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2

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Freedom of Information Act--Investigatory Files (Frankel v. Securities Exchange Commission)

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ADMINISTRATIVE LAW

FREEDOM OF INFORMATION ACT — INVESTIGATORY FILES

Frankel v. Securities Exchange Commission

Concern over the inaccessibility of governmental agencies¹ prompted Congress to amend the Administrative Procedure Act² by adding the Freedom of Information Act (FOIA)³ to it in 1966. Despite

¹ An effect of the growth in the number and size of governmental agencies has been the erection of a "paper curtain" of bureaucracy. The primary justification for agency non-disclosure of information is derived from the doctrine of executive privilege. In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court acknowledged the existence of executive privilege as inherent in the separation of powers. "The court itself must determine whether the circumstances are appropriate for the claim of privilege and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8. Thus, in order to resolve a particular controversy where the doctrine of executive privilege is raised, a court must analyze the interest at stake in light of the separation of powers and the checks and balances designed to safeguard that separation.

However, executive privilege is not a shield which is automatically activated when the public approaches the government for information. The courts have recognized that such an interpretation of the doctrine could circumvent the judiciary's check on the executive branch and, as a result, have held that the executive privilege must be pleaded and will not be implied. In *General Services Administration v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969), the court enjoined the Internal Revenue Service from withholding records concerning a business transaction. The Ninth Circuit, in rejecting the Service's claim of executive privilege, held that the privilege may not be invoked by inference alone but must be raised specifically. In *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971), the court of appeals remanded a case to determine whether the Garwin Report (report on the SST compiled at Presidential request) was within the statutory exemptions of the Freedom of Information Act. The court refused to consider the doctrine of executive privilege as a defense because it had not been expressly invoked by the government. *Id.* at 1071. Therefore, the doctrine of executive privilege is subject to certain limitations: it must be expressly pleaded as a defense by the executive branch and the guidelines for its operation are determined by the judiciary.

Occasionally, the doctrine of executive privilege also proves to be a barrier when Congress seeks to enforce its right to be privy to important information. See *Berger, Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1943 (1965).

² The Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* (1970), was designed, at least in part, to provide the public with information about government activities. By its terms, only persons "properly and directly concerned" could obtain access to agency files. The right to information was further qualified by provisions stating that an agency could withhold documents from even this limited group "in the public interest" or whenever "good cause [for confidentiality]" was shown. Administrative Procedure Act of 1946, ch. 324, 60 Stat. § 3. This vague language made the APA susceptible to agency manipulation and severely hampered the ability of interested persons to get information. The effectiveness of the APA was further limited by the lack of judicial review of an agency refusal to disclose information, making the agency decision as to the propriety of disclosing information final. The combined effect of these factors was to render the APA ineffective as a means to secure information from agencies.

³ 5 U.S.C. § 552 (1970). This Act requires the disclosure of "identifiable" government records to "any persons" except as "specifically stated in nine exceptions." It eliminates the APA restriction that only those "properly and directly concerned" are entitled to information. See note 2 *supra*. Also, the FOIA reverses the APA by placing the burden of

its simple phraseology, or perhaps because of it,⁴ the FOIA has been the subject of varying interpretations.⁵ In *Frankel v. Securities Exchange Commission*,⁶ the Second Circuit has adopted a restrictive interpretation of the FOIA.

The specific issue in *Frankel* was whether the exemption for investigatory files⁷ should apply when investigation and enforcement

justifying non-disclosure on the agency rather than requiring the citizen to show a need for disclosure. See Note, *Recent Statute—Administrative Agencies*, 80 HARV. L. REV. 909, 910 (1967), where it is stated that the FOIA creates a presumption of disclosure.

⁴ The dissent in *Frankel v. SEC*, 460 F.2d 813 (2d Cir. 1972), blames the failure of the FOIA on equivocal draftsmanship. *Id.* at 820 n.5. When the FOIA was passed, Professor Kenneth Davis expressed the opinion that the language in the Act was faulty. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 800 (1967) [hereinafter Davis].

The exemption for investigatory files (see note 7 *infra*) was criticized by the Second Circuit in *La Morte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971), where Chief Judge Friendly characterized it as "rather murky." *Id.* at 451 n.3.

