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THE SEPARATION OF POWERS UNDER NIXON: REFLECTIONS ON CONSTITUTIONAL LIBERTIES AND THE RULE OF LAW*

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I. INTRODUCTION

Even now it seems too early to assess, with any assurance, the scope of the dangers posed by the Nixon administration. The flow of memoirs of the period continues,[1] and an almost imponderable store of tape recordings and other "Presidential historical material" remains inaccessible to researchers.[2] Yet whatever judgments may ultimately be passed on the period as a whole, it is clear that the actions of the Nixon administration revealed extraordinary attempts to concentrate power in the executive branch at the expense of other organs of government.

After the Watergate episode and the resignation of the President, the events of the Nixon period provoked a strong reaction against executive power. This reaction now seems, however, to be giving way to a renewed tendency toward vigorous assertion of executive claims.[3] In this current period of apparent counter-reaction, it is important to reexamine the assertions of executive power under President Nixon, both to analyze the forms that those executive assertions assumed and to inquire whether this analysis of recent history gives any further guidance for the development of constitutional doctrine.[4]

Assertions of executive power under President Nixon did not represent a sharp break from the immediate past. Fueled by years of foreign emergencies and by the increasing centralization of the domestic economy, presidential power and pretensions increased sharply during the period following World War II.[5] Under President Nixon this development reached its apogee, both in the realities of presidential power and also in the insouciance with which extensive claims of presi-

1. Memoirs already published include: J. DEAN, BLIND AMBITION: THE WHITE HOUSE YEARS (1976); H. HALDEMAN, THE ENDS OF POWER (1978); H. KISSINGER, THE WHITE HOUSE YEARS (1979); R. NIXON, THE MEMOIRS OF RICHARD NIXON (1978); J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979).

2. *See* Presidential Recordings and Materials Preservation Act of 1974, 44 U.S.C. § 2107 (1976); Note, *Government Control of Richard Nixon's Presidential Material*, 87 YALE L.J. 1601 (1978).

3. Although renewed executive claims have appeared in many areas, those relating to the control of the Central Intelligence Agency have perhaps achieved the greatest prominence. *See, e.g.*, Szulc, *Putting Back the Bite in the C.I.A.*, N.Y. Times, Apr. 6, 1980, § 6 (Magazine), at 28, 33 ("Both Jimmy Carter and Ronald Reagan, almost in identical phrases, have publicly demanded that the agency be liberated from legislative constraints"); *id.* at 62 (The Director of Central Intelligence argues that covert operations are within the province of the executive branch and "it is not proper to share that responsibility with the Congress").

4. *Cf.* Berger, *The President and the Constitution*, 28 OKLA. L. REV. 97 (1975); Swindler, *The Constitution After Watergate*, 28 OKLA. L. REV. 467 (1975) (evaluating the effects of the legislative and judicial events of 1973-1974 on the American constitutional system).

5. *See* Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 125, 125-27 (1976).

dential authority were asserted.[6]

To the extent that the shift in power to the President and his personal staff occurred at the expense of established cabinet offices, there was little effective resistance.[7] Furthermore, Congress was reluctant to oppose many of the most important assertions of executive authority, until the Watergate episode brought legislators face to face with the problem of presidential power, framed not as an issue of political principle but as a simple question of criminal right and wrong. During the Watergate period, Congress enacted legislation to curb presidential claims of war-making authority and to limit the President's power to impound funds appropriated by Congress.[8] Aside from such efforts, however, Congress as a body remained relatively passive on the issue of presidential power until the impeachment inquiry itself.[9] But in political life, as elsewhere, when important interests are affected, there

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6. *See* H. COMMAGER, THE DEFEAT OF AMERICA 137 (1974); A. SCHLESINGER, THE IMPERIAL PRESIDENCY 187 (1973).

7. P. KURLAND, WATERGATE AND THE CONSTITUTION 198 (1978). For example, President Nixon sought to reorganize the federal government by placing major executive departments (including cabinet offices) under the control of presidential assistants. *See* J. SCHELL, THE TIME OF ILLUSION 296-98 (1976). At the beginning of his second term Nixon attempted to accomplish a fundamental reorganization of this type by executive order rather than by statute. *See* P. KURLAND, *supra*, at 198.

A shift of power to presidential assistants at the expense of cabinet officers, though in form a shift of power *within* the executive branch, may in fact significantly reduce the legislature's ability to supervise executive action. *See* J. SCHELL, *supra*, at 107-08. Unlike cabinet officers, presidential assistants are not confirmed by the Senate—a process that can result in the rejection of a nominated officer or, perhaps even more important, in the securing of concessions relating to an official's conduct in office. The confirmation of Elliot Richardson as Attorney General, for example, was expressly made contingent on his promise to appoint a special prosecutor to investigate the Watergate affair. P. KURLAND, *supra*, at 76. Furthermore, in contrast to the practice of cabinet officers, presidential assistants have ordinarily refused to testify before congressional committees even when the assistants have functions as important makers of policy. *See, e.g.*, *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 430-34 (1972) [hereinafter cited as *War Powers Hearings*] (noting the refusal of National Security Advisor Henry Kissinger to testify before the Senate Foreign Relations Committee).

8. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1976)); Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 31 U.S.C. §§ 1301-1407 (1976)). See also note 19 *infra*.

9. Certain committees of Congress did seek to investigate issues raised by executive claims. The Senate Foreign Relations Committee, for example, probed executive actions relating to the Vietnam War. *See, e.g.*, *War Powers Hearings*, *supra* note 7, at 483-538. Also notable were committee hearings concerning the doctrine of executive privilege, military surveillance of political dissidents, and related separation-of-powers problems. *See, e.g.*, *Executive Privilege: The Withholding of Information by the Executive: Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *Executive Privilege Hearings*]; S. REP. No. 1227, 93d Cong., 2d Sess. 21-25 (1974) (detailing 1973-1974 investigations by the Senate Subcommittee on Constitutional Rights concerning military surveillance of political dissidents).

seems to be a law of conservation of conflict. When Congress failed to take up the gauntlet, the focus of resistance moved to the federal courts and occasionally to the Supreme Court. In such cases the Government was not permitted to justify its acts simply by power alone; instead, it was obliged to reconcile the extensive claims of executive authority with constitutional principles.[10]

A principled constitutional argument for the exercise of presidential power claims that the Constitution authorizes the President to take the action at issue. The constitutionality of presidential authority, however, was not the only argument available to the administration's lawyers. They also asserted that whether or not the Constitution permits the President to act in the manner asserted, the courts lack the power to decide the question of presidential authority—either because the Constitution itself explicitly withholds the question from the courts, or because the issue is too complex for judicial resolution.[11] This argument invokes the "political question" doctrine, which posits that some constitutional issues are to be decided by the executive branch or Congress, not by the courts.[12] In addition the Government argued that certain challenges to executive authority are nonjusticiable because no litigant has standing to raise the issue in a judicial forum.[13]

It was by the use of these approaches—the arguments on the merits and on the ground of justiciability—that lawyers for the government

10. Many of the Government's arguments required courts to write on a clean slate. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260 (1980) ("[R]elatively few [separation of powers] questions have been presented for judicial resolution—particularly before the 1970s—and even fewer have ever reached the docket of the Supreme Court").

11. See, *e.g.*, text accompanying notes 25-28 *infra*.

12. The literature on the political question doctrine is extensive. *See, e.g.*, Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). Some commentators doubt that a coherent political question doctrine actually exists; they argue that most political question decisions actually find that the political branches have acted within their constitutional authority. *See* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970). Others view the doctrine as a technique for disqualifying the judiciary from deciding the constitutionality of a particular action without in any way endorsing the constitutionality of the action itself. *See* Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Non-Judicial Model*, 43 U. CHI. L. REV. 463, 469-73 & n.34 (1976); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224-26 (1978).

The political question doctrine, as used by the President, asserts that the law, at least as applied by the courts, does not restrict presidential action in the area at issue. Judicial acceptance of such an argument thus constitutes acquiescence in the creation of an area of effectively unrestricted executive power. *Cf.* Pollak, *The Constitution as an Experiment*, 123 U. PA. L. REV. 1318, 1337-38 (1975) (If certain issues relating to allocation of war powers between President and Congress cannot be judicially determined, "we would be perilously close to confessing institutional bankruptcy as to . . . part of the Constitution . . .").

13. See, *e.g.*, text accompanying notes 126-31 *infra*.

sought to avoid judicial interference with presidential or other executive action. In these attempts they were in the main unsuccessful, at least with respect to the principal domestic issues of the Nixon presidency.[14] Even so, the courts made significant concessions to presidential power. An examination of some of the cases of the Nixon period indicates the breadth of presidential claims and the caution with which the courts rejected some of these positions.[15] This examination also suggests that the executive's claims and the related litigation of the period presented two distinct separation-of-powers problems: In one set of cases, strong claims of presidential power appeared to pose dangers to the process by which the will of the majority is (or should be) translated into law.[16] A second and more complex set of problems arose from the relationship between the doctrine of separation of governmental powers and the protection of constitutional rights of individuals against the will of the majority.[17] This second set of issues especially needs examination, and that examination reinforces the view that an important function of the separation of powers between Congress and the executive is the adequate protection of individual constitutional liberties, and consequently that a requirement of explicit legislative authorization should be a prerequisite to any executive action that may threaten individual constitutional rights.

II. EXECUTIVE ACTION UNDER PRESIDENT NIXON

A. *The War in Indochina.*

One focus of political attention during the initial years of the Nixon administration was the continuing war in Southeast Asia. American involvement in this conflict was an executive enterprise, although not, of course, President Nixon's enterprise alone. The war was conducted from the start by presidential initiative, and the Tonkin Gulf Resolution,[18] procured by President Johnson under questionable cir-

14. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971). These cases are discussed respectively in the text accompanying notes 76-101 and 33-59 *infra*.

15. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974). See text accompanying notes 144-52 *infra*.

