals stated:

> [I]t seems clear that Congress, in enacting the exemption, did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy. . . . If agency custom were the touchstone for applicability of the exemption, the pro-disclosure policy of the Act would be easily evaded.[83]

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[78] *Id.*

[79] 5 U.S.C. § 552(b)(5) (1970).

[80] *Id.*

[81] 410 U.S. 73 (1973).

[82] *Id.* at 91.

[83] Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 717 (D.C. Cir. 1973).

It would appear that Congress intended only court rules and not agency rules of discovery to determine what materials are excluded from disclosure by exemption 5. Reading exemption 5 together with exemption 7 indicates that Congress apparently foresaw that agency litigants would use the FOIA to obtain materials which might not be available under agency discovery rules. Where it objected to such use of the FOIA, it wrote an exemption; but where it did not object, it left the Act's general rule of disclosure to govern in FOIA cases. This textual examination, in conjunction with the Court's indication in *Bannercraft* that a contractor could file an FOIA suit while engaged in renegotiations, demonstrates that Congress did not intend to prohibit agency litigants from using the FOIA to obtain agency-held information, even if it did not expressly indicate that the FOIA created new agency discovery rules. Thus the FOIA seems to be neutral with regard to agency litigants making the FOIA a discovery tool.

If the congressional policy embodied in the FOIA is a neutral factor, the legislative intent expressed in the act on the other side of the balance—the act creating the agency proceeding which the litigant seeks to have restrained—will probably determine whether a court's balancing of congressional policy weighs in favor of or against a restraint of agency proceedings. In *Bannercraft,* the statute involved was the Renegotiation Act, which the Court found to set up a procedure which Congress intended to advance expeditiously and to allow informal bargaining between the Board and the contractor.[84] The problem of informal bargaining is probably unique to the renegotiation process,[85] so the question of whether a restraint would destroy bargaining would most likely not arise in a different FOIA-agency case. However, the issue of Congress' desire to prevent delay in agency proceedings might arise in cases involving other agencies. If a litigant in a future FOIA-agency case is confronted by the argument that delay of agency proceedings caused by a restraint would frustrate congressional intent, he must present evidence to show that a restraint to further the disclosure policy of the FOIA would not contravene congressional policy. An analysis of the *Bannercraft* Court's finding that renegotiations should not be delayed demonstrates how

[84]*See* notes 46-47, 50 *supra* and accompanying text.

[85]Renegotiation involves several levels of informal negotiations between the Board and the contractor (see text accompanying notes 29-31 *supra*) while proceedings before the FTC and the NLRB, for example, involve formal hearings. *Compare* 50 U.S.C. APP. § 1215(a) (Supp. III, 1973), *amending* 50 U.S.C. APP. § 1215 (1970) *with* 15 U.S.C. § 45(b) (1970) (hearings before the FTC on unfair trade practices) *and* 29 U.S.C. § 160(b) (1970) (hearings before the NLRB on unfair labor practices).

the presentation of such evidence could change the outcome in a later case.

The *Bannercraft* majority's reliance on the 1947 case *Aircraft & Diesel Equipment Corp. v. Hirsch*[86] for the proposition that Congress intended renegotiations to proceed expeditiously and without restraints,[87] read together with its statement that the FOIA did not change the pre-FOIA rule preventing court interference with renegotiations,[88] seems to indicate a finding by the Court that Congress condemned all causes of delayed renegotiations. Apparently this is an accurate statement of congressional policy concerning wartime renegotiation, for successful fighting of the war required the procurement of large amounts of materials in short periods of time. Because of the resulting hasty procurement, advance estimates of costs were often inaccurate—a problem which renegotiation was intended to rectify by allowing a review of profits after production experience had established more accurate cost figures. Yet, if contractors became bogged down in protracted renegotiations, procurement could be slowed. To eliminate one cause of delay, Congress reduced to a minimum the availability of court proceedings.[89]

Evidence concerning the modern function of renegotiation, not presented in the *Bannercraft* briefs, raises some doubt as to the absolute nature of the congressional command of minimum delay in the proceedings. At present, the complexity and novelty of space and military procurement rather than the haste of wartime procurement form the main reasons for providing a later look at a contractor's profits.[90] As a result of this new function, renegotiation is currently a slow process: statistics for 1973 show that the average processing time for cases filed with the regional boards, subdivisions of the Renegotia-

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[86]331 U.S. 752 (1947).