⁵ Compare the Senate Report on the Act, S. REP. NO. 813, 89th Cong., 1st Sess. (1965) with the House Report, H. R. REP. NO. 1497, 89th Cong., 2d Sess. (1966) and Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967).

In general, the Senate Report complies with the intent of the drafters of the Act to a greater degree than either the House or the Attorney General's report, both of which tend toward a restrictive interpretation. This difference between the Senate and the House and Attorney General's Reports has been judicially noted. In *Benson v. General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969), Chief Judge Lindberg wrote:

[T]he House Report accompanied the bill on its passage through the House of Representatives, after the bill had already passed the Senate. . . . [T]o the extent that the two reports disagree, the sure indication of Congressional intent is to be found in the Senate Report which was available for consideration in both houses.

Id. at 595. See also *Consumer Union of United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796, 800 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

⁶ 460 F.2d 813 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972).

⁷ 5 U.S.C. § 552(b)7. The FOIA exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." This exemption was included to prevent premature access to government records (thereby revealing litigation strategy), and to protect the informer's privilege.

It is interesting to note the discrepancy between the Senate and House reports as to the scope of this exemption. According to the Senate, Exemption 7 applies to those ". . . files prepared . . . to prosecute law violators." (S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965)). A reasonable interpretation of this report is that the exemption applies only to judicial proceedings, *i.e.*, criminal proceedings. In contrast, the House expands Exemption 7 to include those ". . . files related to enforcement of all kinds of laws, labor and securities laws, [including] adjudicative proceedings." (H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966)). See note 5, *supra*.

The significance of this discrepancy should not be understated because it has a direct bearing on the question of whether an agency may claim that a file is privileged under Exemption 7. The interpretation adopted by the House is more inclusive and will allow a greater amount of material to escape disclosure while the Senate version will allow only a limited class of investigatory files to be so protected.

The majority in *Frankel* fails to recognize the existence of any discrepancy between the Senate and House reports as to the scope of Exemption 7. *Id.* at 817. Inasmuch as the purpose of the FOIA amendment is to promote disclosure (see note 3 *supra*), the exemptions should be narrowly construed. See Nader, *The Freedom From Information: The Act*

proceedings have terminated.⁸ The plaintiffs were stockholders pursuing a class action for damages against the officers of Occidental Petroleum Corporation for violating the securities laws. In order to obtain "documentary support" for the allegations of their complaint, they requested to be permitted to inspect the files which the SEC had compiled in an earlier prosecution of Occidental Petroleum for securities violations.⁹ A divided court reversed the district court's decision enjoining the SEC from withholding these documents and ruled that the files were

and the Agencies, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970), where Mr. Nader argues that the exemptions were intended to provide objective guidelines for the courts to use in reviewing the validity of agency denials and must, necessarily, be narrowly construed.

In *Consumer Union of United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796, 800 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971) the district court, by way of dictum, said that the exemptions should be construed with disclosure as the "guiding star." The failure of the Second Circuit, in *Frankel*, to discern the discrepancy between the Senate and House reports and its unwillingness to adopt a narrow construction reflects a lack of judicial sensitivity to the basic problem.

⁸ This question was considered by the draftsmen of the FOIA. The initial version of the FOIA provided that the exemption for investigatory files was limited by the provision that they would be privileged ". . . until they were [used] and/or effect[ed] an action or proceeding or a private party's effective participation therein." S. REP. NO. 1666, 88th Cong., 2d Sess. (1964). The position of the agencies was that such a provision would hinder investigatory procedures and the agencies might be ordered to disclose a file containing a collateral aspect not yet concluded. This provision was subsequently deleted. See note 7 *supra*.

Those who favored the disclosure of investigatory files upon termination of the investigation and enforcement proceedings argued that the agencies should not be permitted to rely on the initial classification of a file to authorize the unwarranted withholding of information *ad infinitum*. The controversy is one of considerable import and has resulted in a conflict among circuits and district courts. The Court of Appeals for the District of Columbia and a district court in the Third Circuit have adopted the position that an agency must disclose its files upon termination of enforcement proceedings. In *Bristol Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970), the court remanded the action to the district court to determine whether there was a realistic prospect of continued enforcement proceedings. "[A]n agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date." *Id.* at 939. A similar conclusion was reached in *Cooney v. Sun Shipbuilding and Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968), where the court held that the exemption for investigatory files applied to files relating to a contemplated lawsuit or enforcement proceedings. See also Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970). "Once litigation is concluded, disclosure is impliedly required." *Id.* at 1279.

