

NOTE

EXECUTIVE PRIVILEGE AND THE FREEDOM OF INFORMATION ACT: THE CONSTITUTIONAL FOUNDATION OF THE AMENDED NATIONAL SECURITY EXEMPTION

The 1974 amendments¹ to the Freedom of Information Act (FOIA),² which were intended to overrule the Supreme Court decision in *EPA v. Mink*,³ permit in camera judicial inspection of classified documents to determine the propriety of classification and to segregate nonsecret portions for release. President Ford vetoed the bill,⁴ in large part because he believed the amendments unconstitutional.⁵ The President's veto, shortly overridden by Congress, focused on the requirement that the executive branch assume the burden of proving that classification was more reasonable than release.⁶ Respectable authorities have asserted that the revised national security exemption⁷ unconstitutionally trespasses on the exclusive constitutional domain of the President.⁸ Specifically, these critics contend that classification of national security information is an inherently presidential function, in which neither Congress nor the courts may intrude. A necessary corollary to this contention is that the Constitution grants to the President an absolute, unreviewable privilege to withhold any documents whose release would injure the national security.⁹

1. 5 U.S.C. § 552 (Supp. IV 1974).

2. 5 U.S.C. § 552 (1970) (amended 1974).

3. 410 U.S. 73 (1973).

4. 10 WEEKLY COMP. OF PRES. DOC. 1318 (1974).

5. *Id.*

6. *Id.*

7. 5 U.S.C. § 552(b)(1) (Supp. IV 1974).

8. See notes 179-89 *infra* and accompanying text.

9. The phrase "national security" is of relatively recent origin and no little ambiguity. See Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401, 409-15 (1976). It first gained currency in 1947 with the passage of the National Security Act, 50 U.S.C. §§ 401-06 (1970), which established the National Security Council and the Central Intelligence Agency. The purpose was "to provide a comprehensive program for the future security of the United States." *Id.* § 401.

Sander Vanocur, in a speech at Northwestern University on June 30, 1973, character-

This Note will examine the constitutional foundation of the 1974 FOIA amendments relating to the national security exemption. Section I will outline the administrative procedures required by the FOIA, the reasons for enacting it, and the legal background to the 1974 amendments. Section II will discuss the state secrets privilege in the common law of evidence and suggest that this legal doctrine also has guided courts in developing a constitutionally based executive privilege. Section III will consider the President's constitutional privilege to refuse disclosure of confidential advice of his subordinates and the Supreme Court's recent construction of that privilege in *United States v. Nixon*.¹⁰ Section IV will consider the constitutional foundation of an exclusively executive national security privilege. This section will examine the assertion that the Constitution grants the President absolute, unreviewable discretion to conduct American foreign policy, and its corollary that such power extends to directly related domestic activity. Section V will discuss judicial ability to review national security classifications under the political question doctrine.

This Note will argue that the executive branch faces an inherent conflict of interest in attempting to reach the delicate balance between openness and secrecy. Thus, the Constitution permits final judicial determination of the propriety of secrecy whenever the executive's conflict of interest reaches sufficient magnitude. The necessary magnitude will vary with the need for secrecy, the consequences of nondisclosure, and the constitutional allocation of the initial decisionmaking authority. With narrow exceptions this theory supports the 1974 FOIA amendments as a constitutionally permissible use of Congress' concurrent powers in foreign affairs.

I. INTRODUCTION

The Freedom of Information Act requires federal agencies to make available identifiable records on request from any member of the public.¹¹ If the agency fails to comply, the citizen may seek injunctive relief

ized the term "national security" as a "golden calf," the idolatrous worship of which had led the United States into both Vietnam and Watergate. Regardless of the dispute into which the term has fallen in the popular press, national security does embody essential public interests. See notes 24-27 *infra* and accompanying text.

10. 418 U.S. 683 (1974).

11. 5 U.S.C. § 552(a)(3) (Supp. IV 1974). The original FOIA required a request for "identifiable records." 5 U.S.C. § 552(a)(3) (1970) (amended 1974). The 1974

from the federal district courts, which have original jurisdiction to conduct a hearing *de novo* with priority on the docket.¹² The agency bears the burden of justifying its refusal.¹³ Unless the agency can establish that the information is exempt from disclosure under one of nine statutory exceptions,¹⁴ each to be construed narrowly,¹⁵ the citizen must prevail.¹⁶

amendments merely require that the request "reasonably describ[e] such records." 5 U.S.C. § 552(a)(3)(A) (Supp. IV 1974).

12. 5 U.S.C. § 552(a)(3) (1970) (amended 1974).

13. *Id.*

14. This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of 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

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

Id. § 552(b) (amended 1974).

15. *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Ethyl Corp. v. EPA*, 478 F.2d 47, 49 (4th Cir. 1973); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

16. Subsection (c) was explicit: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c) (1970) (amended 1974).

Whether Congress intended to deprive the courts of general equitable powers to exempt material not specifically within the nine exemptions is an open question. *Compare Getman v. NLRB*, 450 F.2d 670, 677-80 (D.C. Cir. 1971) (courts lack equitable power to exempt material not specifically exempted by Congress; contrary result would upset delicate balance desired by Congress), *and Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (same), *with Theriault v. United States*, 395 F. Supp. 637, 641 (C.D. Cal. 1975) (court retains equity power to weigh public benefit of disclosure). *Cf. Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 17 (1942) (courts retain power to stay administrative orders absent explicit congressional denial). *See generally Renegotiation Bd. v. Bannercraft Clothing, Inc.*, 415 U.S. 1, 19-20 (1974) (dictum that courts retain equity powers absent explicit congressional denial); *Rose v. Department of Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), *affd*, 96 S. Ct. 1592 (1976); Note, *The*

The FOIA was intended to increase governmental accountability to the electorate.¹⁷ Congress recognized that only an informed electorate is capable of intelligent decisions;¹⁸ absent basic knowledge of government policies democracy functions poorly.¹⁹ The FOIA is potentially capable of serving more tangible if no less important interests. As presidential power has increased, public information has become essential to insure a rational decisionmaking process within the executive branch. Despite lipservice to the value of candid advice and open debate, the modern imperial Presidency has developed a closeminded "yes-man" mentality.²⁰ By allowing greater access to information, the

Freedom of Information Act: A Seven Year Assessment, 74 COLUM. L. REV. 895, 912-20 (1974); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1150-56 (1975).

17. H.R. REP. NO. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418; S. REP. NO. 813, 89th Cong., 1st Sess. (1965); 2 WEEKLY COMP. OF PRES. DOC. 895 (1966). See also *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J., concurring); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 REC. N.Y. CITY B.A. 177 (1974); Note, *In Camera Inspection Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 564-66 (1974); Comment, *Judicial Review of Classified Documents: Amendments to the Freedom of Information Act*, 12 HARV. J. LEGIS. 415 (1975).

18. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2429; 2 WEEKLY COMP. OF PRES. DOC. 895 (1966).

19. Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps*, 49 IND. L.J. 399, 406 (1974); Rourke, *Introduction to A Symposium on Administrative Secrecy: A Comparative Perspective*, 35 PUB. AD. REV. 1, 1 (1975); Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93, 105 (1973); 2 WEEKLY COMP. OF PRES. DOC. 895 (1966).

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power knowledge gives.

James Madison, Letter to W.T. Barry, quoted in *EPA v. Mink*, 410 U.S. 73, 110-11 (1973) (Douglas, J., dissenting).

The assumption that the majority of the electorate is capable of intelligent issue voting even with adequate information has, of course, been challenged. See M. ARNOLD, C. GARVIN & G. ROSENBAUM, *BEYOND POLITICS* 25-28 (1974); A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* (1964). The assumption is irrelevant to the pluralist theory of modern American politics, because political parties and interest groups channel information to and mold the voting patterns of the uninformed voter. See M. ARNOLD, C. GARVIN & G. ROSENBAUM, *supra* at 45-47; B. BERELSON, P. LAZARFELD & W. MCPHEE, *VOTING* (1954); V. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* (1961). Access to accurate government information is critical to the effectiveness of these opinion leaders. See note 31 *infra*.

20. G. REEDY, *THE TWILIGHT OF THE PRESIDENCY* 10-14, 74-81 (1970); Gravel,

FOIA improves the ability of external critics to challenge and thus to strengthen government policies.²¹ Moreover, a policy subjected to care-

Introduction to THE PENTAGON PAPERS x (M. Gravel ed. 1971); Hargrove, *What Manner of Man?*, in CHOOSING THE PRESIDENT 21-28 (J. Barber ed. 1974). See generally D. HALBERSTAM, THE BEST AND THE BRIGHTEST (1972).

The imperial trappings of the modern Presidency simultaneously encourage a presidential belief in his own infallibility while discouraging criticism by his close advisors. G. REEDY, *supra* at 11-14, 22; Hargrove, *supra* at 26-27. The occasional devil's advocate is tolerated as a necessary evil, his arguments discounted in advance. G. REEDY, *supra* at 11. Consequently, presidential policies often escape critical evaluation in their formative stages; contrary data are ignored, faulty premises remain unexamined, alternative policies remain unexplored. The unsurprising results are, all too often, egregious blunders. Some Presidents do retain the ability to elicit honest advice from their subordinates. Experience suggests, however, that the majority of strongwilled Presidents will behave otherwise. Hargrove, *supra* at 20.

David Halberstam writes of John McNaughton, an Assistant Secretary of Defense during the Vietnam escalation, a "secret dove" who symbolized as no one else "the incapacity to be oneself because the price of being oneself meant losing one's governmental position and respectability as a player" of the bureaucratic power game. D. HALBERSTAM, *supra* at 441. Despite the strongest personal misgivings about the escalation strategy, McNaughton would not openly challenge the policies of McNamara and Johnson.

McNamara would override [his doubts], he would dampen them, it would be business as usual, and McNaughton, the secret dove, would emerge from the Secretary's office and hide his doubts, because he still wanted to be a player, and he knew there was no power at the Pentagon if he differed from McNamara at all. So John McNaughton would attend meetings where some of George Ball's people might express their doubts, the same skepticism he felt, but he would tear them apart, into little pieces, almost rudely.

Id. at 448-49. Those who provided candid, open advice did not long retain their power. *Id.* at 449-61.

Neither Congress nor the Cabinet can effectively challenge unwise presidential policies; the Cabinet lacks the political base, G. REEDY, *supra* at 78, and Congress lacks the will. Congressional leaders privy to executive councils are rarely those who challenge the assumptions of executive policy. *Id.* at 80. Nor can Congressmen escape the suffocating atmosphere of the closed decisionmaking process. Senator J.W. Fulbright, for example, was sharply critical of the abortive Bay of Pigs operation in 1961; yet President Kennedy, musing over the disaster, thought Fulbright too would have been swept along with the current had he been involved from the start. A. SCHLESINGER, A THOUSAND DAYS 259 (1965).

In short, an external critic, outside the decision process, is required.

21. F. HARGROVE, THE POWER OF THE MODERN PRESIDENCY 167 (1974); G. REEDY, *supra* note 20, at 11; Rourke, *supra* note 19, at 2. Cf. Cox, *Executive Privilege*, 122 U. PA L. REV. 1383, 1431 (1974). See also Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975); D. EHNINGER & W. BROCKRIEDE, DECISION BY DEBATE (1965).

Applying this theory to previous foreign policy blunders is fraught with danger; the advantage of hindsight obscures the uncertainties originally facing policymakers. Notwithstanding the oft heard lament that early publication of the Pentagon Papers would have prevented the Vietnam escalation, see, e.g., Falk, *The Nuremberg Defense in the*

ful public scrutiny is likely, when implemented, to attract greater public support.²² Finally, the FOIA might lend badly needed credibility to the entire national security classification system. Abuses of secrecy by recent Administrations have so eroded the sanctity of classified information that it has become increasingly difficult to keep truly confidential information secret.²³ To the extent that the FOIA lessens abuse of the "Top-Secret" stamp, credibility may be restored, thereby permitting vital government secrets to remain secret.

There is little dispute that some government data is not fit for public knowledge. Current negotiations with foreign governments, technical details of military weapons, and covert intelligence operations illustrate

Pentagon Papers Case, 13 COLUM. J. TRANSNAT'L L. 208, 213 (1974), the war continued for four years after their appearance in 1971.

Nonetheless, respectable authority has asserted that thorough evaluation of the political situation in Vietnam during the early 1960's with a view to alternative policies would have permitted wiser choices. E. REISCHAUER, *BEYOND VIETNAM* 32 (1967). Informed public discussion of the merits of escalation might well have forced such an evaluation upon the Johnson Administration, averting disaster. Gravel, *supra* note 20, at ix; Hughes, *The Power to Speak and the Power to Listen: Reflections on Bureaucratic Politics and a Recommendation on Information Flows*, in *SECRECY AND FOREIGN POLICY* 13, 37-38 (T. Franck & E. Weisband eds. 1974).

The Bay of Pigs operation was also built on faulty premises and inadequate data, G. REEDY, *supra* note 20, at 12, failings that an external critic might easily have perceived. D. WISE, *THE POLITICS OF LYING* 349 (1973). Obviously, no external critic will ever be privy to the details, or even the existence, of covert military operations. The example does, however, illustrate both the dangers of a closed decisionmaking process and the strengths of open debate on foreign policy.

22. E. HARGROVE, *supra* note 21, at 167; Franck & Weisband, *Introduction: Executive Secrecy in Three Democracies: The Parameters of Reform*, in *SECRECY AND FOREIGN POLICY* 1, 8 (T. Franck & E. Weisband eds. 1974).

23. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring); Brief for Special Prosecutor, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in L. FRIEDMAN, *U.S. v. NIXON* 247 (1974); Dixon, *Congress, Shared Administration and Executive Privilege*, in *CONGRESS AGAINST THE PRESIDENT* 125, 133 (H. Mansfield ed. 1975); Franck & Weisband, *supra* note 22, at 9. Professor Dixon has stated the theory best:

The constitutional theory of plenary executive power in respect to certain kinds of government information, whether called state-secrets doctrine or executive privilege, palls when its political base in popular trust erodes, as the readiness to expose the CIA has shown. Confidentiality and credibility have a symbiotic relationship. In order to withhold, much must be disclosed.

Dixon, *supra* at 133. The publication of the names and addresses of CIA agents abroad, and the release of the secret House of Representatives report on the CIA by CBS newsman Daniel Schorr are contemporary illustrations of this phenomenon. See generally Crewdson, *Leak is Studied for Illegality*, N.Y. Times, Feb. 15, 1976, § 1, at 24, col. 1; N.Y. Times, Feb. 15, 1976, § 4, at 4, col. 2.

such confidential information.²⁴ Executive Order 11652²⁵ requires executive agencies to withhold material whose "unauthorized disclosure could reasonably be expected to cause damage to the national security."²⁶ The first exemption to the FOIA explicitly recognized these needs; the disclosure requirements did not apply to information "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."²⁷ The other exemptions similarly restricted public access to information that properly should remain confidential.²⁸

The FOIA thus altered the balance between secrecy and openness in government. Congress recognized that executive agencies are inevitably biased in favor of excessive secrecy.²⁹ Secrecy serves the parochial interests of the bureaucracy,³⁰ whereas disclosure permits more effective

24. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 116-17; Comment, *supra* note 17, at 416; Project, *supra* note 16, at 987.

25. Exec. Order No. 11,652, 3 C.F.R. 339 (1974), *reprinted in* 50 U.S.C. § 401, at 1429 (Supp. II 1972), *quoted in* note 337 *infra*.

26. Exec. Order No. 11,652, 3 C.F.R. 339 (1974), *reprinted in* 50 U.S.C. § 401, at 1429 (Supp. II 1972).

27. 5 U.S.C. § 552(b)(1) (1970) (amended 1974).

28. *See* note 14 *supra*.