[87]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 21 (1974).

[88]*Id.* at 22.

[89]Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 770 (1947); *accord,* Lichter v. United States, 334 U.S. 742, 763 n.7, 793 (1948).

[90] [M]odern military and space procurement is characterized by changing technical requirements and increasing complexity. The nature of the procurement often means that there is a lack of established market costs or prices to guide Government procurement personnel. As a result, negotiated contracts—in other words, contracts that are not formally advertised—are used for the bulk of this procurement.

[T]he renegotiation process is an after-the-fact review to eliminate excessive profits which may arise on procurement occurring under these conditions.

119 CONG. REC. 3468 (daily ed. May 9, 1973) (statement of Rep. Griffiths of Michigan, member of the House Ways and Means Committee which favorably reported the bill).

tion Board, was 29 months.[91] Congress recognized the delaying effect of renegotiation's present purpose when it removed jurisdiction to redetermine the Board's finding of excess profits from the Tax Court to the Court of Claims.[92] The Senate Report noted that one of the major reasons for the shift was the Court of Claims' ability to handle cases "extending over a long period of time . . . and involving a large volume of evidence. Both of these elements customarily exist in a renegotiation case."[93]

In light of this evidence that Congress expects renegotiations to proceed slowly to accommodate the complex nature of its current purpose, it would seem inaccurate to find that all causes of delay of renegotiations are contrary to congressional intent. If some causes of delay are not contrary to Congress' will, the proper question would seem to be whether the particular cause of delay, in this context an FOIA suit and restraint, would frustrate congressional policy. Had this evidence been presented to the *Bannercraft* Court and had the majority accepted this reasoning and found that an FOIA delay would not be objectionable, it might not have prohibited restraints in all FOIA-renegotiation cases. If the majority was concerned that objectionable delays would result from contractors' frivolous FOIA suits, it could have prevented most of these unwarranted delays by requiring district courts, before granting restraints, strictly to apply the rule that a petitioner show that he will probably win on the merits of his claim.[94] The outcome in a future FOIA-agency case, therefore, might well depend on a showing that, although Congress generally intended an agency procedure to advance without delay, it did not intend to prevent congressionally authorized court proceedings under the FOIA from operating effectively, even though the FOIA proceeding would delay the agency procedure. If the future litigant can make such a showing, when the court balances the act creating the agency proceedings which he seeks to have restrained with the neutral FOIA, the balance should lean towards allowing a restraint.

Yet even if a future FOIA-agency litigant demonstrates that the

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[91]18 RENEGOTIATION BOARD ANNUAL REPORT 10 (1973).

[92]Act of July 1, 1971, Pub. L. No. 92-40, § 3, 85 Stat. 98.

[93]S. REP. No. 92-245, 92d Cong., 1st Sess. (1971) (reprinted at 117 CONG. REC. 22879, 22881 (1971)).

[94]In considering whether to grant a restraint of agency proceedings, the court in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958) inquired: "Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Id.* at 925.

balancing of congressional intent favors a restraint, the *Bannercraft* decision indicates that he must also show that his right to information under the FOIA will be irretrievably lost unless the court restrains agency proceedings.[95] The *Bannercraft* contractors attempted to make such a showing of irreparable harm,[96] but the majority rejected their arguments.[97] Because of the unique nature of renegotiation, the Court's reasons for rejecting the arguments of irreparable harm may also be unique to renegotiation. The majority's reasons for rejection should be examined, however, to demonstrate why the *Bannercraft* decision should not determine the adequacy of a litigant's showing of irreparable harm in future FOIA cases involving agencies with procedures different from those of the Renegotiation Board.