Prior to the decision of the Second Circuit in *Frankel*, no federal court of appeals had ruled that the exemption for investigatory files would apply despite termination of enforcement proceedings. The only decision favoring that position was *Cowles Communications, Inc. v. Dep't of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), where the court held that, so long as a file is compiled for enforcement purposes, it need not be produced when law enforcement ceases. The *Frankel* decision provides that the exemption for investigatory files continues after termination of enforcement proceedings and is in opposition to the D.C. Circuit's position as enunciated in *Bristol Myers*, *supra*. Certiorari was applied for in *Frankel* but was denied, 93 S. Ct. 125 (1972).

⁹ SEC v. Occidental Petroleum Corp. No. 71-0520 (S.D.N.Y., terminated on the basis of consent decree, March 5, 1971).

exempt from disclosure by virtue of their classification as investigatory files.

In reaching its decision, the majority relied on two cases decided under the Act¹⁰ and on its reading of the primary purpose of the FOIA and the scope of the exemption for investigatory files. The court stated that disclosure of the files would seriously hamper future investigations¹¹ while it would not promote the ultimate goal of the Act which, the court contends, is to enable the public to secure information in order to make informed decisions through the electoral process as to the nature, scope and procedure of federal government activities.¹² The court's view of the FOIA's purpose is contrary to that expressed by Chief Judge Friendly in *LaMorte v. Mansfield*¹³ as well as to the

¹⁰ The two cases relied on by the majority are unconvincing as supportive material. The first, *NLRB v. Clement Bros. Co.*, 407 F.2d 1027 (5th Cir. 1969), upheld a refusal to disclose statements of nonwitnesses in a pre-trial hearing on unfair labor practices because the information was sensitive in light of the employer-employee relationship. The other case cited was *Evans v. Dep't of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), in which the court upheld a refusal to disclose a letter sent to the Federal Aviation Agency regarding the competence of the plaintiff pilot. The court held that the public interest in assuring confidentiality of those seeking to call potentially important facts to the attention of the appropriate agency greatly outweighed the individual's need to know.

Both of these cases are extremely weak authority for the proposition that Exemption 7 does not end upon termination of the enforcement proceeding. The decision in *Clement Bros.* was made in order to protect employees who have testified against their employer regarding unfair labor practices. Clearly, an employer should not be entitled to testimony given by an employee to an agency because of the sensitivity of the employer-employee relationship and the inhibiting effect on the testimony of future witnesses. The *Evans* case relies on the same rationale since the FAA depends upon informants to trigger its investigations and no purpose would be served by disclosing the name of the informant. In *Frankel*, the agency did not establish a sensitive relationship nor did it show that no purpose would be served by disclosure. On the contrary, any contention of a sensitive relationship in *Frankel* would seem to be precluded by the decision of the Second Circuit in *La Morte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971), where the court required that non-public testimony given to the SEC be disclosed to the stockholders in a derivative action. In addition, the plaintiff in *Frankel* seeks disclosure not for personal reprisal as was the case in *Clement Bros.* and *Evans* but rather to collect damages for securities law violations.

The inadequacy of the cases relied on by the majority is matched by the opinion's failure to cite cases which deal with the issue at bar. The court does not attempt to distinguish *Bristol Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935 (D.C. Cir. 1970) (*see note 8 supra*), which is in conflict with the *Frankel* decision, nor does the court mention *Cowles Communications, Inc. v. Dept't of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971) (*see note 8 supra*), which is in direct support with its position.

¹¹ That the government has a privilege not to disclose the identity of informers in certain situations is generally accepted. *See Roviario v. United States*, 353 U.S. 53 (1957), *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). However, in the instant case, the court expands that privilege, without explanation, to include the protection of the agency's investigatory techniques.

¹² 460 F.2d 813, 816 (2d Cir. 1972).