29. *Cf.* Cox, *supra* note 21, at 1433. *See also* note 30 *infra*. The clearest proof of this bias is the widespread abuse of the classification system. The exact figures are unknown. Compare Gravel v. United States, 408 U.S. 606, 642 (1972) (Douglas, J., dissenting) (citing testimony of retired Air Force security expert William G. Florence that 99.5% of classified material is improperly withheld), with Comment, *supra* note 19, at 106 (two-thirds of secret information improperly classified). But it is beyond cavil that classification serves no national security interest in the great majority of cases. D. WISE, *supra* note 21, at 347-48; Project, *supra* note 16, at 990-98; Note, *supra* note 9, at 420 n.98.

30. M. WEBER, 3 *ECONOMY AND SOCIETY* 992-93 (G. Roth & C. Wittich eds. 1968); Cox, *supra* note 21, at 1431-33; Nesson, *supra* note 19, at 406; Rourke, *supra* note 19, at 2. There are numerous incentives for a bureaucrat or a politician to withhold information from the public. First, and most obvious, is simple aggrandizement of power. Information is power. M. WEBER, *supra* at 992; Cox, *supra* note 21, at 1433; Rourke, *supra* note 19, at 1. In the short run, decisions based on secret information are easier to implement. Informed criticism is impossible; the inability to verify it makes unanswerable the argument that superior information warrants the action taken.

It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke.

Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). *Accord*, Nesson, *supra* note 19, at 406. Second, secrecy hides inevitable

challenge to and public control of these institutions.³¹ Congress enacted the FOIA in recognition of the failure of prior statutory controls³² to offset this inevitable bias.

Before the 1974 amendments only seven decisions had even discussed the national security exemption of the FOIA,³³ two dealing with the same documents.³⁴ In none of these cases did a court order in camera inspection or seriously challenge the agency for proof beyond the fact of classification. Only in *Schaffer v. Kissinger*³⁵ did the court insist on additional proof; the agency was merely required to show that it had properly followed its own classification procedures.

mistakes and shields the institution from criticism. Rourke, *supra* note 19, at 1; Vaughn, *The Freedom of Information Act and Vaughn v. Rosen: Some Personal Comments*, 23 AM. U.L. REV. 865, 877 (1974); Comment, *supra* note 19, at 106 n.59. Finally, secrecy hides corruption; suspicion is less likely to arise and harder to verify when information is unavailable. Cox, *supra* note 21, at 1433; Miller, *Secrecy in Government*, CURRENT MAGAZINE, Jan. 1974, at 13, reprinted from 37 THE PROGRESSIVE, Dec. 1973, at 15.

These biases inhere in the institutional structure of the executive branch. Each derives from the natural inclination of the bureaucracy to prefer its own interests to those of the public. Their cumulative effect is to tip the delicate balance between secrecy and openness, *see* S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965), heavily in favor of secrecy. *See* note 29 *supra*.

31. G. REEDY, *supra* note 20, at 11; Cox, *supra* note 21, at 1431. *See* note 21 *supra*.

32. 5 U.S.C. § 552 (1964) (amended 1966).

33. EPA v. Mink, 410 U.S. 73 (1973); *Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974); Kruh v. GSA, 64 F.R.D. 1 (E.D.N.Y. 1974); Wolfe v. Froehlke, 358 F. Supp. 1318 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974); Aspin v. Department of Defense, 348 F. Supp. 1081 (D.D.C. 1972), *aff'd*, 491 F.2d 24 (D.C. Cir. 1973); Moss v. Laird, Civil No. 1254 (D.D.C. Dec. 7, 1971); Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

34. Wolfe v. Froehlke, 358 F. Supp. 1318 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974); Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). In both cases plaintiffs sought the records of Operation Keelhaul, the forcible repatriation by the Allies of anti-Communist Russian citizens after World War II. When Epstein filed suit in 1969, these documents were classified Top Secret. Subsequently, the United States Government announced that it had no objection to declassification, but would not release the material without British consent, which was not forthcoming. Wolfe v. Froehlke, *supra* at 1320. Consequently, the documents remained classified.

35. *Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974). Schaffer sought a copy of Red Cross reports on the conditions in South Vietnamese prison camps. Schaffer argued that this information had been classified after suit was filed solely to prevent release. Nonetheless, the court held that "there may be no judicial examination concerning the reasons and motives for an executive security classification." *Id.* at 391. While the case was remanded, the only issue for the trial court to determine was whether the Department of State had followed its own classification procedures.

A primary cause of the absence of litigation over the national security exemption was the courts' generally restrictive interpretation of its meaning. The first court to construe the exemption, in *Epstein v. Resor*,³⁶ adopted the view that none of the procedural provisions of the FOIA applied when the agency claimed an exemption.³⁷ Consequently, the court conducted no hearing and required the agency to submit no proof justifying the claim of exemption.³⁸ Although disapproving this broad construction, the Ninth Circuit on appeal upheld the ruling as applied to the national security exemption.³⁹ The court held that Congress had explicitly assigned the underlying factual issue, the propriety of classification, to the executive, so that judicial review of that issue was unauthorized.⁴⁰ The Supreme Court accepted and broadened this interpretation in *EPA v. Mink*,⁴¹ in which Representative Patsy Mink sued the EPA to acquire classified information about an underground nuclear test. The Court agreed that the agency had fulfilled its burden under the national security exemption by proving that the material had been classified according to executive order.⁴² Moreover, the Court refused to permit in camera judicial inspection to segregate for public release those portions of the documents that did not meet the standards of Executive Order 11,652.⁴³

The Court in *Mink* probably realized that it was making a "shambles" of the FOIA, at least for classified information,⁴⁴ but assigned the responsibility to Congress: "Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored."⁴⁵

36. *Epstein v. Resor*, 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

37. *Id.* at 216-17.

38. *Id.*

39. 421 F.2d at 932-33.

40. *Id.* at 933.

41. 410 U.S. 73 (1973).

42. *Id.* at 81-83; *id.* at 94 (Stewart, J., concurring).

43. *Id.* at 84. This ruling was especially unfortunate in view of the practice of "derivative classification," in which a document acquires a security classification equal to that of the most secret item used in its preparation or mentioned within. Nesson, *supra* note 19, at 402-03. Thus, had *Blackstone's Commentaries* been classified Top Secret, the entire West system would be derivatively classified as Top Secret. *Id.* The opportunity for abuse is as clear as the value of the FOIA which segregates nonclassified material for release.

44. *See* *EPA v. Mink*, 410 U.S. 73, 94-95 (1973) (Stewart, J., concurring).

45. *Id.* at 81. It is probable that *Mink* misinterpreted congressional intent. *See*

Honoring that choice meant that henceforth the only issue for a court to determine was whether the requested information had been classified under executive procedures, although dicta in two lower court opinions suggested a possible exception when the classification was wholly arbitrary or capricious,⁴⁶ or motivated by fraud or subterfuge.⁴⁷

The 1974 amendments to the FOIA were an outgrowth of congressional dissatisfaction with *Mink*, fueled by a Watergate-induced skepticism of executive secrecy. Four of the revisions dealt with the national security exemption.⁴⁸ First, Congress authorized but did not mandate in camera inspection as a part of the de novo hearing.⁴⁹ Second, the exemption was rewritten to exempt from disclosure matters that are "specifically authorized under criteria established by an Executive order to be kept in the interest of national defense or foreign policy and . . . , are in fact properly classified pursuant to such Executive order."⁵⁰ Third, Congress required the release of any reasonably segregable nonsecret portion of any record after deleting the exempt portions.⁵¹ Finally, the amendments clarified the executive's burden of proof in national security cases; unless classification is more reasonable than release, the exemption does not apply.⁵²

These amendments, although specifically intended to overrule

Note, *supra* note 16, at 932. The case illustrates judicial reluctance to challenge presidential decisions in foreign policy and related matters. See note 281 *infra*.

46. *Ethyl Corp. v. EPA*, 478 F.2d 47, 51 (4th Cir. 1973). See also *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (Pre-*Mink* case allowing same exception).

47. *Wolfe v. Froehle*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974).

48. The 1974 amendments also revised portions of the FOIA unrelated to national security. The amendments replaced the "identifiable record" test, see note 11 *supra*, with a "reasonable description" requirement, 5 U.S.C. § 552(a)(3)(A) (Supp. IV 1974), and permitted the court to award attorneys' fees against the Government when the complainant substantially prevailed, *id.* § 552(a)(4), and to trigger disciplinary action against civil servants who arbitrarily or capriciously denied information to the public. *Id.* § 552(a)(4)(F). Agencies must respond to a request within ten working days. *Id.* § 552(a)(6). Congress also rewrote the seventh exemption, which dealt with investigatory files of law enforcement agencies, *id.* § 552(b)(7), and required each agency to report to Congress on its efforts to comply with the purposes of the Act. *Id.* § 552(d).

49. *Id.* § 552(a)(4)(B). See H.R. REP. NO. 93-876, 93d Cong., 2d Sess. 7-8, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267, 6272.

50. 5 U.S.C. § 552(b)(1) (Supp. IV 1974).

51. *Id.* § 552(b).

52. *Id.* § 552(b)(1). See H.R. REP. NO. 93-876, 93d Cong., 2d Sess. 7, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267, 6272; 10 WEEKLY COMP. OF PRES. DOC. 1318 (1974).

Mink,⁵³ in fact impose much heavier constraints on executive secrecy than even the *Mink* dissent had contemplated.⁵⁴ Congresswoman Mink had requested in camera review to segregate nonsecret portions from the classified materials.⁵⁵ While the 1974 amendments authorize this procedure, they also grant final authority to the district judge to release improperly classified material.⁵⁶ Although the court must give "substantial weight" to an agency's affidavit on the merits of classification,⁵⁷ it is clear that the final determination of the propriety of the classification rests with the court.⁵⁸ Moreover, the agency must assume the burden of proof to justify the classification.⁵⁹ The 1974 amendments are thus a plain expression of congressional desire that the courts, not the executive, decide what information would, if released, injure the national security.⁶⁰ Consequently, the 1974 amendments raise unique constitutional questions of the power of Congress to assign and the judiciary to accept final responsibility for classification of documents related to foreign policy and national defense. The remainder of this Note will examine those questions.

II. THE STATE SECRETS PRIVILEGE IN THE COMMON LAW OF EVIDENCE

The most extensive case law involving classified information has

53. See H.R. REP. No. 93-876, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6272.

54. See note 56 *infra*.

55. EPA v. Mink, 410 U.S. 73, 78 (1973).

56. H.R. REP. No. 93-876, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6272. This was significantly more than the *Mink* dissent envisioned. "The Court of Appeals never dreamed that the trial judge would declassify documents." EPA v. Mink, 410 U.S. 73, 109 (1973) (Douglas, J., dissenting). Yet that was precisely what the 1974 amendments allowed.

57. CONF. REP. No. 93-1200, 93d Cong., 2d Sess. (1974).

58. The Department of Defense viewed this as permitting the courts to "second guess" security classifications, of which it took a predictably dim view. H.R. REP. No. 93-876, 93d Cong., 2d Sess. (1974) (Appendix containing remarks of L. Niederlehner). See also Project, *supra* note 16, at 1049; Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438, 1450 (1975).

59. A preliminary version of the amendments would have permitted a "reasonable basis" for the classification to sustain the agency's position. Comment, *supra* note 58, at 1449. The Senate deleted this provision at the urging of Senator Muskie, who properly believed it would raise an insurmountable barrier to challenges to agency action. *Id.* See also Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 757 (1975).

60. Comment, *supra* note 58, at 1450.

arisen when the Government claimed an evidentiary privilege in litigation—the state secrets privilege.⁶¹ The state secrets privilege protects military and diplomatic secrets from compulsory disclosure. Unlike executive privilege this privilege is grounded, not in the constitutional separation of powers, but in “the principles of the common law . . . interpreted . . . in the light of reason and experience.”⁶² Therefore, the evidentiary rules of the state secrets privilege are not dispositive of the constitutional issues raised by the 1974 FOIA amendments.⁶³

Nonetheless, the principles derived from the evidentiary privilege are important in resolving the constitutional issues. First, the issues of judicial competence and executive bias are similar.⁶⁴ Second, the custom and usage developed in litigation, reinforced by congressional action, guide the constitutional interpretation.⁶⁵ Finally, courts will naturally analogize to the common law privilege since it is the only significant body of apposite case law, a conclusion strongly supported by the recent litigation involving the Nixon tapes.⁶⁶

The leading American case is *United States v. Reynolds*,⁶⁷ a suit against the Air Force under the Federal Tort Claims Act.⁶⁸ Plaintiff's husband was killed when an Air Force bomber crashed during a test of secret electronic equipment. Plaintiff subpoenaed the official accident investigation report, which the Government, under formal claim of privilege by the Secretary of the Air Force, declined to produce, asserting that it contained national security data about the aircraft's mission. Instead, the Government offered to provide the three survivors of the crash, without cost to the plaintiff, and to refresh their memories with all statements made during the investigation.⁶⁹ The district court ordered in camera inspection of the report to verify its privileged status,⁷⁰ and

61. See *United States v. Reynolds*, 345 U.S. 1 (1953); PROP. FED. R. EVID. 509, 56 F.R.D. 183, 251 (1973).

62. FED. R. EVID. 501.

63. Cox, *supra* note 21, at 1416. See notes 117-22 *infra* and accompanying text.

64. See notes 85-88, 344 *infra* and accompanying text.

65. Cf. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 793 (1967).

66. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). See notes 131-59 *infra* and accompanying text.

67. 345 U.S. 1 (1953).

68. 28 U.S.C. § 1346 (1970).

69. 345 U.S. at 5.

70. *Brauner v. United States*, 10 F.R.D. 469 (E.D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

entered judgment for plaintiff when the Air Force refused to comply.⁷¹ On appeal the Supreme Court reversed and held that when alternative sources of evidence minimized the need for material under a formal claim of privilege, a court should not jeopardize state secrets even by in camera judicial inspection.⁷²

Commentators have accurately characterized the opinion in *Reynolds* as "Janus-faced,"⁷³ almost deliberately vague on the critical issues.⁷⁴ The spirit of compromise which permeated the Court's opinion caused serious ambiguities:

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. . . . Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. . . . Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.⁷⁵

71. See *Reynolds v. United States*, 192 F.2d 987, 991 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953). The district court's order entering judgment for plaintiff was unreported.

72. 345 U.S. at 10.

73. Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 U.C.L.A. L. REV. 47, 64 n.94 (1974).

74. Berger, *How the Privilege for Government Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747, 751-53 (1975).

75. 345 U.S. at 8-11. Compare the statement of the *Reynolds* holding in *Machin v. Zuckert*, 316 F.2d 336, 341 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) ("the Supreme Court did not require submission of the report there involved to a court for a judicial determination of the applicability of the privilege invoked to the contents of the report in question"), with the view taken in *Nader v. Butz*, 60 F.R.D. 381, 384-85 (D.D.C. 1973):

The Court held that if the trial court were satisfied from all the circumstances of the case that disclosure of the evidence would expose military secrets which should not be disclosed for national security reasons, even in camera inspection

Although addressing a common law evidentiary issue, the opinion also contained constitutional overtones. The Court's failure in *Reynolds* to distinguish the responsibility for determining when the privilege applies from its scope when applicable has thus created confusion in both constitutional and common law.⁷⁶ Nonetheless, some common themes have emerged.

First, who may claim the common law privilege? *Reynolds* considered this issue specifically, and concluded that the head of the department controlling the information must lodge a formal claim of privilege⁷⁷ after personal examination.⁷⁸ A private party, even a former official, cannot invoke the privilege.⁷⁹ This is not a purely technical requirement, because the courts must rely heavily on executive judgment when state secrets are implicated.⁸⁰ Only personal consideration by the incumbent department chief guarantees adequate evaluation of the public interests involved. The initial responsibility for claiming the state secrets privilege is thus exclusively an executive function.