By requiring the *Bannercraft* contractors to exhaust the administrative process, the Court required them to go through the various steps of renegotiation at the agency level and then to appeal to the

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[95]"Without a clear showing of irreparable injury . . . failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process." Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

The *Bannercraft* Court approved the court of appeals' statement in Sears Roebuck & Co. v. NLRB, 473 F.2d 91, 93 (D.C. Cir. 1972): " . . . it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention." 415 U.S. at 24. The court of appeals decision in *Bannercraft* reached the same result but in different terms: "The first purpose served by the exhaustion doctrine stems not so much from the law of administrative agencies as from general equity jurisprudence. A party seeking equitable relief must always show that he would suffer some sort of irreparable injury without it." Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 355 (D.C. Cir. 1972), *rev'd on other grounds,* 415 U.S. 1 (1974).

In some instances, courts will grant a restraint of agency proceedings pending court review of agency action if the petitioner makes only a showing of irreparable harm. For example, the Supreme Court in Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n, 306 U.S. 56 (1939), found that the petitioner's claim that the commission's threatened disclosure of confidential materials would irreparably harm it was sufficient to allow a court restraint of proceedings. A litigant in an FOIA-agency case, however, should not rely solely on a showing of irreparable harm because in deciding whether to restrain proceedings, courts take into account the public interest. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Note, *Stays of Federal Administrative Action,* 67 HARV. L. REV. 876, 877 (1954). A petitioner, therefore, should accompany his arguments of irreparable harm with a showing that congressional policy favors, or at least does not bar, a restraint in his case.

[96]Brief for Respondent Bannercraft Clothing Co. at 20-28; Brief for Respondent David B. Lilly Co. at 20-21, Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974).

[97]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 23 (1974).

Court of Claims for a de novo determination of excess profits.[98] The majority found that requiring the contractors to complete the renegotiation process was proper because the Court of Claims proceeding would provide adequate protection for the contractors' rights to information.[99] The authority cited for this position was a law review note[100] which relied on *Virginia Petroleum Jobbers Association v. FPC.*[101] In that case, the association sought to intervene in a Federal Power Commission proceeding, and when it was refused its request, it sought a restraint of proceedings while the court determined its right to intervene.[102] The court of appeals refused to approve a restraint, finding that the association could assert its claim in a judicial review of final agency action. The court review was an adequate remedy because if the association were correct in its claim, it could intervene in a court-ordered de novo consideration of the matter by the FPC.[103] In essence, this relief returned the parties very nearly to their pre-error positions and allowed the administrative procedure to rerun its course without the error complained of at the court review of the first agency proceeding.

In renegotiation cases, however, the Court of Claims may not order the contractors to a second round of negotiations with the Board personnel who improperly denied them information, but must itself redetermine the amounts which the contractors must refund to the government.[104] Because of the vagueness of the statutory standards governing renegotiation[105]— standards which require the application

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[98]*See* text accompanying notes 24-34 *supra.*

[99]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 23 (1974).

[100]As authority for this point, the Court cited only Note, 41 GEO. WASH. L. REV. 1072, 1084 (1973). 415 U.S. at 23.

[101]259 F.2d 921 (D.C. Cir. 1958).

[102]*Id.* at 923-24.

[103]*Id.* at 926-27.

[104]50 U.S.C. APP. § 1218 (Supp. III, 1973), *amending* 50 U.S.C. APP. § 1218 (1970).

[105](e) Excessive Profits.

> The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title . . . to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:
>
> (1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;
>
> (2) The net worth, with particular regard to the amount and source of public and private capital employed;

of a large amount of personal judgment[106]— the chances are great that the final determination of excess profits made by the Court of Claims will differ from that which the contractors could have negotiated at the agency level where the information was improperly denied them. It is not unlikely that the contractors' liability for excess profits will be increased if they move beyond the level where the information was withheld from them; thus, the uncertainty of the Court of Claims relief in renegotiations is greater than that of the agency reconsideration provided in *Virginia Petroleum Jobbers Association v. FPC.*[107]

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(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