¹³ 438 F.2d 448 (2d Cir. 1971). "[T]he objective of the Information Act was to promote general access to agency records." *Id.* at 451.

opinions of the Fourth¹⁴ and D.C. Circuits.¹⁵ Relying on this questionable interpretation, the court denied relief and limited the plaintiff to ordinary discovery procedures.¹⁶

The dissenting opinion of Judge Oakes emphasized two important considerations. First, he rejected the majority view of the ultimate purpose of the Act and argued that the aim of the FOIA is to empower the federal courts¹⁷ to subject agency operations to public perusal. In addition, Judge Oakes stressed that the district court had sufficiently

¹⁴ In *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971) the court said that the FOIA was designed ". . . to guarantee the public's right to know how the government is discharging its duty to protect the public interest." *Id.* at 24.

¹⁵ *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 699 (D.C. Cir. 1969). "The premier purpose of the act was to elucidate the availability of governmental records and actions to the American citizen." See also Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1970). According to Ralph Nader, the ultimate goal of the FOIA is substantial administrative reform achieved through public awareness of administrative failing.

¹⁶ By virtue of the decision, the litigants are precluded from using the FOIA as a vehicle to secure documentation for their claim and must, therefore, satisfy the requirements for discovery set down in the Federal Rules of Civil Procedure (FED. R. CIV. P. 26-37). Although the federal discovery procedures are liberal, they do not match the all inclusive language of the FOIA and represent a more difficult path for the litigants to follow. "In the discovery procedure a district court judge will be able to balance the need for the documents with the need for confidentiality." 460 F.2d at 818. See generally note 23 *infra*.

¹⁷ By providing district courts with the power to enjoin an agency from withholding records, the FOIA represents a substantial improvement over the APA which was lacking in provisions for judicial review. See note 2 *supra*. However, this provision in the FOIA is not a panacea because it lacks a mandatory provision for judicial enforcement. Since the relief sought is equitable, the petition may be subject to the court's intrinsic power to refuse to participate. A problem also arises as to the extent to which a court may exercise its equitable discretion. Where the information sought to be disclosed does not fall within the enumerated exemptions of the FOIA, 5 U.S.C. § 552(b) (1970), there is a question as to whether a court may withhold non-exempt material when it deems such to be in the public interest. In *Consumer Union of the United States, Inc. v. Veteran's Administration* 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971) the court held that it must "according to traditional equity principles, weigh the effects of disclosure and non-disclosure and determine the best course to follow . . ." *Id.* at 806.

However, the Fourth and D.C. Circuits have expressly rejected the contention that the courts have any such equitable discretion. In *Welford v. Hardin*, 448 F.2d 1067, 1077 (D.C. Cir. 1971), and *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971), the courts held that the district court has no equitable jurisdiction to deny disclosure on grounds other than those "specifically stated" in the FOIA.

In *General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969), the Ninth Circuit, in discussing the exemption of internal agency memoranda, stated:

In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.

415 F.2d at 880.

However, *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970) suggests that the broad language of *Benson* was not meant to apply to other than the enumerated exemptions. *Id.* at 933.

narrowed the scope of its order and accompanying memorandum¹⁸ by providing for *in camera* production of the records.¹⁹ By virtue of *in camera* examination, the agency's procedures and informants would be amply safeguarded, thereby rendering the majority's fear of exposure groundless. Although Judge Oakes acknowledged that on such a question reasonable judges may differ, he bolstered his position by citing numerous cases in which governmental agencies have been required to produce documentary material obtained in the course of investigation.²⁰

Contrary to the analysis of the court in *Frankel*, the provisions of the FOIA were deliberately couched in broad terms, reflecting the paramount intention that the Act be a *disclosure* rather than a *withholding* statute.²¹ The key issue underlying all the cases under FOIA is a determination of the ultimate goal Congress sought to attain. The majority in *Frankel* relies on a loose reading of the House report but that report is not itself representative of the Act's purpose.²²

Frankel is, in effect, a retreat from the liberal position adopted last term in *La Morte*.²³ The Second Circuit had, in that case, set forth a policy advocating the free flow of information. By adopting this re-

¹⁸ *Frankel v. SEC*, 336 F. Supp. 675 (S.D.N.Y., Oct. 20, 1971 [mem.]; Nov. 5, 1971 [order]).

¹⁹ This is a procedure whereby the records requested are disclosed before the judge in the privacy of his chambers. Attorneys for either or both parties may be present at this time depending upon the sensitivity of the material being disclosed. After reviewing the records the judge may require that suitable deletions be made by the agency in order to protect exempt information. The remaining portion of these records would be disclosed to the petitioner. The rationale for this procedure is that, while a portion of the records is exempt from disclosure, there should not be a blanket protection for the entire file. Such *in camera* examinations were mandated in *Gruman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), and *Bristol Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970).