Second, who finally determines if the common law privilege applies? Although claims of the state secrets privilege are comparatively rare, the general principle that the judiciary, not the executive, makes the final decision whether the privilege applies has been uniformly upheld.⁸¹

would not be required. Implicit in this statement is a requirement that the trial court must be satisfied without in camera inspection that the claim of privilege is a proper one.

76. The state secrets privilege, if applicable, is absolute. If military or diplomatic secrets are involved, the court may not compel their production in open court or their use in evidence. See notes 101-02 *infra*. The scope of the privilege, however, is analytically distinct from the threshold issue of who finally decides if the subpoenaed evidence does contain such secrets. The litigation over the Nixon tapes is the most recent illustration of the confusion of these separate issues; only Judge Wilkey's dissent in *Nixon v. Sirica* correctly identified as critical the threshold issue of who decides. *Nixon v. Sirica*, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, J., dissenting).

77. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

78. *Kinoy v. Mitchell*, 67 F.R.D. 1, 8 (S.D.N.Y. 1975).

79. *Id.* Cf. *Halperin v. Kissinger*, 401 F. Supp. 272 (D.D.C. 1975); *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C.), *stayed sub nom.* *Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975); *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975). Each of these cases rejected former President Nixon's claim of a constitutional privilege for internal discussions before he left office. In none of these cases did President Ford invoke the privilege.

80. *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975).

81. *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975); *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949).

Dicta in cases considering other claims of privilege confirm this rule.⁸² The court's reasoning in *Snyder v. United States*⁸³ is representative of the legal analysis:

[T]he Government should realize that at such time as it comes before a court of law, it is subjected to and bound by the rules of law and may not, without regard to the law, arbitrarily decline to produce information upon the claim of a self-imposed restriction that it is classified information or that its disclosure would injure national security. . . . [I]f an adversary party in a pending action properly requests the information and the Government declines to respond because of alleged military secrecy, then it is obliged to submit the information or records to the Court for its determination as to whether the claim of privilege is well founded. The point is that when the matter is in litigation the Court and not a Government agency must ultimately adjudicate the question of privilege.⁸⁴

The policy argument for a court as the final arbiter is compelling. When the Government is a litigant, executive determination of the propriety of the privilege creates a clear conflict of interest.⁸⁵ As the court ruled in *Committee for Nuclear Responsibility v. Seaborg*:⁸⁶

[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and

82. *Nixon v. Sirica*, 487 F.2d 700, 714 (D.C. Cir. 1973); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 793-94 (D.C. Cir. 1971); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *Sperandeo v. Milk Drivers and Dairy Employees Local 527*, 334 F.2d 381 (10th Cir. 1964); *Machin v. Zuckert*, 316 F.2d 336, 341 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961); *In re Midwest Milk Monopolization Litigation*, 60 F.R.D. 12, 17 (W.D. Mo. 1973); *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176, 1178 n.7 (E.D. Pa. 1972); *FDIC v. St. Paul Fire & Marine Ins. Co.*, 53 F.R.D. 260, 262 n.2 (W.D. Okla. 1971); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958).

83. 20 F.R.D. 7 (E.D.N.Y. 1956).

84. *Id.* at 9.

85. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 793-94 (D.C. Cir. 1971); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 389 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 876 (5th Cir. 1961); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958); Brief for Special Prosecutor, *supra* note 23, at 221.

86. 463 F.2d 788 (D.C. Cir. 1971).

corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.⁸⁷

In contrast to the bias inherent in a litigant judging the validity of his own privilege, the courts are well-suited to a principled, impartial resolution of the applicability of the state secrets privilege.⁸⁸ Consequently, the courts, not the executive, determine when the privilege applies.

Third, may the courts use in camera review to determine the applicability of the common law privilege? Although *Reynolds* is most ambiguous on this question,⁸⁹ a fair reading of the case law supports an affirmative answer, at least when inspection is necessary to an informed judicial decision.⁹⁰ *Reynolds* strongly implied that the court could order in camera review if appropriate, noting that "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters . . ." ⁹¹ and that "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."⁹² *Reynolds* was an easy decision; the alternative witnesses minimized the need for the accident report, which was almost certain to include information about the secret electronic devices that prompted the mission. The ad hoc approach of *Reynolds* should, however, allow in camera inspection if the decision is more difficult. Indeed, in *Halpern v. United States*,⁹³ the Second Circuit explicitly authorized an entire trial in camera. Plaintiff brought suit under the Invention Secrecy Act of 1951,⁹⁴ which authorizes compensation to inventors unable to patent devices because

87. *Id.* at 794. See also notes 291-99 *infra* and accompanying text.

88. Karst & Horowitz, *supra* note 73, at 56-57. This statement assumes judicially manageable standards, see notes 332-44 *infra* and accompanying text, by which the courts can assess the merits of the executive's claim of privilege.

89. 345 U.S. at 8-11.

90. *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958); *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 (S.D.N.Y. 1975); *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139-40 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974); *Nader v. Butz*, 60 F.R.D. 381, 384-85 (D.D.C. 1973); *In re Midwest Milk Monopolization Litigation*, 60 F.R.D. 12, 17 (W.D. Mo. 1973); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949). *But see* *United States v. Nixon*, 418 U.S. 683, 710-11 (1974); *Machin v. Zuckert*, 316 F.2d 336, 341 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Berger*, *supra* note 74, at 785-86.

91. 345 U.S. at 10 (emphasis added). See also *Clark*, *supra* note 59, at 754.

92. 345 U.S. at 11 (emphasis added).

93. 258 F.2d 36 (2d Cir. 1958).

94. 35 U.S.C. §§ 181-88 (1970).

of a national security interest in their secrecy. The Government formally invoked the state secrets privilege. The court held, however, that Congress had implicitly authorized an *in camera* trial to protect plaintiff's right to compensation.⁹⁵ The court in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,⁹⁶ though declining to order *in camera* review of documents under a formal claim of privilege, strongly implied that such review would have been proper had plaintiff's need been greater or the case for secrecy less clear.⁹⁷

In camera review is routine if the executive claims other privileges.⁹⁸ In national security matters the movant must show significantly greater need for the subpoenaed document,⁹⁹ because *in camera* inspection exposes the information to marginally greater risk of disclosure. The law is clear, however, that *in camera* review is permissible in appropriate circumstances. The policy considerations underlying final judicial resolution of the propriety of the privilege apply equally to *in camera* inspection. Informed judicial decisionmaking is the ultimate goal; ac-

95. *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958). The court authorized but did not require the *in camera* proceeding, on condition that the trial court found no serious risk of divulging military secrets in conducting it. There was clearly no danger of plaintiff acquiring such secrets since he was well acquainted with the details of his own invention. *Id.* at 44. Thus the court refused to apply the state secrets privilege when "disclosure to court personnel in an *in camera* proceeding will not make the information public or endanger national security." *Id.* The basis for the holding, however, was not the common law of evidence, but the court's reading of congressional intent to authorize such a proceeding. *Id.* at 43.

96. 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

97. *Id.* at 1139.

98. *E.g.*, *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Sperandeo v. Milk Drivers & Dairy Employees Local 527*, 334 F.2d 381 (10th Cir. 1964); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Therault v. United States*, 395 F. Supp. 637 (C.D. Cal. 1975); *Rabbitt v. Department of Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953); *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided court*, 339 U.S. 940 (1950). See generally Note, *supra* note 17.

99. *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953); *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 (S.D.N.Y. 1975); *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

tual inspection of the documents may constitute the only means by which the judiciary can properly evaluate executive assertions.¹⁰⁰

Fourth, what is the proper scope of the common law privilege when it does apply? The rule is clear; if military or diplomatic secrets are at stake, the privilege is absolute and cannot be overcome by "even the most compelling necessity."¹⁰¹ This rule is grounded in a sober judicial recognition that only the executive branch can assess the consequences of public release of such data.¹⁰² Other common law privileges traditionally claimed by the executive, however, are more limited. The internal discussions privilege, for example, codified in the fifth exemption to the FOIA,¹⁰³ has two qualifications. First, it cannot be used to shield ongoing criminal activity; the privilege takes flight when abused.¹⁰⁴ Second, the privilege might not withstand a compelling need for production.¹⁰⁵

The development of the common law state secrets privilege therefore supports the conflict of interest thesis initially outlined.¹⁰⁰ Although the executive retains the initial authority, and despite the grave public consequences of erroneous release, the courts ultimately determine if the

100. See generally *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

101. *United States v. Reynolds*, 345 U.S. 1, 11 (1953); *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968), *cert. denied*, 402 U.S. 914 (1971); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57 (N.D. Ohio 1964) (dictum).

102. See notes 332-44 *infra* and accompanying text.

103. 5 U.S.C. § 552(b)(5) (1970) (amended 1974).

104. *Black v. Sheraton Corp.*, 371 F. Supp. 97, 102 (D.D.C. 1974); *Rosee v. Board of Trade*, 36 F.R.D. 684, 690 (N.D. Ill. 1965); *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960). Cf. *In re Grand Jury Subpoena to Nixon*, 360 F. Supp. 1, 12-13 (D.D.C.), *aff'd sub nom. Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (constitutionally-based executive privilege for confidential communications). See generally *Cox*, *supra* note 21, at 1413. Most evidentiary privileges are waived when used to shield current or contemplated criminal activity. See, e.g., *Gravel v. United States*, 408 U.S. 606, 627 (1972) (Senator's speech and debate clause privilege); *Clark v. United States*, 289 U.S. 1 (1933) (jury deliberations); *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971) (attorney-client privilege). See notes 156-58 *infra* and accompanying text.

105. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 791 (D.C. Cir. 1971); *Machin v. Zuckert*, 316 F.2d 336, 340 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Halperin v. Kissinger*, 401 F. Supp. 272 (D.D.C. 1975); *Rabbitt v. Department of Air Force*, 401 F. Supp. 1206, 1208 n.1 (S.D.N.Y. 1974). See generally *Hickman v. Taylor*, 329 U.S. 495 (1947).

106. See text accompanying notes 10-11 *supra*.

privilege applies. “[R]eason and experience”¹⁰⁷ dictate that the conflict of interest debars the executive from serving as both litigant and judge. In camera inspection, if necessary to an informed decision, is a logical corollary to final judicial authority.

In construing the original FOIA, the courts naturally sought guidance in the common law of evidentiary privilege. The Act explicitly authorized final judicial decision when agencies sought to conceal information.¹⁰⁸ Except for cases involving the national security exemption, *Mink* permitted in camera review,¹⁰⁹ and the courts readily accepted the invitation.¹¹⁰ Courts and commentators generally regarded the exemptions as codifying the common law,¹¹¹ with the possible exception of the national security exemption.¹¹² The policy reasons for ultimate court determination were identical to those in the common law; were an agency’s claim to absolute privilege accepted on its face, then “[t]he Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights.”¹¹³ The major change from the common law was that the agency, rather than the movant, bore the

107. FED. R. EVID. 501.

108. 5 U.S.C. § 552(a)(3) (1970) (amended 1974).

109. 410 U.S. at 93. The Court assumed that “Congress legislated against the backdrop” of the case law concerning the evidentiary privilege. *Id.* at 89. While in camera inspection should not be automatic or inevitable, the Court did not question its propriety when necessary for the agency to sustain its burden of proof. *Id.* at 93.

110. *Rose v. Department of Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff’d*, 96 S. Ct. 1592 (1976); *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Ackerley v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Kreindler v. Department of Navy*, 363 F. Supp. 611 (S.D.N.Y. 1973); *Williams v. IRS*, 345 F. Supp. 591, 594 (D. Del. 1972), *aff’d per curiam*, 479 F.2d 317 (3d Cir. 1973); *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971). See generally Note, *supra* note 17.

111. *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975); *Nixon v. Sirica*, 487 F.2d 700, 768-69 (Wilkey, J., dissenting); *Ethyl Corp. v. EPA*, 478 F.2d 47, 52 (4th Cir. 1973); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *Rabbitt v. Department of Air Force*, 401 F. Supp. 1206, 1208 (S.D.N.Y. 1974); *EEOC v. Los Alamos Contractors, Inc.*, 382 F. Supp. 1373, 1379 (D.N.M. 1974); *Stokes v. Hodgson*, 347 F. Supp. 1371, 1376 (N.D. Ga. 1972), *aff’d*, 476 F.2d 699 (5th Cir. 1973); Note, *supra* note 16, at 930; Project, *supra* note 16, at 1020; Comment, *The Doctrine of Executive Privilege Limits Statutory Access to Information Held within the Executive Office of the President*, 49 TEX. L. REV. 780, 786 (1971).

112. See notes 115-16 *infra* and accompanying text.

113. *Nixon v. Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1973).

burden of proof.¹¹⁴ Thus the common law of evidentiary privilege guided and shaped the courts' treatment of the original FOIA.

For national security information, however, courts took a more restrictive view of their powers than required by the common law privilege.¹¹⁵ The basis was the Supreme Court's reading of congressional intent in *Mink*, rather than a further limitation on the common law privilege. Indeed, Justice Stewart's concurring opinion in *Mink* strongly suggested legislative revision of the exemption to approach more closely the boundaries of the evidentiary privilege.¹¹⁶

Although the development of the state secrets privilege is consistent with the constitutional validity of the amended FOIA, the common law is not dispositive of a constitutional allocation of power. There are substantive differences between the executive's position as a litigant and as a respondent under the FOIA. First, the executive is not obliged ultimately to disclose anything when it appears as a private litigant or a prosecutor. In both civil and criminal cases, the executive has the option of forfeiting the case in order to preserve the secrecy of the subpoenaed information.¹¹⁷ The inference is that the executive must comply with judicial orders when it seeks judicial assistance, whether to incarcerate criminals, escape a judgment for damages, or enforce executive policy on the community;¹¹⁸ but these orders do not bind the

114. 5 U.S.C. § 552(a)(3) (1970) (amended 1974).

115. *EPA v. Mink*, 410 U.S. 73 (1973); *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), cert. denied, 398 U.S. 965 (1970).

116. *EPA v. Mink*, 410 U.S. 73, 94-95 (1973) (Stewart, J., concurring).

117. Comment, *The President Does not Have an Absolute Privilege to Withhold Evidence from a Grand Jury*, 87 HARV. L. REV. 1557, 1565 (1974). The leading case in criminal procedure is *Brady v. Maryland*, 373 U.S. 83 (1963), which held that government suppression of evidence favorable to the accused violates due process, regardless of the good faith of the prosecutor. In civil cases, the trial judge has wide latitude to grant relief to the opposing party, including a directed verdict. FED. R. CIV. P. 37(b)(2). See, e.g., *Sperandeo v. Milk Drivers & Dairy Employees Local 537*, 334 F.2d 381 (10th Cir. 1964); *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950).

118. See *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring); *Snyder v. United States*, 20 F.R.D. 7, 9 (E.D.N.Y. 1956), quoted in text accompanying note 84 *supra*. Cf. *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it"). Under civil rules no adverse inference may be drawn from a proper claim of privilege, diluting somewhat the force of this argument. See Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 481 (1957).

executive when it acts alone pursuant to a constitutional grant of exclusive power. Lawsuits under the FOIA arguably intrude on the purely executive function of classifying national security information.¹¹⁹ Second, neither in FOIA cases nor in other litigation has the President personally claimed a constitutionally-based executive privilege for military or diplomatic secrets.¹²⁰ The President, as commander in chief of the armed forces and sole representative of the nation abroad, may, in consequence of the separation of powers, retain authority to deny information that the FOIA directs to be released, even if his subordinates must comply.¹²¹ Recognizing the "serious constitutional questions" such a claim would pose, courts have avoided discussion of its merits.¹²²

Nonetheless, judicial familiarity with the common law privilege and the experience of working with the executive branch in that context suggest that the courts will rely on the state secrets privilege as a persuasive analogy should the President formally invoke executive privilege in response to an FOIA suit for classified material.¹²³ The recent decisions in the Watergate tapes litigation¹²⁴ support this conclusion in holding that the constitutionally-based internal discussions privilege paralleled almost exactly the common law evidentiary privilege.