50 U.S.C. APP. § 1213(e) (1970).

[106]Determining excess profits "requires the exercise of an unusually high degree of administrative discretion and judgment on the part of men rather than the application of fixed and determinable rules of law." S. REP. No. 407, 86th Cong., 1st Sess. 1 (1959). The report states this factor as a reason for not making the Renegotiation Act permanent. By extending it only for a short time, Congress may periodically review renegotiation. *Id.* The same consideration caused the short extensions of the Act by the 92d Congress, S. REP. No. 92-245, 92d Cong., 1st Sess. (1971) (reprinted at 117 CONG. REC. 22879, 22880 (1971)), and by the 93d Congress. 119 CONG. REC. 3468 (daily ed. May 9, 1973) (statement of Rep. Griffiths of Michigan, member of the House Ways and Means Committee which favorably reported the bill).

[107]262 F.2d 921 (D.C. Cir. 1958). It could be argued that the ability of the *Bannercraft* contractors to file an FOIA suit while renegotiations continued (Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24, 26 (1974)) and expedited FOIA hearings (5 U.S.C. § 552(a)(3) (1970)) would provide the contractors with the information they requested at the level at which it was improperly denied because renegotiations proceed slowly. *See* text accompanying note 91 *supra.* The *Bannercraft* Court, however, indicated that not all FOIA cases are resolved quickly. 415 U.S. at 23. Arguably, therefore, the FOIA suit without a restraint is uncertain relief because the time required to determine an FOIA claim would depend on several factors, including the Renegotiation Board's delaying the resolution of a case by appealing an unfavorable district court order.

If the contractors move beyond the level of renegotiations at which the information was denied, the application of the vague statutory standards by persons other than those who improperly withheld information combined with the de novo character of each renegotiation stage (see note 30 *supra*) makes the relief provided the contractors

The *Bannercraft* Court's disregard of this distinction could mean that even a showing of a high degree of uncertainty of relief would not be sufficient to allow a district court to restrain agency proceedings. If so, it is unlikely that litigants in future FOIA-agency cases could ever receive a restraint.

The unique nature of renegotiation, however, probably makes *Bannercraft* distinguishable from other FOIA-agency cases. The majority found that the uncertainty of relief at the Court of Claims level—the risk that the final determination of excess profits might exceed that which a contractor could have negotiated earlier—was intended by Congress to characterize the entire renegotiation process.[108] Therefore, in cases involving other agencies, a litigant might be able to show that uncertainty of relief was not congressionally incorporated into the procedure which he is attempting to have restrained. If he goes on to show that his right to information guaranteed by the FOIA will not be adequately protected in later stages of agency proceedings, he may have made an adequate showing of irreparable harm. If such a showing is combined with his arguments that congressional policy does not prohibit a restraint in his case and that he will probably win on the merits of his FOIA claim,[109] the litigant should be entitled to a restraint of agency proceedings pending the resolution of his FOIA claim.

Thus, the significance of *Bannercraft* lies not only in its prohibition of restraints in renegotiation cases, but also in its holding that generally district courts have full equitable powers under the FOIA[110] and its indication that these courts could consider the merits of granting a restraint of agency proceedings in cases not involving the Renegotiation Board.[111] Because the Court refused to allow a restraint in *Bannercraft,* that case, if superficially read, could become general authority for not allowing a restraint of any agency proceedings in FOIA cases. This use of *Bannercraft* would ignore the Court's reasoning in the case. The majority's heavy reliance on congressional intent would seem to indicate that the question of the appropriateness of a restraint in FOIA-agency cases should be decided at least on an

much more uncertain than it would be if they were allowed to negotiate a second time, this time with the materials they sought, with the personnel who denied them these materials the first time.

[108]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 25 (1974).

[109]*See* note 94 *supra.* A strong showing of probability of success on the merits of a claim might move a court to lessen the strictness of the required showing of irreparable harm. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[110]Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 19-20 (1974).

[111]*Id.* at 20.

agency by agency basis so that the different congressional intents behind the various agency proceedings may be balanced with the congressional policy expressed in the FOIA.

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