²⁰ 460 F.2d at 820. Although this list of cases provides a valuable insight into the extent of court and agency interaction, none of them deals with Exemption 7 of the FOIA.

²¹ See note 3 *supra*.

²² There are several reasons supporting the view that the Senate Report reflects the better interpretation of the FOIA. In the first place, the Senate Report was the only report to accompany the FOIA through both the Senate and the House. Secondly, the history of the legislation in this area lends additional support to the proposition that the Senate Report is more representative of Congressional intent. The FOIA's predecessor, the APA, was considered ineffective in combating the growing "paper curtain" of governmental bureaucracy. See note 2 *supra*. In light of the abuses it was designed to rectify (see note 3 *supra*) it would be incongruous to espouse a restrictive interpretation of the FOIA. Since the Senate Report adopts an approach which favors disclosure, it more accurately represents the intent of Congress.

²³ The court there held that a party who testified in a non-public investigation conducted by the SEC and who received a copy of the transcript of his testimony was required to furnish copies thereof to his adversaries in a stockholder's action. The effect of this ruling was to severely limit the privilege of confidentiality of administrative investigations. See *Second Circuit Note*, 46 ST. JOHN L. REV. 418 (1972).

strictive approach, the Second Circuit has diluted the provisions of the FOIA and may have so severely blunted the thrust of the entire Act as to prevent its use as a weapon in the fight against the "curse of bigness" in governmental agencies.

PRE-INDUCTION REVIEW

Naskiewicz v. Lawyer

When a potential Army inductee objects to his draft board's decision to deny him a deferment, he usually finds that immediate recourse to the courts is not available. As a general rule, Congress has prohibited pre-induction judicial review of Selective Service orders.²⁴ However, in *Naskiewicz v. Lawyer*,²⁵ the Second Circuit held that, where a registrant has been denied the benefits of Selective Service regulations enacted for his benefit, a district court has jurisdiction to review.²⁶

The petitioner had been given an ophthalmological examination at the Cleveland office of the Armed Forces Entrance Examining Station (AFEES) and was found unfit for military service after originally

²⁴ 50 U.S.C. App. § 460(b)(3) (1970) reads:

No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution

Prior to the enactment of this legislation, the draft law contained no specific provision pertaining to judicial review of Selective Service board decisions. However, the Supreme Court, in two important cases, considered this problem. In *Falbo v. United States*, 320 U.S. 549 (1944), an appeal of a criminal prosecution of a Jehovah's Witness who had refused to report for the mandatory civilian work alternative to military service, the Court refused to review the local board's decision on the grounds that the applicant had failed to exhaust his administrative remedies. In *Estep v. United States*, 327 U.S. 114 (1946), where the problem of exhaustion of remedies did not exist, the Court ruled that, in the event of a criminal prosecution, it will have jurisdiction to review a decision of a draft board. *Id.* at 123. The Court, in defining the scope of its jurisdiction to review in such proceedings, stated that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Id.* at 122-23. See also Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966).

It was the Second Circuit's decision in *Wolf v. Selective Service Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967) that aroused Congress to enact § 460(b)(3). See *Oestereich v. Selective Service System Local Bd. No. 11*, 393 U.S. 233, 244 n.7 (1968) (Harlan, J., concurring). In *Wolf*, which involved registrants who were reclassified I-A as a result of their participation in an anti-Vietnam war rally, the court of appeals ruled that the restrictions on judicial review of a board's decision did not apply when first amendment rights were involved. In order to prevent such an expansion of the judiciary's power to review Selective Service Board opinions, which power was felt to cause unnecessary and costly delays to the induction system (113 Cong. Rec. 15, 426 (1967) Conf. Rep. No. 346 (June 18, 1967) 1 U.S.C.A.N. 1360 (1967)), Congress moved to restore the stricter "criminal prosecution" principle resulting in § 460(b)(3).

²⁵ 456 F.2d 1166 (2d Cir. 1972).

²⁶ *Id.* at 1168. The district court had dismissed the appellant's action on the ground that it lacked jurisdiction.