III. THE CONSTITUTIONAL PRIVILEGE FOR INTERNAL DISCUSSIONS

The litigation over the Watergate tapes raised several constitutional issues. Relevant to this Note was former President Nixon's claim to a constitutional privilege shielding confidential communications with his advisors from compulsory disclosure. Both the common law¹²⁵ and the FOIA¹²⁶ recognize a qualified internal discussions privilege. The Nixon claim, however, arose from the concept of separation of powers; it postulated a privilege unknown to statutory or common law—absolute

119. See Project, *supra* note 16, at 1000-01; notes 179-89, 239-45 *infra* and accompanying text.

120. Comment, *supra* note 117, at 1565.

121. Project, *supra* note 16, at 1016.

122. *E.g.*, *Soucie v. David*, 448 F.2d 1067, 1071-72 (D.C. Cir. 1971).

123. See notes 64-66 *supra* and accompanying text.

124. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

125. See notes 103-05 *supra* and accompanying text.

126. 5 U.S.C. § 552(b)(5) (Supp. IV 1974).

in scope, applicable in the sole discretion of the President, over which courts and Congress held no power.

The explicit rejection of this claim to absolute, unreviewable executive privilege in the tapes litigation¹²⁷ provides significant insights into the constitutional merits of the amended FOIA. First, *United States v. Nixon* is the only Supreme Court opinion that directly addresses the issue of executive privilege in a constitutional sense. Second, the rule emerging from the Watergate decisions, properly interpreted, establishes a constitutional privilege for internal discussions closely resembling the common law privilege. The inference is that the common law would also guide the judicial development of a constitutional privilege for national security information.¹²⁸ Finally, the constitutional basis of an absolute, unreviewable executive privilege for confidential communications is much stronger than the case for a similar presidential privilege for national security data.¹²⁹ Despite contrary dicta,¹³⁰ *United States v. Nixon* thus supports the constitutionality of the amended FOIA.

In the first principal tapes decision, *Nixon v. Sirica*,¹³¹ the Watergate grand jury subpoenaed nine presidential tapes. Claiming a constitutional privilege for confidential communications with his advisors, President Nixon sought a writ of mandamus to quash Judge Sirica's order upholding the subpoena.¹³² Although granting the "greatest weight and deference" to executive views,¹³³ the District of Columbia Circuit held that "the applicability of the privilege is in the end for the [courts] and not the executive to decide."¹³⁴ The presumptive privilege for internal discussions was overcome by the "uniquely powerful showing" by the Special Prosecutor,¹³⁵ requiring in camera judicial inspection to determine if the privilege applied¹³⁶ and to segregate irrelevant or privileged material.¹³⁷ Material relating to "Watergate and the alleged coverup"

127. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

128. *Cox*, *supra* note 21, at 1384. See also note 140 *infra*.

129. See notes 174-75, 309-10 *infra* and accompanying text.

130. 418 U.S. at 710-11. See notes 244-45 *infra* and accompanying text.

131. 487 F.2d 700 (D.C. Cir. 1973).

132. *In re Grand Jury Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C.), *aff'd sub nom.* *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

133. 487 F.2d at 713.

134. *Id.*

135. *Id.* at 717.

136. *Id.* at 718-20.

137. *Id.* at 720-21.

would, of course, be disclosed.¹³⁸ The court thus produced a constitutional rule similar to the common law privilege: the President alone asserts the privilege, but the courts alone finally determine its applicability in a specific instance. If plaintiff demonstrates a sufficiently compelling need, the court may review the material *in camera* to reach an informed decision.¹³⁹

Judge Wilkey's dissent properly criticized both the logic of the majority opinion¹⁴⁰ and the cases on which it relied. With one exception,¹⁴¹ these cases discussed the common law privilege and ignored the separation of powers argument on which the President's claim to absolute privilege rested.¹⁴² The majority result is nonetheless defensible. Despite an explicit disclaimer,¹⁴³ the factor which ultimately persuaded the majority was almost surely the clear showing of personal involvement by President Nixon in the very illegal actions which the grand jury sought to investigate.¹⁴⁴ "[A] sound Hamiltonian sense of 'structure and relationship'"¹⁴⁵ would dictate judicial resolution of the merits of a claim of privilege when the President suffers so clear a conflict of interest.¹⁴⁶ While the court was understandably reluctant to articulate

138. *Id.* at 720.

139. Compare this rule with the common law privilege discussed in text accompanying notes 106-07 *supra*. The similarity between the constitutional privilege and the evidentiary privilege, however, was the basis of Judge Wilkey's dissent. 487 F.2d at 763-64 (Wilkey, J., dissenting). See note 140 *infra*.

140. The *Per Curiam* here never confronts the fundamental Constitutional question of separation of powers, but instead prefers to treat the case as if all were involved was a weighing and balancing of conflicting public interests. . . . [T]he most fundamental, necessarily decisive issue is, Who Does the weighing and balancing of conflicting public interests? The District Judge or the President? The answer to this question necessarily involves the Constitutional question of separation of powers. But the whole line of reasoning, the whole line of authorities, relied on by the *Per Curiam* does not deal with the separation of powers issue at all.
487 F.2d at 763 (Wilkey, J., dissenting).

141. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788 (D.C. Cir. 1971).

142. In addition to *Committee for Nuclear Responsibility*, the court relied on *United States v. Reynolds*, 345 U.S. 1 (1953); *Olson Rug Co. v. NLRB*, 291 F.2d 655 (7th Cir. 1961); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57 (N.D. Ohio 1964); *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960); and, *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). 487 F.2d at 713 n.60. None of these cases considered a claim of executive privilege based on separation of powers.

143. 487 F.2d at 718.

144. *Id.* at 717.

145. *Karst & Horowitz*, *supra* note 73, at 58.

146. Judge MacKinnon attempted to refute the majority's concern with presidential

it, the rule in *Nixon v. Sirica* is probably that the President is the ultimate arbiter of the applicability of the constitutional privilege for internal discussions, *absent proof of a disabling conflict of interest*, such as personal involvement in criminal activity under investigation.¹⁴⁷ Because evidence supporting such a conflict of interest will also tend to prove great public need for presidential information, the latter standard could serve as a surrogate for a rule¹⁴⁸ the court preferred not to state publicly.¹⁴⁹

In the second principal tapes decision, *United States v. Nixon*,¹⁵⁰ the Supreme Court adopted a similar rule in holding that the President's general interest in confidentiality, though constitutionally based, must yield to the "demonstrated, specific need for evidence in a pending criminal trial."¹⁵¹ The Court agreed that the internal discussions privilege was constitutionally grounded in the separation of powers,¹⁵² but the common law qualifications still attached. The Court reasoned that it is "emphatically the province and duty of the judicial department to

abuse of an unlimited privilege by noting that power may be abused wherever it ultimately rests. 487 F.2d at 743 (MacKinnon, J., dissenting). This truism is unresponsive to the conflict of interest. Even honest men cannot fairly judge their own cause; the mere existence of a conflict of interest increases the likelihood of abuse of power. That chance is reduced by assigning decisionmaking authority elsewhere in such instances. See Brief for Special Prosecutor, *supra* note 23, at 221, 245-47; Cox, *supra* note 21, at 1409-10.

147. Although Judge Wilkey's dissent correctly identified the crucial issue, his resolution of that issue and his perception of the underlying basis for the majority result were less accurate. If this situation has no precedent "in any case for 184 years," 487 F.2d at 772 (Wilkey, J., dissenting), it is because our public officials have been generally honest men. Thus the interbranch disputes on which Wilkey relies, *id.* at 768-73, are inapplicable; the Senate *per se*, for example, suffered no conflict of interest in *United States v. Brewster*, 408 U.S. 501 (1972), a case illustrative of those relied on by Wilkey, 487 F.2d at 772. It is significant that the most nearly analogous cases, *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14692d), and *United States v. Burr*, 25 F. Cas. 187 (C.C. Va. 1807) (No. 14694), concerned the prosecution of the former Vice-President, a bitter political enemy of President Jefferson. The possibility of a presidential conflict of interest was obvious.

The Wilkey dissent has also attracted criticism of the historical data on which it relies. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 348-72 (1974); Cox, *supra* note 21, at 1394-95.

148. See text accompanying notes 159-61 *infra*.

149. *But see* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

150. 418 U.S. 683 (1974).

151. *Id.* at 713.

152. *Id.* at 708.

say what the law is."¹⁵³ Consequently, the courts, not the President, ultimately determine if the privilege applies.¹⁵⁴ An appropriate showing of need will subject even the most intimate presidential conversations to in camera review, and possible use in court. In this case the presidential interest in confidential discussions was subordinate to the demands of the criminal justice system.¹⁵⁵

United States v. Nixon adopted a constitutional privilege parallel to the common law privilege, but less protective of presidential conversations.¹⁵⁶ It is not clear that the common law would permit a "demonstrated, specific need for evidence" to override the presidential interest in confidentiality.¹⁵⁷ It is improbable, however, that the Court intended to allow every criminal prosecution to override a formal claim of constitutional privilege, even if the defendant could prove a specific need. The precedential value of the case is probably limited to the narrow rule that the privilege takes flight when abused. Such a holding, however, would have required a detailed recitation of the evidence implicating the President and a finding of probable cause of criminal complicity. This would have detracted from the Court's effort to appear neutral in the political storms that swirled around the impeachment controversy. Fac-

153. *Id.* at 703, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

154. The opinion's "question-begging inexorability" on this point places it "in the mainstream tradition of the Court's great decisions." Karst & Horowitz, *supra* note 73, at 55. The bland reference to the judicial duty to construe the law in no way supports the conclusion that the judiciary, rather than the executive, ultimately decides when the privilege applies. President Nixon's position was that the Constitution, properly interpreted, had assigned that function to him; nothing in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), precludes judicial agreement with that view. Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30, 33-34 (1974). There is, however, little question that a principled resolution of the applicability of the privilege is more likely to come from the judiciary, at least when the executive faces a serious conflict of interest. As Karst & Horowitz conclude, "*United States v. Nixon*, like *Marbury v. Madison*, rests most comfortably not on textual exegesis, but on a sound Hamiltonian sense of 'structure and relationship' in a system of separated powers." Karst & Horowitz, *supra* note 73, at 58.

155. 418 U.S. at 713.

156. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A. L. REV. 76, 84-85 (1974); Ratner, *Self-Incrimination and the Separation of Powers Issue*, 22 U.C.L.A. L. REV. 92, 97 (1974). The Special Prosecutor had asked merely for a ruling that the courts could override the privilege when substantial evidence indicated that it was shielding criminal conduct. Brief for Special Prosecutor, *supra* note 23, at 222. This would have closely paralleled the common law rule. See notes 104 *supra* & 157 *infra* and accompanying text.

157. See note 105 *supra*.

ing the prospect of outright presidential defiance of its order, the Court chose to rely publicly on the broader ground,¹⁵⁸ whose overbreadth could subsequently be corrected. A similar theory accounts for the logical deficiencies in the Court's holding that the judiciary has the power to decide the applicability of the privilege.¹⁵⁹ A fair statement of the rule emerging from the Watergate litigation is that the judiciary has final authority to decide the applicability of a constitutionally-based internal discussions privilege when the President faces a conflict of interest sufficiently great to disqualify him from making an impartial decision.

Applying this rule to the national security provisions of the amended FOIA poses two difficulties. First, the language in which the courts phrased the rule looks to the plaintiff's need rather than the President's conflict of interest.¹⁶⁰ Although the grand jury's need is closely related to the executive conflict of interest in a Watergate situation, an FOIA plaintiff's generalized interest in information is not so related. Moreover, a general desire for knowledge of government activity, although critical to the democratic process, is the kind of impersonal interest traditionally disfavored by courts.¹⁶¹ The implication is that an FOIA plaintiff could never demonstrate need sufficient for the court to require in camera review of information under a formal claim of executive privilege for internal discussions.

In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹⁶² the District of Columbia Circuit upheld a presidential assertion of executive privilege against a subpoena of presidential tapes based solely on the Senate Watergate Committee's factfinding needs.¹⁶³ The court held that a plaintiff must demonstrate need "of the order [shown] by the grand jury . . . before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the court" for in camera inspection.¹⁶⁴ This ruling implied that the court cannot acquire the *power* to determine finally the applicability of executive privilege until plaintiff makes the required showing. If this reading of *Senate Select Committee* is correct, the rule

158. Mishkin, *supra* note 156, at 86-89.

159. *Id.* See note 154 *supra*.

160. See notes 135-39, 154-55 *supra* and accompanying text.

161. See, e.g., *United States v. Richardson*, 418 U.S. 166, 176-77 (1974).

162. 498 F.2d 725 (D.C. Cir. 1974).

163. *Id.* at 732.

164. *Id.* at 730-31.

is plainly illogical. A case which the judiciary lacks the constitutional power to decide does not become justiciable merely because plaintiff's need is great;¹⁶⁵ nor is an otherwise justiciable case dismissed merely because the injury is trivial.¹⁶⁶ Instead, the courts acquire power to determine the applicability of the internal discussions privilege when plaintiff clearly proves a disabling conflict of interest in the President.¹⁶⁷ In direct contradiction to *Senate Select Committee*, therefore, the test should *not* be "the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its performance,"¹⁶⁸ but the "nature of the presidential conduct which the subpoenaed material might reveal."¹⁶⁹

Plaintiff's need is relevant to the *propriety* of judicial exercise of power. Absent special circumstances a presidential assertion of the internal discussions privilege should defeat a suit for information under the FOIA without need to examine in camera the materials sought. When the plaintiff proves a disabling presidential conflict of interest, however, the decision should not be automatic. In these special circumstances the minimal intrusion of in camera judicial review is a small price to pay for effective operation of the FOIA.¹⁷⁰

Second, the Watergate cases provide no indication of the magnitude of the conflict of interest required to shift final decisionmaking authority to the courts.¹⁷¹ The magnitude should vary, however, depending on

165. *E.g.*, *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem. sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973) (constitutionality of Vietnam war).

166. *E.g.*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

167. See text accompanying notes 159-61 *supra*.

168. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

169. *Id.*

170. In such a case, Judge Sirica's approach in *Senate Select Committee* is superior to that employed by the District of Columbia Circuit. Since the House Judiciary Committee had already received copies of the recordings for use in impeachment proceedings, the Ervin Committee's need was minimal. Nonetheless, Judge Sirica thought the conclusory allegations of the President's affidavit so flimsy that they merely balanced the Committee's minimal need. He ultimately resolved the issue in favor of the President solely for fear of prejudicial publicity in the second Watergate trial. See *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

171. If the test is, as stated, the magnitude of the plaintiff's interest, there is no real indication of the standard against which such need must be tested. Compare *Halperin v.*

the allocation of initial decisionmaking authority by the Constitution. For confidential communications, in camera review would presumably be appropriate if plaintiff could present a prima facie case that the privilege was serving as a shield for crime.¹⁷² The threshold is high because the privilege is necessarily executive; its purpose is to protect executive decisionmaking processes.¹⁷³ Consequently, the Constitution implicitly assigns to the President the initial choice to invoke or waive the privilege.

By contrast, the national security privilege is a state privilege that directly serves the interests of the entire government.¹⁷⁴ It is the exclusive property of the executive branch only to the extent that the Constitution explicitly or implicitly assigns sole responsibility for national security to the executive branch. If the Constitution does not so allocate responsibility, it does not grant solely to the President the initial decision to invoke the privilege. Consequently, the conflict of interest required to place final authority elsewhere is far less than that required for the internal discussions privilege. Indeed, a functional analysis

Kissinger, 401 F. Supp. 272 (D.D.C. 1975), and *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975) (civil litigant's need for information outweighs formal claim of executive privilege by former President), with Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (generalized information needs of Senate Committee insufficient to overcome formal claim of privilege by incumbent President), and *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975) (formal claim of privilege by former President insufficient to defeat FOIA suit for presidential documents).

172. Cf. *Clark v. United States*, 289 U.S. 1 (1933).

173. The speech and debate clause, U.S. CONST. art. I, § 6, serves a similar function for Congress. See *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *Nixon v. Sirica*, 487 F.2d 700, 772-73 (D.C. Cir. 1973) (Wilkey, J., dissenting). An implied "judicial privilege" doubtless protects the decision process of the judiciary. *Nixon v. Sirica*, *supra* at 740-42 (MacKinnon, J., dissenting); *Cox*, *supra* note 21, at 1406; Winter, Book Review, 83 YALE L.J. 1730, 1737 (1975). Cf. *Clark v. United States*, 289 U.S. 1 (1933) (jury deliberations usually privileged from disclosure). These privileges can be exercised initially by no other branch, because they exist solely to protect executive, legislative, or judicial processes.

174. Obviously, the executive privilege for internal discussions also serves the public interest by protecting the executive decisionmaking process. Only the branch whose decision process it protects, however, can properly assess the need to assert the internal discussions privilege in any one case; hence, only that branch can initially claim the privilege. See notes 77-80 *supra* and accompanying text. The national security privilege is different. A priori, one cannot say that only a single branch can assess the danger to national security from release of a given bit of information. The privilege is exclusively executive only if national security is the exclusive responsibility of the executive, a proposition explored in Section IV of this Note.

would suggest that final authority should lie elsewhere if even a minor conflict exists in the executive.¹⁷⁵

The Watergate tapes litigation makes clear that the executive privilege for internal discussions, although solidly based in the Constitution, may be overcome in appropriate circumstances. Properly analyzed, both the rule and the reason are the same: the judiciary acquires final authority to determine the applicability of the privilege when the President is disabled by a severe conflict of interest. A similar rule should apply to the executive privilege for national security. The magnitude of the conflict required, however, depends on whether the Constitution assigns sole responsibility for national security to the President.

IV. THE CONSTITUTIONAL PRIVILEGE FOR NATIONAL SECURITY INFORMATION

An assessment of the constitutional merits of the amended FOIA thus requires extended discussion of the constitutional allocation of national security powers. If the President is solely responsible for all aspects of national security, the Constitution must also allocate to the executive the sole initial authority to invoke or waive the national security privilege, so that it would be truly an executive privilege. On the other hand, if the President and Congress share responsibility for national security, the authority to invoke the national security privilege would also be shared. Consequently, a relatively small conflict of interest would suffice to assign final authority for information classification outside the executive branch.

The case against the constitutionality of the amended FOIA rests on a premise and a corollary. The premise is that the executive is solely responsible for foreign policy. The corollary is that these special unreviewable powers over foreign relations and national defense implicitly contain all domestic powers necessary to safeguard the national security, including unreviewable power to classify information.¹⁷⁶ Consequently, Congress may not shift final authority to classify information from the executive to the judiciary, "[n]or may courts sit *in camera* in order to be taken into executive confidences."¹⁷⁷

175. See notes 291-300 & 310 *infra* and accompanying text.

176. *Government Secrecy: Hearings on S. 1250, S. 1276, S. 2451, S. 2738, S. 3393, & S. 3399 Before the Subcomm. on Governmental Relations of the Senate Comm. on Government Operations, 93d Cong., 2d Sess. 146-52 (1974)* (testimony of Robert G. Dixon, Jr.) [hereinafter cited as *Government Secrecy Hearings*].

177. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

This Section will examine both the premise and the corollary. The conclusion is that with limited exceptions¹⁷⁸ neither is constitutionally sound.

A. *Exclusive Presidential Authority over National Security*

1. *The Case for Exclusive Control*

Respectable authorities have asserted that the constitutional separation of powers allocates exclusive control of American foreign relations to the President; although Congress may share concern with military and foreign affairs, it cannot share responsibility.¹⁷⁹ The leading case supporting this proposition is *United States v. Curtiss-Wright Export Corp.*¹⁸⁰ In *Curtiss-Wright* the Supreme Court upheld a presidential order imposing an arms embargo pursuant to congressional resolution authorizing such action in the President's discretion.¹⁸¹ The defendant asserted that Congress had impermissibly delegated legislative power to the President and that the embargo was consequently invalid.¹⁸² The Court rejected this assertion, on the basis that the nation's foreign affairs powers had vested directly in the new government following the Revolution.¹⁸³ Consequently, the Court reasoned, presidential power over foreign affairs "did not depend upon the affirmative grants of the Constitution,"¹⁸⁴ but rather inhered in the office:

178. See notes 301-09 *infra* and accompanying text.

179. *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875); Dixon, *supra* note 23, at 130-34; Comment, *Developments Under the Freedom of Information Act*, 1974 DUKE L.J. 251, 258-59.

180. 299 U.S. 304 (1936).

181. H.J. Res. 347, ch. 365, 48 Stat. 811 (1934). The resolution permitted an arms embargo to those countries warring over the Chaco, territory then subject to hostilities between Bolivia and Paraguay.

182. The Court heard *Curtiss-Wright* in the wake of two cases from the prior Term construing narrowly congressional authority to delegate powers to the President: *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). The need to escape the restrictive delegation of powers doctrine enunciated in these two cases accounted in large measure for the expansive language of *Curtiss-Wright*. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 6-7 (1973).

183. 299 U.S. at 316-17.

184. *Id.* at 318.

[P]articipation in the exercise of the [foreign affairs] power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . [T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress. . . . Moreover, he, not Congress has the better opportunity of knowing the conditions which prevail in foreign countries and especially this is true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful effects. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and comments relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been questioned.¹⁸⁵

The second leading case supporting unreviewable presidential power in foreign affairs is *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*¹⁸⁶ In *Waterman* the Court declined to review a presidentially approved award of overseas air routes, despite explicit congressional authorization of judicial review.¹⁸⁷ The Court offered two rationales. First, the basis of executive action might be secret information that should not be transmitted to the courts for review on the merits.¹⁸⁸ Second, and apparently of greater importance, the political question doctrine precluded judicial review:

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹⁸⁹

185. *Id.* at 319-20.

186. 333 U.S. 103 (1948).

187. Civil Aeronautics Act, ch. 601, § 1006, 52 Stat. 1024 (1938) (current version at 49 U.S.C. § 1486 (1970)).

188. *Id.* at 111.

189. *Id.* See also *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937) (upholding presidential power to recognize the Soviet Union on whatever terms and conditions the President sees fit).

2. *The Case for Concurrent Congressional Powers*

There are several reasons to discount the sweeping language in *Curtiss-Wright* and *Waterman* as a basis for exclusive presidential authority in foreign affairs.¹⁹⁰ First, neither case is directly applicable to a statute limiting presidential power because each spoke of such power in the context of congressional authorization. Second, both courts and commentators have strongly criticized the rationale of each case, and courts have subsequently applied the reasoning of neither. Finally, Congress has often asserted concurrent jurisdiction over foreign affairs, a custom suggesting that presidential powers over national security, although pre-eminent, are not exclusive.

The first flaw in *Curtiss-Wright* and *Waterman* is that neither directly applies to a statute like the amended FOIA. Each case considered presidential action explicitly authorized by Congress. By contrast, the FOIA explicitly restricts presidential authority, reducing such power to its "lowest ebb."¹⁹¹ Courts can sustain exclusive presidential power only by holding that Congress has no constitutional role in foreign affairs. Cases upholding executive authority when authorized by Congress cannot sustain that authority when restricted by Congress.

Second, the doctrinal basis of both *Curtiss-Wright* and *Waterman* is suspect. Although the Court has not explicitly overruled *Curtiss-Wright*, later decisions have not been faithful to Justice Sutherland's reasoning.¹⁹² *Curtiss-Wright* rested on the theory that the foreign affairs powers vested directly in the federal government and the President as an attribute of sovereignty.¹⁹³ Yet the Court has since stated flatly that the "Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones,"¹⁹⁴ and applied this rule on several occasions to foreign as well as domestic affairs.¹⁹⁵ The Court has also held that statutes governing the issuance of passports must meet "accepted tests"

190. See generally Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974); Project, *supra* note 16, at 1000-06.

191. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring).

192. See Lofgren, *supra* note 182, at 5.

193. 299 U.S. at 316-17.

194. *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

195. *Id.*; *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). See generally Lofgren, *supra* note 182, at 5 & n.30.

of delegation,¹⁹⁶ again implicitly denying the *Curtiss-Wright* theory that foreign affairs powers are derived independently of the Constitution.

Supreme Court rulings on the jurisdiction of military courts illustrate the implicit rejection of *Curtiss-Wright*. The leading case of *Ex parte Milligan*¹⁹⁷ established in 1868 the rule that military jurisdiction does not extend to civilians during civil war when the civilian courts are open and functioning.¹⁹⁸ The Court reaffirmed that basic principle in *Duncan v. Kahanamoku*,¹⁹⁹ although the military court in that case also enjoyed congressional sanction.²⁰⁰ Finally, a series of cases construing the Uniform Code of Military Justice²⁰¹ has prohibited military courts martial of ex-servicemen for crimes committed while in the armed forces;²⁰² of civilian dependents of troops stationed overseas;²⁰³ and of servicemen for crimes unconnected with military service.²⁰⁴

196. *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

197. 71 U.S. (4 Wall.) 2 (1868).

198. *Id.* at 127.

199. 327 U.S. 304 (1946). *See also* *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

200. 327 U.S. at 324. The Court construed the statute, the Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900), not to allow military courts to replace their civilian counterparts, at least when the latter were open and operating.

201. 10 U.S.C. §§ 801-940 (1970).

202. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

203. *Reid v. Covert*, 354 U.S. 1 (1957).

204. *O'Callaghan v. Parker*, 395 U.S. 258 (1969). These cases considered constitutional rights in connection with criminal trials, rather than the statutory right granted to a citizen by the FOIA. In assessing the merits of the amended FOIA, however, this distinction is irrelevant. First, there is a sound argument that the first amendment implicitly guarantees the public a constitutional right to know. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 96 S. Ct. 1817, 1823 (1976); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974); *Pell v. Procunier*, 417 U.S. 817, 832 (1974); *Stanley v. Georgia*, 394 U.S. 557, 569 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Emerson, supra* note 24, at 3. *But see Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *United States v. Marchetti*, 466 F.2d 1309, 1316 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). Second, merely alleging a constitutional violation does not confer jurisdiction on the courts. *E.g., United States v. Richardson*, 418 U.S. 166, 179 (1974); *Atlee v. Laird*, 347 F. Supp. 689, 708 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973). If the President exercises absolute, unreviewable power in any sphere, courts cannot redress injuries he imposes. Thus the Court's review of the scope of military jurisdiction strongly implies that military and foreign affairs are not solely committed to presidential discretion. *Zweibon v. Mitchell*, 516 F.2d 594, 626-27 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

These cases establish two propositions relevant to *Curtiss-Wright*. First, they embody a clear rejection of its premise that the President inherited his foreign affairs powers directly from George III, without the need for separate constitutional authority. "The United States is entirely a creature of the Constitution. Its power and authority can have no other source. It can act only in accordance with all the limitations imposed by the Constitution."²⁰⁵ Second, the President is not immune from judicial review merely because he exercises power in foreign affairs or as commander-in-chief of the armed forces. Rather, unless the issue presents a political question,²⁰⁶ judicial review of presidential action overseas is appropriate.

Finally, a recent assessment of the historical basis of *Curtiss-Wright* has found the opinion wanting.²⁰⁷ Professor Lofgren has characterized the treatment of precedent as "shockingly inaccurate," and concluded, "*Curtiss-Wright* does not support . . . broad, independent executive authority [in foreign affairs.] . . . It certainly invests the President with no sweeping and independent *policy* role."²⁰⁸

The doctrinal base of *Waterman* is equally suspect:²⁰⁹ it illustrates the automatic classification of foreign affairs as political questions which *Baker v. Carr*²¹⁰ squarely rejected.²¹¹ Consequently, although not explicitly overruled, *Waterman's* "apparently sweeping contours have been eroded by recent Circuit Court opinions."²¹² The Court's willingness to review executive decisions about passports for American citizens illustrates the implicit rejection of *Waterman*. In *Kent v. Dulles*,²¹³

205. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957); *accord*, *Zweibon v. Mitchell*, 516 F.2d 594, 626-27 (D.C. Cir. 1975), *cert. denied*, 96 S. Ct. 1685 (1976).

206. See notes 311-59 *infra* and accompanying text.

207. Lofgren, *supra* note 182.

208. *Id.* at 32 (emphasis original).

209. See generally Miller, *The Waterman Doctrine Revisited*, 54 GEO. L.J. 5 (1965); Comment, *supra* note 17, at 425.

210. 369 U.S. 186 (1962).

211. *Id.* at 211. See also Miller, *supra* note 209, at 17.

212. *Pan Am. World Airways, Inc. v. CAB*, 392 F.2d 483, 492 (D.C. Cir. 1968). See also *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973). The *Pillai* court invalidated an order approving transatlantic rate schedules; "hardly anything" in the record supported the Board's decision. The court commented:

The Board cannot wrap its decision in some mystique of foreign policy or purported expertise in international negotiation to achieve a nonreviewable status for the facts underlying its most important and sensitive decisions.

Id. at 1023.

213. 357 U.S. 116 (1958).

the Court overturned an administrative practice that denied passports to American members of the Communist Party; the Court narrowly construed the relevant statutes²¹⁴ to deny the Secretary of State power to refuse passports on political grounds.²¹⁵ In *Aptheker v. Secretary of State*,²¹⁶ the Court invalidated section 6 of the Subversive Activities Control Act,²¹⁷ which prohibited granting passports to Communists, despite the national security motives underlying the Act.²¹⁸ In *Zemel v. Rusk*,²¹⁹ although the Court upheld the Secretary of State's refusal to validate passports for travel to Cuba, the reviewability of the decision was not seriously questioned.²²⁰

The Court's decision to review these cases is directly contrary to the *Waterman* thesis. It means not only that courts can "review and perhaps nullify actions of the Executive taken on information properly held secret,"²²¹ but further demonstrates that executive action in foreign affairs is not per se immune from judicial scrutiny.

Finally, in most cases which the Court has declined to review under the political question doctrine, it has recognized, albeit in dicta, the concurrent powers of Congress in the area of national security. In *Oetjen v. Central Leather Co.*,²²² the Court found nonjusticiable a dispute over the validity of title to property seized by the Mexican government on the ground that "[t]he conduct of foreign relations of our Government is committed by the Constitution to the Executive and the Legislative"²²³ In *United States v. Belmont*,²²⁴ which upheld presidential recognition of the Soviet Union, the Court referred to *Oetjen* in the following terms:

This court held that the conduct of foreign affairs was committed by the Constitution to the political *departments* of the government . . . that who is the sovereign of a territory is not a judicial question but one the

214. 8 U.S.C. § 1185 (1970); 22 U.S.C. § 211(a) (1970).

215. 357 U.S. at 129-30.

216. 378 U.S. 500 (1964).

217. 50 U.S.C. § 785 (1970).

218. 378 U.S. at 509-14.

219. 381 U.S. 1 (1965).

220. *Id.* at 6-7.

221. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

222. 246 U.S. 297 (1918).

223. *Id.* at 302 (emphasis added).

224. 301 U.S. 324 (1937).

determination of which by the political *departments* conclusively binds the courts.²²⁵

Even in *Waterman* the Court held that "[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."²²⁶ This language is irreconcilable with the notion of absolute executive autonomy in foreign affairs.²²⁷

Third, congressional action asserting power over foreign affairs is also consistent with the theory that the President shares responsibility for national security with the Congress. Congress has often used the power of the purse to impose its foreign policy judgments on the executive.²²⁸ The special dependence of foreign aid on appropriations makes it a special target of congressional concern,²²⁹ most recently illustrated by the cutoffs of military aid to Turkey and to Southeast Asia.²³⁰ Were presidential powers in foreign relations unlimited, Congress would be restricted to a general authorization of funds,²³¹ leaving its distribution entirely to the executive.

In the War Powers Resolution,²³² Congress has also asserted its determination to share in the decision to commit American troops to combat. The Resolution requires the President to report any engagement of American military forces within 48 hours, together with the

225. *Id.* at 328.

226. 333 U.S. at 111 (emphasis added). See also *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

227. Whether the judiciary can properly share such powers depends on whether the political question doctrine precludes judicial review. See notes 311-59 *infra* and accompanying text.

228. See generally Fulbright, *American Foreign Policy in the 20th Century under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 5-6 (1961); Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid*, 1970 DUKE L.J. 293, 493. Senator Fulbright in 1961 lamented the absence of plenary executive power in foreign affairs; he accurately observed that, whatever the juridical basis for the sweeping language of *Curtiss-Wright*, "I do not think that it is accurate in fact." Fulbright, *supra*, at 3.

229. Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 827, 827 (1961).

230. 22 U.S.C.A. § 2321f (Supp. 1976) (prohibiting military aid to South Vietnam, Laos, and Thailand unless explicitly authorized by act of Congress); 22 U.S.C.A. § 2370(x) (Supp. 1976) (suspending military aid to Turkey pending a negotiated settlement of the Cyprus conflict). Other illustrations of congressional authority over foreign aid include the Hickenlooper amendment, 22 U.S.C. § 2370(e) (1970) (prohibiting foreign aid to countries that nationalize American industry without just compensation); 22 U.S.C. § 2370(f) (1970) (prohibiting aid to Communist countries).

231. The general aid authorization is 22 U.S.C. § 2312 (1970).

232. 50 U.S.C. §§ 1541-48 (Supp. IV 1974).

reasons for the engagement, its constitutional and legislative authority, and the estimated scope and duration of hostilities.²³³ Without explicit congressional approval, the President must terminate the engagement within 60 days.²³⁴ The *Mayaguez* incident—in which American troops invaded a Cambodian island to liberate an American merchant ship—was the first test of the War Powers Resolution. President Ford largely complied with the letter, if not the spirit, of the statute.²³⁵ Those portions of the National Security Act creating the CIA and defining its role²³⁶ are further unmistakable indications of the concurrent power of Congress in foreign affairs.²³⁷

That the President exercises primary authority in foreign affairs is indisputable. There is equally little dispute, however, that Congress also has a role that has been sanctioned by judicial interpretation and by long usage. Consequently, in normal circumstances,²³⁸ Congress has the constitutional power to impose restraints on executive classification of national security information, including a transfer of the final authority to determine the propriety of classification.

B. *Exclusive Presidential Authority over Domestic Threats to National Security.*

1. *The Case for Exclusive Presidential Authority*

Assuming that the President does enjoy complete autonomy in foreign affairs, the amended FOIA is unconstitutional only if exclusive presidential authority also extends to domestic action directly threatening national security. Authority to classify information, although closely related to foreign affairs, itself is purely domestic action. The FOIA impermissibly invades the executive domain only if exclusive presidential power over national security implicitly includes exclusive, unreviewable domestic powers over all activities that directly affect national security.

233. 50 U.S.C. § 1543(a) (Supp. IV 1974).

234. 50 U.S.C. § 1544(b) (Supp. IV 1974).

235. See Clifford, *In Praise of Congress*, N.Y. Times, May 21, 1975, at 43, col. 2; Lewis, *The Laws under Which Mr. Ford Took Action*, N.Y. Times, May 18, 1975, § 4, at 2, col. 3. But see Berger, *The Mayaguez Incident and the Constitution*, N.Y. Times, May 23, 1975, at 37, col. 1.

236. 50 U.S.C. §§ 403-403j (1970).

237. *United States v. Butenko*, 494 F.2d 593, 629 (3d Cir.) (Gibbons, J., dissenting), cert. denied, 419 U.S. 884 (1974).

238. But see notes 301-10 *infra* and accompanying text.

Language in several Supreme Court opinions supports this theory. Both *Curtiss-Wright* and *Waterman* strongly hinted that the President has plenary power to reserve secret information from Congress²³⁹ and the courts²⁴⁰ on national security grounds. Justice Stewart's concurring opinion in the *Pentagon Papers* case²⁴¹ is the most complete judicial expression of this theory:

The responsibility [for classification] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.²⁴²

Finally, dicta in *United States v. Nixon*²⁴³ imply that the executive privilege for national security information is constitutionally based, absolute in scope, and unreviewable by courts or Congress.²⁴⁴ The Court noted that the privilege claimed in the tapes litigation did not rest on the ground that the tapes contained "military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."²⁴⁵

2. *The Case for Concurrent Powers*

A closer examination of relevant Supreme Court precedent reveals that whenever the issue has been directly presented the Court has

239. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

240. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

241. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

242. *Id.* at 728-30 (Stewart, J., concurring) (footnotes omitted). See also *Government Secrecy Hearings*, *supra* note 176, at 146-53 (testimony of Robert G. Dixon, Jr.).

243. 418 U.S. 683, 710-11 (1974), *quoted in* text accompanying note 245 *infra*.

244. See also *Nixon v. Sirica*, 487 F.2d 700, 721 (D.C. Cir. 1973) (explicitly exempting national defense and foreign relations material from order requiring production of presidential tapes for in camera inspection).

245. 418 U.S. at 710-11, *citing* *United States v. Reynolds*, 345 U.S. 1 (1953), and *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

decisively rejected the notion of unreviewable presidential autonomy in domestic affairs closely related to national security.²⁴⁶ First, the cases supporting the theory are not reliable precedent in its favor. The deficiencies in *Curtiss-Wright* and *Waterman* have previously been noted.²⁴⁷ The *Pentagon Papers* result, properly viewed, holds that presidential power independent of congressional sanction does not extend to domestic affairs implicating national security.²⁴⁸ Nor is the language in *United States v. Nixon*²⁴⁹ dispositive. First, the statement is dictum, because military secrets were not at issue. Second, its position in the opinion suggests that it refers to the scope of the privilege when applicable rather than to judicial power to determine if it applies.²⁵⁰ Third, the opinion elsewhere contemplates in camera review by the district court to excise material inadmissible under *Reynolds* and *Waterman*.²⁵¹ The only material inadmissible under these cases is national security data; the plain inference is that the court may examine in camera all presidential documents.²⁵² In short, available precedent does not establish the right to "throttle judicial review by presenting a claim of executive privilege in the cellophane wrapper of 'national security.'"²⁵³

Moreover, whenever it has addressed the issue directly, the Court has flatly refused to extend presidential foreign relations powers to domestic affairs threatening the national security. *Youngstown Sheet & Tube Co. v. Sawyer*,²⁵⁴ known as the *Steel Seizure* case, is the decision most nearly in point. Fearing that a national steel strike in 1952 would cripple the

246. *Zweibon v. Mitchell*, 516 F.2d 594, 626 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976).

247. See notes 190-221 *supra* and accompanying text.

248. See notes 276-81 *infra* and accompanying text.

249. 418 U.S. 683, 710-11 (1974).

250. Sections A and B of the Court's discussion of the claim of privilege established that the judiciary has ultimate power to determine the applicability of the privilege. 418 U.S. at 703-07. The dicta concerning the national security privilege appear in Section C, which discusses the circumstances in which the claim of privilege may be overridden. *Id.* at 707-13. See *Berger*, *supra* note 74, at 787.

251. 418 U.S. at 715 n.21.

252. *Berger*, *supra* note 74, at 787. A possible explanation for the Court's apparently contradictory view of the national security privilege lies in its desire to maximize its apparent neutrality to minimize the prospect of presidential disobedience. See notes 156-59 *supra* and accompanying text. Lip service to presidential autonomy in foreign relations was a relatively inexpensive means to achieve such apparent neutrality. Mishkin, *supra* note 156, at 87-88.

253. Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116, 117 (1974).

254. 343 U.S. 579 (1952).

Korean War effort, President Truman ordered the Secretary of Commerce to seize the steel mills. Lacking statutory support,²⁵⁵ the President asserted his inherent executive powers and his position as commander-in-chief to justify his action. The Supreme Court nullified the seizure.²⁵⁶ Although the implications of the case have been hotly debated,²⁵⁷ it is clear that a close connection between national security and a domestic crisis does not warrant unilateral presidential action absent either congressional consent or imminent threat of national disaster.²⁵⁸ Justice Jackson, the author of *Waterman*, explained:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.²⁵⁹

The so-called "national security" wiretaps sponsored by the Nixon Administration also clearly illustrate the absence of unbridled presidential discretion in domestic affairs that relate, however directly, to national security. The leading case is *United States v. United States District Court*,²⁶⁰ in which the Government had wiretapped a defendant's telephone without a warrant. The Government resisted disclosure of the intercepts, asserting that the warrantless wire tap was constitutional under the President's inherent power to protect national security. A

255. The Government explicitly disclaimed reliance on any of the statutory procedures then in effect that allowed the Government to seize private property. 343 U.S. at 585-86. Congress' refusal to include such powers in the Taft-Hartley Act, 29 U.S.C. §§ 141-87 (1970), implicitly rejected seizure as a means to deal with crippling strikes. The President thus had to rely solely on his powers as chief executive and commander-in-chief of the armed forces.

256. 343 U.S. at 589.

257. Compare Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 65-66 (1953) (approving result, but criticizing shallowness of analysis), and Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 177-82 (1952) (approving both result and reasoning), with Hutton, *Usurpation of Political Power*, 57 DICK. L. REV. 179, 184-87 (1953) (questioning propriety of judicial review in *Steel Seizure* case).

258. See notes 301-10 *infra* and accompanying text.

259. 343 U.S. at 642 (Jackson, J., concurring) (footnote omitted). One might argue that national security classification is more closely related to the foreign affairs and military powers of the President than is the production of steel. Two comments are in order. First, it is hard to imagine anything more directly connected to the military power than the industrial base on which it rests. Second, the notion that the President's domestic powers can be confined to those which are "directly connected" to his national security powers is fraught with peril. See notes 291-99 *infra* and accompanying text.

260. 407 U.S. 297 (1972).

unanimous Court rejected this contention and held that the President must protect internal security in accordance with the fourth amendment requirement of prior judicial authorization of searches and seizures.²⁶¹ The Court's treatment of the issue of judicial competence is of particular relevance to the amended FOIA:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. . . . If the threat is too subtle or complex for our senior law enforcement officials to convey its significance to a court, one may question whether there is probable cause for surveillance. Nor do we believe that prior judicial review will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. . . . Moreover, a warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge. Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.²⁶²

Two recent circuit court decisions²⁶³ have applied this rationale in subjecting to judicial review executive authority to wiretap in national security cases. In *Zweibon v. Mitchell*²⁶⁴ sixteen members of the Jewish Defense League (JDL) sought damages from former Attorney General John Mitchell for a warrantless wiretap of their headquarters.²⁶⁵ The

261. *Id.* at 321.

262. *Id.* at 320-21.

263. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), *discussed in text* accompanying notes 264-67 *infra*; *United States v. Butenko*, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974), *discussed in text* accompanying notes 268-71 *infra*.

264. 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976).

265. The JDL is a militant Zionist organization with a history of strong anti-Soviet actions, both legal and illegal. Some of these actions had allegedly caused serious frictions in Soviet-American relations. *Id.* at 608-09 nn.21-24. Of primary concern were the plainly illegal bombings of Soviet trade and airline offices in New York City, in response to which the President feared retaliation against American citizens in Moscow.

defense was that former President Nixon had explicitly authorized the intercepts. In holding the defendants liable, the District of Columbia Circuit decisively rejected the notion that the foreign affairs powers established "the inherent authority of the President to engage in warrantless national security surveillances as a necessary concomitant of his responsibilities as Commander-in-Chief of the Armed Forces and Chief Executive of the nation."²⁶⁶ Instead, the court ruled:

This brief survey of the types of cases which have acknowledged . . . the vast scope of Executive power in the domain of foreign relations should clarify any misconception that they render that power exempt from judicial review or immune to constitutional limitations. Indeed, there is another series of cases which graphically establishes the limits on presidential power when national security is used as a talisman to invoke extraordinary powers in the conduct of domestic affairs.²⁶⁷

In *United States v. Butenko*,²⁶⁸ the Third Circuit considered presidential power to wiretap the American embassy of a foreign power.²⁶⁹ The

The Soviet objections also extended to conduct clearly protected by the first amendment, such as picketing the home of the Soviet ambassador. *Id.* at 608 n.23.

The President ordered the wiretaps to protect American citizens in the Soviet Union, preserve Soviet-American relations, and "obtain foreign intelligence information deemed essential to the security of the United States." Affidavit of Attorney General, *quoted in id.* at 607. The legal basis of the wiretaps was asserted to be the "authority relating to the nation's foreign affairs." *Id.*

266. 516 F.2d at 615. Although the court split sharply on several damage related issues, there was unanimity that the wiretaps were illegal. Two judges thought the intercepts violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1970). 516 F.2d at 681 (McGowan, J., concurring); *id.* at 688 (Robb, J., concurring). The remaining judges thought the wiretaps violated the fourth amendment. *Id.* at 614 (plurality opinion); *id.* at 689 (Wilkey, J., concurring and dissenting); *id.* at 706 (MacKinnon, J., concurring and dissenting). All judges agreed that the national security rationale did not confer plenary power on the President to wiretap domestic organizations without prior judicial sanction.

267. 516 F.2d at 626, *citing* *New York Times Co. v. United States*, 403 U.S. 713 (1971), *see* notes 276-81 *infra* and accompanying text; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578 (1952), *see* notes 254-59 *supra* and accompanying text; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), *see* notes 199-200 *supra* and accompanying text; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1868), *see* notes 197-98 *supra* and accompanying text.

268. 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974).

269. Butenko was accused of being a Russian spy. After his first conviction, the Government confessed that it had overheard Butenko's conversations through wiretaps on various Soviet installations in the United States. On appeal, the Supreme Court held that copies of all illegal wiretaps must be disclosed and remanded the case for a decision on the legality of the warrantless wiretaps. *Alderman v. United States*, 394 U.S. 165 (1969). The Government declined to release any of the intercepts, asserting that the

court granted substantial latitude to presidential discretion but retained the authority to review the propriety of its exercise. The court unanimously agreed that "the Fourth Amendment is also applicable where, as here, the President is acting pursuant to his foreign affairs duties even though the object of the surveillance is not a domestic political organization."²⁷⁰ The court split sharply on the need for prior judicial review in all instances. The majority permitted a warrantless tap if it were otherwise reasonable and Congress had not prohibited it,²⁷¹ but emphasized that post-search judicial review would test the reasonability of the wiretap and that the in camera inspection conducted by the trial judge was a proper method to ensure legality.²⁷² *Butenko* does stand for substantial presidential discretion in foreign affairs,²⁷³ but does not support *unreviewable* presidential discretion in direct defiance of congressional action. On the contrary, *Butenko* subjects presidential action to protect internal security to judicial review; the final authority on the legality of the wiretaps remains with the judiciary.²⁷⁴ The national security wiretap cases thus support the basic principle that the Constitution does not grant autonomy to the President in domestic matters directly related to the national security.²⁷⁵

Finally, cases considering the first amendment and foreign policy further support this principle. Although Justice Stewart's concurring

President's national security powers allowed warrantless wiretaps of agents of foreign governments in the United States. A majority of the Third Circuit sustained this position. 494 F.2d at 608.

270. 494 F.2d at 603.

271. The *Butenko* majority held that the Federal Communications Act, 47 U.S.C. § 605 (1970), did not ban warrantless wiretaps of the agents of foreign governments. Noting that such a prohibition would raise constitutional questions, the majority declined to discuss the outcome. 494 F.2d at 601.

272. 494 F.2d at 606-07.

273. The absence of prior judicial review is clearly inconsistent with the fourth amendment. *United States v. United States District Court*, 407 U.S. 297, 315-18 (1972). Moreover, the potential for abuse of such power is great, *United States v. Butenko*, 494 F.2d 593, 628 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 419 U.S. 881 (1974). *Butenko* is probably inconsistent with the reasoning of *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), and grants immense latitude to presidential action to protect the national security.

Nonetheless, even this ruling stretching presidential power to its outermost limits retains subsequent judicial review of the legality of such action. See note 272 *supra* and accompanying text.

274. 494 F.2d at 603-06.

275. See also *United States v. Barker*, 514 F.2d 208 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975); *United States v. Ehrlichman*, 376 F. Supp. 29, 33-34 (D.D.C. 1974)

opinion in the *Pentagon Papers* case suggests complete executive autonomy in national security classification,²⁷⁶ the result requires a contrary conclusion. The Court refused to enjoin the *New York Times* from publishing the complete text of the 47-volume history of American intervention in Vietnam, despite the President's claim that release of these "Top Secret" documents would cause incalculable harm to the national security.²⁷⁷ The Court was well aware that this decision limited the President's domestic authority implicitly derived from the foreign relations power;²⁷⁸ Justice Harlan's dissent on the merits was bottomed on this precise issue.²⁷⁹ But a majority of the Court held that the first amendment required, at minimum, proof of direct, immediate and irreparable injury to warrant injunction,²⁸⁰ and the judiciary, not the executive, was the final arbiter of whether that burden had been fulfilled.²⁸¹

(flat rejection of defendants' claims that President may authorize domestic burglary to protect national security). *But see* *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (good faith reliance on apparent authority of government agent to authorize illegal action, if objectively reasonable, negates intent to violate law).

276. *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring), *quoted in text* accompanying note 242 *supra*.

277. 403 U.S. at 714.

278. *See* *Atlee v. Laird*, 347 F. Supp. 689, 711 (E.D. Pa. 1972) (Lord, C.J., dissenting), *aff'd mem. sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973). An exception must be made for Justice Stewart, who thought that the responsibility for classification was exclusively executive. Consequently, the duty to safeguard secret documents was also exclusively executive. Absent some congressional action, or proof of immediate and irreparable injury, the executive had to act alone. 403 U.S. at 728-30 (Stewart, J., concurring).

279. 403 U.S. at 756-58 (Harlan, J., dissenting).

280. 403 U.S. at 730 (Stewart, J., concurring).

281. For two, perhaps three, of the Justices, the absence of congressional sanction for the President's action was decisive of the merits. 403 U.S. at 732 (White, J., concurring); *id.* at 741-47 (Marshall, J., concurring):

It would, however, be utterly inconsistent with the concept of separations of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit.

Id. at 742 (Marshall, J., concurring). Although Justice Douglas would probably have reached the same result in any event, he too was troubled by the lack of congressional authorization. *Id.* at 720-22 (Douglas, J., concurring).

See also *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). Both cases dealt with ex-agent Victor Marchetti's attempt to publish a book highly critical of the CIA. *See* V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974). Marchetti had signed an agreement not to release classified material, which the Agency sought to enforce in the courts. In each case, the court enjoined publication of classified material. In *Colby* the court did assume final

These three lines of cases establish that, although the national security powers imply some executive authority to act domestically, such authority is not independent of congressional and judicial scrutiny. Consequently, the Congress may exercise concurrent powers in classifying information.

Custom and usage confirm Congress' role in information classification.²⁸² Although the present security classification system was established by executive order,²⁸³ Congress could amend or replace the system.²⁸⁴ The congressional role in applying sanctions to violations of the executive secrecy system is even clearer. Congress has prohibited acquisition and disclosure of classified information with intent or reason to believe that it will injure the United States or aid a foreign government.²⁸⁵ Knowing or willful publication of classified material relating to communications intelligence is likewise illegal,²⁸⁶ as is the release of atomic secrets with intent to injure the United States or assist a foreign government.²⁸⁷ Congress has prohibited transmission of national security information to Communists,²⁸⁸ but has to date refused to enact a comprehensive Official Secrets Act despite strong pressure from the executive.²⁸⁹ The most recent assertion of congressional authority over executive information is the resolution on executive agreements, which

authority to determine the propriety of classification, relying on the 1974 FOIA amendments. *Alfred A. Knopf, Inc. v. Colby*, *supra* at 1367. The court then limited the depth of its review by invoking a general presumption that executive officials act properly in performing their duties, thus limiting the Agency's proof to the fact of classification and some reasonable relationship between the classified documents and the national security. *Id.* at 1368-69. That presumption is erroneous in the context of national security classifications. *See* note 29 *supra*. The case illustrates clearly, however, the judicial reluctance to overturn executive classifications. For critical reviews of the *Colby* decision, see Comment, *Freedom of Information: Judicial Review of Executive Security Classifications*, 28 U. FLA. L. REV. 551, 561-65 (1976); Note, *supra* note 9, at 416-19.

282. *See* *New York Times Co. v. United States*, 403 U.S. 713, 743-47 (1971) (Marshall, J., concurring); Project, *supra* note 16, at 1003-06.

283. Exec. Order No. 11,652, 3 C.F.R. 339 (1974), *reprinted in* 50 U.S.C. § 401, at 1429 (Supp. II 1972).

284. Project, *supra* note 16, at 1006.

285. 18 U.S.C. §§ 793-94 (1970).

286. 18 U.S.C. § 798 (1970).

287. 42 U.S.C. § 2274 (1970).

288. 50 U.S.C. § 783(b) (1970).

289. *E.g.*, 12 WEEKLY COMP. OF PRES. DOC. 243 (1976). The President's request for such legislation itself suggests that Congress has concurrent powers in classifying information.

requires the President to transmit to Congress the text of all such agreements to which the United States is a party.²⁹⁰

Finally, compelling functional arguments demand rejection of unlimited presidential authority in national security classifications. Absolute power in any single branch was foreign to the intent of the Founding Fathers; rather, they hoped to provide each branch with the constitutional means and personal motives to resist encroachment by the others.²⁹¹ Power was divided within the Government to prevent tyranny by a single branch, not to provide a series of "watertight compartments" in which any branch enjoyed complete autonomy.²⁹² A rule whose constitutional foundation was a grant of plenary power to the President in all domestic affairs related to national security would lay the foundation for complete executive tyranny.²⁹³ The concept of national security has elastic bounds, easily stretched to expand presidential power.²⁹⁴ Moreover, the attempt to limit such unreviewable power to domestic activity "directly related" to the national security would almost surely prove fruitless. The Court's unavailing struggle to limit federal legislation to commerce "directly affecting" interstate commerce²⁹⁵ has given way to an expansive construction of the commerce clause, which today justifies federal legislation on civil rights,²⁹⁶ riots,²⁹⁷ racketeering,²⁹⁸ and white slavery.²⁹⁹ Limiting presidential power to activity which "directly relates" to national security limits it not at all.

290. 1 U.S.C. § 112b (Supp. IV 1974).

291. See generally THE FEDERALIST No. 51 (A. Hamilton).

292. Cf. Comment, *supra* note 58, at 1467 (power divided to ensure independence of each branch).

293. *United States v. Butenko*, 494 F.2d 593, 628 (3d Cir.) (Gibbons, J., dissenting), cert. denied, 419 U.S. 881 (1974); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1219 (1972) [hereinafter cited as *National Security Developments*].

294. See *Zweibon v. Mitchell*, 516 F.2d 594, 635-36 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 924 (1976).

295. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

296. 42 U.S.C. §§ 2000a to 2000a-6 (1970). See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (sustaining on commerce clause grounds the 1964 Civil Rights Act).

297. 18 U.S.C. § 2101 (1970).

298. 18 U.S.C. § 1952 (1970). See *United States v. Compton*, 365 F.2d 1, 3 (6th Cir.), cert. denied, 385 U.S. 956 (1966); *Marshall v. United States*, 355 F.2d 999, 1004 (9th Cir.), cert. denied, 385 U.S. 815 (1966) (sustaining Travel Act on commerce clause grounds).

299. 18 U.S.C. §§ 2421-24 (1970). See *Cleveland v. United States*, 329 U.S. 14

Separation of powers therefore does not preclude and may require judicial review of presidential action in domestic national security cases.³⁰⁰ The argument for unreviewable presidential authority over information classification presumes presidential autonomy in all domestic activities which directly affect the national security. The Court has firmly rejected any such proposition in several lines of cases. Congress does have a role, albeit subordinate, in the classification of national security information. Consequently, in normal circumstances, it is erroneous to assert that the President has sole power to classify national security information.

C. *The National Emergency Exception*

In times of national emergency, the Constitution permits a narrow exception to the general rule that the President shares national security powers with Congress. Unless Congress has specified precise measures to cope with the specific emergency in question, the President may act without congressional approval, or even in the face of prior congressional disapproval, for a limited period during "the gravest imminent danger to the public safety."³⁰¹ In such times

[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . The President was bound to meet [the emergency] in the shape it presented itself, without waiting for Congress to baptize it with a name.³⁰²

During the emergency immediate action may be crucial to the survival of the nation; the executive is necessarily better suited than the legislature to respond with the requisite dispatch.³⁰³ A true national

(1946); *Hoke v. United States*, 227 U.S. 308 (1913) (sustaining Mann Act on commerce clause grounds).

300. *National Security Developments*, *supra* note 293, at 1219.

301. *Korematsu v. United States*, 323 U.S. 214, 218 (1944). *Accord*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring) ("the Constitution does grant to the President extensive authority in times of grave and imperative national emergency"); *Ex parte Quirin*, 317 U.S. 1 (1942) (military power to try spies in wartime); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (President decides when civil war exists and what measures are appropriate to counter it). See generally E. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947).

302. *The Prize Cases*, 67 U.S. (2 Black) 635, 668-69 (1863).

303. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring); M. ARNOLD, C. GARVIN & G. ROSENBAUM, *supra* note 19, at 282.

emergency thus confers plenary power for both foreign and domestic affairs on the only immediately responsive officer, the President.³⁰⁴ It follows that the President may claim a national security privilege, notwithstanding the amended FOIA, during the period in which he may legitimately assume extraconstitutional powers.

The exception is strictly limited to true national emergencies. Only when the public danger is "immediate, imminent and impending"³⁰⁵ can the President assume the extraconstitutional powers necessary to save the nation. Otherwise the exception would swallow the rule, and the President could act at his whim without congressional authorization, in direct violation of the principle of separation of powers. The appropriate test to determine the existence of such an emergency in the context of the FOIA should be closely akin to that suggested in the *Pentagon Papers* case for prior restraint—a national emergency that "will surely result in direct, immediate, and irreparable damage to our nation or its people."³⁰⁶

The President's extraconstitutional powers terminate, not when the emergency ends, but when Congress again can legislate concerning the emergency.³⁰⁷ These powers derive not from the emergency alone but from the executive's comparative speed in responding to crisis.³⁰⁸ When Congress is again able to act, the rationale for the exception dissolves, and the President must act in accord with congressional will. Congress may often ratify the President's actions or grant him new authority for the duration of the emergency.³⁰⁹ Subsequent presidential action is taken pursuant to the duty to execute the laws made by Congress, not pursuant to the extraconstitutional emergency powers. Applied

304. Cf. E. CORWIN, *supra* note 301, at 19-20 (Civil War was first but not last assertion of presidential initiative to meet domestic aspects of war emergency).

305. *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871).

306. *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

307. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Burton, J., concurring) ("The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency"); *id.* at 662 (Clark, J., concurring) (President may act at will in crisis, unless Congress had specified the path to follow in such a crisis). See E. CORWIN, *supra* note 301, at 19.

308. See notes 302-03 *supra* and accompanying text.

309. See, e.g., Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (codified at 50 App. U.S.C. §§ 901-46, repealed 1947). The Supreme Court upheld the constitutionality of the Emergency Price Control Act and its administrative procedures in *Bowles v. Willingham*, 321 U.S. 503 (1944), and *Yakus v. United States*, 321 U.S. 414 (1944).

to the FOIA, the emergency exception permits the President to claim the national security privilege only until Congress has an opportunity to amend the statute. If Congress declines to act, the President's legitimate claim to privilege disappears.

Except during national emergencies when Congress cannot act, then, the amended FOIA trespasses on no exclusively executive prerogatives. The President is not solely responsible for either the conduct of American foreign policy or domestic affairs directly related to foreign affairs, but shares responsibility with Congress. Consequently, the President cannot claim a constitutionally based executive privilege for national security information, except during a national emergency. The privilege is not an executive privilege but a state privilege. The Constitution thus permits either the President or Congress to specify the conditions in which it may be waived. In assigning final responsibility for classifying information elsewhere than the executive branch, Congress acted in accord with the principle of separation of powers. Indeed, given the inherent conflict of interest in executive decisions on classification,³¹⁰ the amended FOIA conforms more closely to the principle of separation of powers than did the original FOIA.

V. THE POLITICAL QUESTION DOCTRINE

The conclusion that the President lacks exclusive authority to classify national security information does not necessarily make the judiciary an appropriate participant in national security classifications. Courts traditionally refrain from passing judgment on political questions—issues explicitly assigned to other parts of the federal government or which the judiciary lacks the competence to resolve.³¹¹ Decisions relating to foreign affairs have often been described as classic political questions.³¹²

Some authorities have asserted that national security information classification is such a nonjusticiable political question.³¹³ A review

310. See notes 29-31 *supra* and accompanying text.

311. *Baker v. Carr*, 369 U.S. 186 (1962).

312. *E.g.*, *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

313. *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart,

of the purposes of the political question doctrine in light of the criteria developed in *Baker v. Carr*³¹⁴ justifies a contrary conclusion in most instances. Except for information received in confidence from foreign governments,³¹⁵ the judiciary has the ability to review the propriety of classification. With that exception the amended FOIA presents no political questions disqualifying the judiciary from a final decision on the merits of classification.

The judiciary declines to decide political questions either because it lacks the capacity for rational decisions or because our system of government leaves the decision to officials directly responsible to the people.³¹⁶ The doctrine rests on a wise recognition that enforcement of judicial pronouncements depends on the respect accorded them by the other branches of the federal government and by the people.³¹⁷ Thus the Court refrains from deciding cases in which there is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³¹⁸

Three of these criteria are relevant to the amended FOIA.

First, there is no "textually demonstrable . . . commitment of the issue to a coordinate" branch. Even the strongest critics of the amended FOIA concede that the national security privilege is implicit in the President's foreign affairs powers, rather than explicitly granted by the Constitution.³¹⁹ The current classification order, Executive Order

J., concurring); *id.* at 757-58 (Harlan, J., dissenting); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Government Secrecy Hearings*, *supra* note 176, at 152 (testimony of Robert G. Dixon, Jr.).

314. 369 U.S. 186, 217 (1962).

315. See notes 346-54 *infra* and accompanying text.

316. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

317. See *id.* at 296-97 (Frankfurter, J., dissenting); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

318. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

319. *New York Times Co. v. United States*, 403 U.S. 713, 756 (Harlan, J., dissenting); Comment, *supra* note 17, at 425-26.

11,652,³²⁰ rests on no more specific a claim of authority than "the authority vested in me by the Constitution and statutes of the United States" ³²¹

Moreover, the Court has construed the textually demonstrable commitment doctrine narrowly.³²² In *Powell v. McCormack*,³²³ the Court reached the merits of a Congressman's suit for back pay after the House of Representatives refused to seat him, despite the constitutional provision making each house the "Judge of the Elections, Returns and Qualifications of its own Members" ³²⁴ The Court thought this "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."³²⁵ This narrow construction of the doctrine strongly suggests that the implied presidential privilege for national security information is not a "textually demonstrable . . . commitment" depriving the courts of power to review information classification.

The Court's treatment of the speech and debate clause, the only explicit constitutional privilege, further supports this thesis. The speech and debate clause prohibits questioning a Congressman or Senator "[f]or any Speech or Debate in either House" ³²⁶ In *United States v. Gravel*,³²⁷ the Court held a Senator's aide not privileged from testifying at the behest of a grand jury investigating the theft of the Pentagon Papers; the clause did not extend to matters unrelated to the legislative process.³²⁸ In *United States v. Brewster*,³²⁹ the Court held that a Senator accused of taking a bribe could not seek refuge in the speech and debate clause, which did not protect criminal conduct merely because it related to the legislative process.³³⁰ In each case the dissents dealt solely with the merits; the political question doctrine was not raised. While the scope of the clause has been generously

320. Exec. Order No. 11,652, 3 C.F.R. 339 (1974), reprinted in 50 U.S.C. § 401, at 1429 (Supp. II 1972).

321. *Id.*

322. See *Powell v. McCormack*, 395 U.S. 486 (1969), noted in *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 62-77 (1969).

323. 395 U.S. 486 (1969).

324. U.S. CONST. art. I, § 5.

325. 395 U.S. at 548.

326. U.S. CONST. art. I, § 6.

327. 408 U.S. 606 (1972).

328. *Id.* at 624-25.

329. 408 U.S. 501 (1972).

330. *Id.* at 520-21.

interpreted,³³¹ "legislative privilege" pursuant to an explicit constitutional requirement is unquestionably a fit subject for judicial review. The inference is plain that the textually demonstrable commitment doctrine does not preclude judicial review of the implicit executive privilege for national security information.

The second requirement, "judicially discoverable and manageable standards," poses more serious questions of judicial competence. Federal judges are not experts in foreign relations; courts and commentators are concerned that the judiciary might unwittingly release highly sensitive information.³³² The Fourth Circuit's attitude, illustrated in *United States v. Marchetti*,³³³ is typical:

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.³³⁴

An erroneous decision to release properly classified information poses a twofold danger. The obvious threat is use by foreign powers inimical to the United States. Less obvious but no less serious is the injury sustained by the judiciary, which, lacking political responsibility for national security, nonetheless overrules the judgment of experts to whom that duty has been explicitly entrusted.³³⁵

A closer analysis of the judicial role under the amended FOIA, however, suggests that such concerns are misplaced. Criteria for the

331. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

332. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969); *Wolfe v. Froehlike*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), aff'd, 510 F.2d 654 (D.C. Cir. 1974) (per curiam); Dixon, *supra* note 23, at 130; Henkin, Commentary, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 279 (1971). This concern was the principal reason for President Ford's veto of the 1974 amendments: "As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable." 10 WEEKLY COMP. OF PRES. DOC. 1318, 1318 (1974).

333. 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

334. *Id.* at 1318.

335. See note 317 *supra*.

need for secrecy do exist, developed by the President himself.³³⁶ Executive Order 11,652 provides explicit tests for classifying information.³³⁷ The FOIA incorporates these tests in the first exemption, which excludes material properly classified "under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy."³³⁸ These constitute judicially manageable standards.³³⁹

Moreover, the review process itself aids in the task of avoiding error. Courts do not initially classify material, but review a decision reached by experts to determine whether it conforms to established criteria. This is similar to the review of any administrative action, in which courts "regularly deal with the most complex issues of our society."³⁴⁰ The

336. Additional legislation may thus be necessary to reduce abuses in the classification system. Material is "confidential" if its "unauthorized disclosure could reasonably be expected to cause damage to the national security." Exec. Order No. 11,652, 3 C.F.R. 339, 340 (1974), *reprinted in* 50 U.S.C. § 401, at 1429 (Supp. II 1972). The diligent bureaucrat bent on secrecy will have little difficulty in constructing some injury to national security that might "reasonably be expected" if the subpoenaed material were disclosed. *See* Dorsen & Shattuck, *supra* note 190, at 5 n.18; Nesson, *supra* note 19, at 404; Note, *supra* note 9, at 411-16.

337. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. . . . The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. . . . The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security. Exec. Order No. 11,652, 3 C.F.R. 339, 340 (1974), *reprinted in* 50 U.S.C. § 401, at 1429 (Supp. II 1972).

338. 5 U.S.C. § 552(b)(1) (Supp. IV 1974).

339. Comment, *supra* note 17, at 430; Comment, *supra* note 58, at 1464.

340. *United States v. United States District Court*, 407 U.S. 297, 320 (1972). *See also* *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641, 647-48 (D.C. Cir. 1973); *National Security Developments*, *supra* note 293, at 1225.

Courts usually review administrative action under a "substantial evidence" test. Administrative Procedure Act § 10-e, 5 U.S.C. § 706(2)(E) (1970). The issue in these cases is whether the agency's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate . . .," *Brasher v. Celebrezze*, 340 F.2d 413, 414 (8th Cir. 1965), and the court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In FOIA suits, however, the court must conduct a trial de novo and enter its own judgment on the merits of classification. *See* notes 56-59 *supra* and accompanying text.

This distinction does not convert an otherwise justiciable case into a political question. The expertise necessary to discover "substantial evidence" in favor of an agency's decision is no less than that required to assess the merits of classification de novo. *Cf. International Harvester Co. v. Ruckelshaus*, *supra* at 641 (court's diffidence in reaching

impartial judgment of the court, in contrast to the bias of the executive,³⁴¹ more than compensates for "any marginal lack of expertise."³⁴² To paraphrase Justice Powell's discussion in *United States District Court*, "[i]f the threat is too subtle or complex for our senior [security experts] to convey its significance to a court, one may question whether there is probable cause for [classification]."³⁴³ Finally, judicial review under the FOIA is similar to review of an evidentiary privilege in litigation, and *Reynolds* and its progeny establish the propriety of judicial review in such cases.³⁴⁴

The third criterion of *Baker v. Carr*³⁴⁵ relevant to national security classification is the prospect of "embarrassment from multifarious pro-

merits "rooted in the underlying technical complexities" and "remains even when we take into account that ours is a judicial review, and not a technical or policy redetermination"). Moreover, de novo review of agency action, while unusual, is not unique to the FOIA. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* at 414 (de novo review authorized in reviewing adjudication based on inadequate factfinding, or when new issues appear in judicial proceeding to enforce nonadjudicatory action); *Russ v. Southern Ry. Co.*, 334 F.2d 224, 227 (6th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965) (money awards of National Railroad Adjustment Board reviewed de novo); *John J. Trombetta Co. v. Goldstein & Procacci*, 198 F. Supp. 288, 290 (E.D. Pa. 1961) (awards by Secretary of Agriculture under Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4) (1970), reviewed de novo).

341. See notes 29-31 *supra* and accompanying text.

342. *Zweibon v. Mitchell*, 516 F.2d 594, 644 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976); Comment, *supra* note 58, at 1473. It is unlikely that the initial decision reflects any broad view of foreign policy, given the thousands of lower level bureaucrats with classification authority. It is even less likely that the original classifier is better informed than the court at the conclusion of an in camera inspection, supplemented with the affidavits and testimony of top level executive officers. See Comment, *supra* note 58, at 1469-70.

343. *United States v. United States District Court*, 407 U.S. 297, 320 (1972). *Accord*, *Zweibon v. Mitchell*, 516 F.2d 594, 644 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976):

We simply do not believe that any margin of expertise possessed by the Attorney General can compensate for the neutral and detached attitude that a judge would bring to his decision; given the likely deference that a judge will accord the Attorney General's request, there is no substantial likelihood that any marginal lack of expertise will result in denial of legitimate requests for a warrant and frustration of proper intelligence gathering on the part of the Executive.

Since the judiciary must grant substantial weight to the agency's affidavit, *see* note 57 *supra* and accompanying text, these comments about national security wiretapping are relevant to national security classification.

344. See notes 67-100 *supra* and accompanying text. The force of this argument is significantly diluted by the common law requirement that the court *must* allow the privilege once it is clear that state secrets are implicated. Under *Reynolds*, unlike the FOIA, the court may not balance the need for secrecy against the need of the party subpoenaing the records. See notes 101-02 *supra* and accompanying text.

345. 369 U.S. 186 (1962).

nouncements" from different branches of the government. This element of the political question doctrine derives from the Government's need to present a united front when dealing with foreign governments. As the nation's designated representative to foreign countries, the President assumes powers in such dealings necessarily exempt from subsequent judicial review.³⁴⁶ The leading case is *Doe v. Braden*,³⁴⁷ in which the Court declined to consider whether a foreign government had properly ratified a treaty with the United States:

[I]t would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.³⁴⁸

The problem of embarrassment from multifarious pronouncements is irrelevant to most national security data;³⁴⁹ the Government as a whole is not usually embarrassed by a court reversal of an executive classification decision. When the President or his representatives have acquired documents from a foreign government under a pledge of secrecy, however, the courts cannot order their release,³⁵⁰ for the entire Government would suffer if an independent judiciary could subsequently overrule the executive's solemn promise of secrecy. Diplomatic negotiations would founder; exchanges with foreign governments would decline. Consequently, the political question doctrine denies the judiciary the power to release such information, a conclusion implicit in the District of Columbia Circuit's opinion in *Wolfe v. Froehlke*.³⁵¹

There remains the question of the proper judicial role when the claim of privilege rests on confidential communications received from a foreign government. The procedures employed to evaluate the common law state secrets privilege seem analogous. Under *United States v.*

346. *Id.* at 211-12; *Doe v. Braden*, 57 U.S. (16 How.) 635 (1853).

347. 57 U.S. (16 How.) 635 (1853).

348. *Id.* at 657.

349. Dorsen & Shattuck, *supra* note 190, at 37 n.129.

350. *The Freedom of Information Act: Hearings on H.R. 5425 & H.R. 4960 Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 93d Cong., 1st Sess. 137 (1973) (testimony of Robert G. Dixon, Jr.).

351. 510 F.2d 654, 655 (D.C. Cir. 1974), *aff'g* 358 F. Supp. 1081 (D.C. Cir. 1974). See note 34 *supra*.

Reynolds,³⁵² the courts may employ any means necessary, including in camera inspection, to ensure that the subpoenaed documents contain state secrets.³⁵³ Once the court is "ultimately satisfied that military secrets are at stake," it must allow the privilege without addressing the issue whether secrecy is desirable.³⁵⁴ A similar procedure is appropriate for information received in confidence from foreign governments and sought by a citizen under the FOIA.

A final observation about the political question doctrine is relevant: the long-term role of the judiciary in enforcing the FOIA is entirely consistent with the underlying goals of the doctrine. Political questions are by definition those issues better left to the ballot box than to judicial resolution.³⁵⁵ The "political branches," the executive and legislature, being directly elected by the people, more accurately reflect the popular will than do appointed judges. As the court in *Atlee v. Laird*³⁵⁶ observed, "One critical line of legal thought from Thayer through Holmes, from Brandeis through Frankfurter, has urged that courts serve democracy best by leaving the principal issues confronting the citizenry to the political branches of the government."³⁵⁷ In reviewing executive decisions to conceal information from the electorate, the judiciary improves the democratic process by enlarging the information base on which it rests.³⁵⁸ An uninformed electorate means a less accountable Government. By releasing improperly classified information, the courts make possible informed choice on the great foreign policy issues of the day, restore presidential accountability to the electorate, and reduce the likelihood of ill-considered action by the President. A rule grounded in democratic accountability should not block judicial action that improves accountability.³⁵⁹

352. 345 U.S. 1 (1953).

353. See notes 89-97 *supra* and accompanying text.

354. See notes 101-02 *supra* and accompanying text.

355. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

356. 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

357. *Id.* at 707.

358. See Karst & Horowitz, *supra* note 73, at 59; notes 17-19 *supra* and accompanying text.

359. Professor Winter has challenged this view on the ground that "How much secrecy?" is the people's business and we should not discourage their attention to that business by acting as though a final and infallible decision is available in the courts." Winter, Book Review, 83 *YALE L.J.* 1730, 1740 (1974). In short, he believes that the political process will itself correct abuses of secrecy because the President remains accountable at the ballot box.

This analysis overlooks political reality. In theory, all presidents are committed to

In sum, the political question doctrine does not preclude judicial review of national security classifications except for documents received in confidence from foreign governments. When the court is satisfied that the subpoenaed information was so received, it must allow the claim of privilege. In all other cases, however, the courts are competent to assess the merits of classification in accord with the standards of Executive Order 11,652. With a single exception, therefore, the amended FOIA presents no political questions inappropriate for judicial resolution.

VI. CONCLUSION

Fifteen days after its decision in *Curtiss-Wright* laid the foundation for the sweeping claim of executive privilege in foreign affairs, the Supreme Court had occasion to discuss the importance of informed public debate. In *DeJonge v. Oregon*,³⁶⁰ Chief Justice Hughes wrote of the necessity for "free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."³⁶¹ That prescription is no less valid when applied to foreign policy.³⁶²

open government and minimal secrecy. In practice, however, the institutional bias inherent to the executive branch, *see* notes 29-31 *supra* and accompanying text, tips the balance in favor of secrecy. Viewed in this light, the amended FOIA bears a striking resemblance to the original reapportionment case, *Baker v. Carr*, 369 U.S. 186 (1962). In theory, the fair-minded people of Tennessee could have elected representatives pledged to reapportion the state's archaic legislative districts, in theory, the legislators themselves could have voted to reapportion the state. In practice, however, the residents of the rotten boroughs could hardly be expected to vote away their advantages; nor could legislators reasonably be expected to vote themselves out of office. Absent a referendum or initiative, there was no political redress possible for the underrepresented majorities in the cities. Although only Justice Clark mentioned it explicitly, *id.* at 258-59 (Clark, J., concurring), the breakdown in the political process was probably a significant factor in the majority's decision to hear the case on the merits. Similarly, one cannot expect the executive branch of its own accord to weigh impartially the public need for information against its own need for secrecy; the inherent institutional bias prevents a fair balancing. Although the conflict of interest is probably less than that faced by the Tennessee legislature, it is sufficiently great to prevent resolution of the secrecy problem through the political process.

360. 299 U.S. 353 (1937).

361. *Id.* at 365.

362. *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

The 1974 amendments to the FOIA offer the hope of improved public discussion and understanding of America's foreign policy. The decision to classify information is inevitably delicate. The executive branch is inherently biased, however, in favor of secrecy, for secrecy serves the parochial interests of the executive bureaucracy, rather than the nation's broader needs. Yet in the long run, if error must occur, erroneous disclosure is better for democracy than erroneous secrecy. A functional analysis of the classification process dictates that the executive not make the final decision about the propriety of classification.

The implied executive privilege for national security information is consistent with this conclusion. Although the President has primary responsibility for foreign policy, his power is neither absolute nor unreviewable; except in time of national emergency, Congress shares these powers. Consequently, the national security privilege is properly a state privilege rather than an executive privilege, and Congress can constitutionally determine when it may be waived. The law is clear that the President cannot disobey statutory or constitutional commands in executing domestic functions, such as national security classification, directly related to foreign policy. Congress thus has constitutional authority to remove the final decision on national security classifications from the executive branch.

Assuming that Congress or the President define the circumstances in which classification is appropriate, the judiciary is a proper repository of the final authority to classify, except for documents received in confidence from foreign governments. Although judges are not experts in foreign policy, their expertise in administrative review, when enlightened by the executive branch, should permit proper decisions about the propriety of classification.

No one questions the need for secrecy in foreign affairs. A final executive determination of when it is appropriate, however, leads only to abuse of the Top Secret stamp. Such abuse always threatens the accountability of the Government to the electorate; ultimately it destroys the ability to retain even those secrets that should remain secret. More active judicial involvement in the classification process, through intelligent interpretation and use of the amended FOIA, may permit more rational and more democratic decisions about America's role in world affairs.