16. See text accompanying notes 163-78 *infra*.

17. See text accompanying notes 191-273 *infra*.

18. Joint Resolution of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384. For commentary on the effect of the Tonkin Gulf Resolution, compare Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 874-92 (1972) (indicating that the Tonkin Gulf Resolution authorized the hostilities in Vietnam) with *War Powers Hearings*, *supra* note 7, at 563 (argument of Alexander M. Bickel that if the Tonkin Gulf Resolution "anthorized anything, beyond an immediate reaction [to the Tonkin Gulf incident], . . . it was an unconstitutionally broad delegation"). *See also* Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81

cumstances, lent only ambiguous congressional authority. Yet Congress followed each presidential step, almost to the very end, with funds and other necessary support.[19] Constitutional theories advanced by the Nixon administration to support the war in Southeast Asia did not rely solely on these elements of congressional participation, however: the administration also invoked presidential powers said to derive from the Commander-in-Chief clause of article II.[20] Similar assertions of executive war-making authority had accompanied the earlier escalation of the Vietnam War under President Johnson.[21]

Since "an indifferent Congress provided little or no restraint on executive actions,"[22] challenges to the conflict in Southeast Asia moved to the courts. Efforts to stop a major war by judicial action seemed doomed from the outset, however, and the lawsuits, which the Supreme Court declined to hear on the merits,[23] are perhaps best viewed as aspects of a wider political resistance to the war, employing a special form of rhetoric.[24]

HARV. L. REV. 1771, 1803-05 (1968). The Tonkin Gulf Resolution was repealed on January 12, 1971. Act of January 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

19. Congress repeatedly passed appropriations for the war and extended the Selective Service Act. *See* Orlando v. Laird, 443 F.2d 1039, 1042 nn. 2-3 (2d Cir. 1971); Berk v. Laird, 317 F. Supp. 715, 723-28 (E.D.N.Y. 1970). In contrast the Mansfield Amendment, Pub. L. No. 92-156, § 601(a), 85 Stat. 423 (1971), a congressional statement urging the early termination of hostilities, appeared to be hortatory only, DaCosta v. Laird, 471 F.2d 1146, 1156-57 & n.15 (2d Cir. 1973), and was, in any event, disregarded by the President. A. SCHLESINGER, *supra* note 6, at 194.

Congress did, of course, finally terminate American participation in the war. Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (withdrawing all funds for bombing and other combat activities in Cambodia after August 15, 1973). *See generally* Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 ST. LOUIS U. L.J. 1 (1973). Earlier, Congress had also denied funds for ground troops in Laos, Thailand, and Cambodia. A. SCHLESINGER, *supra* note 6, at 194.

20. U.S. CONST. art. II, § 2, cl. 1. In testimony before the Senate Foreign Relations Committee, Secretary of State William P. Rogers justified continuation of the Vietnam War as an exercise of presidential power under the Commander-in-Chief clause "to withdraw our forces in an orderly way from Vietnam, in a way that is consistent with the policy of our initial involvement"; incursions into Laos and Cambodia, and the bombing of North Vietnam, were justified under the President's power as Commander-in-Chief to protect remaining American troops and prisoners of war. *War Powers Hearings*, *supra* note 7, at 504-05, 507-09, 521, 535-36. *See also* Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 82-83 (1971); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 623-24 (1972).

21. *See* OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIETNAM, *reprinted in Legality of United States Participation in the Vietnam Conflict: A Symposium*, 75 YALE L.J. 1085, 1100-01 (1966) (asserting independent article II powers in addition to authority said to be conferred by the SEATO Treaty and the Tonkin Gulf Resolution).

22. Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 1, 27 (1972).

23. *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (denying a motion by the Commonwealth of Massachusetts for leave to file a bill of complaint); Mora v. McNamara, 389 U.S. 934 (1967) (denying certiorari). *See also* Atlee v. Richardson, 411 U.S. 911 (1973) (affirming the decision below without opinion).

24. The only injunction issued against hostilities in Southeast Asia was a district court order

Yet the arguments that the courts used in rejecting these challenges are instructive. Because Congress had never clearly declared war, a number of courts declined to legitimize the presidential effort. Rather than holding that the President's actions were constitutionally valid, these courts found that the executive's use of military force in Southeast Asia raised political questions, which the judiciary lacked the power to resolve.[25] In another important line of decisions the Court of Appeals for the Second Circuit held that congressional measures to finance the war and to enact selective service legislation sufficiently authorized the President's actions. A judicial determination that the form of congressional participation was incorrect—that, for example, an explicit declaration of war was necessary—"would constitute a deep invasion of the political question domain."[26] Furthermore, even after the repeal of the Tonkin Gulf Resolution,[27] the court of appeals held that strategic and factual problems involved in the American withdrawal from Southeast Asia made the constitutional issues of that period too complex for judicial cognizance.[28] Consequently, whether the mining of Haiphong Harbor and the continued bombing of Cambodia were part of the authorized withdrawal, or whether these actions were new presidential initiatives requiring new congressional authority, raised nonjusticiable issues.

This invocation of the political question doctrine suggests an underlying ambivalence: on the one hand, the courts were unwilling to confront executive power in its most massive and uncompromising

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requiring the Secretary of Defense to suspend the bombing of Cambodia a few days before the deadline established by Congress for the conclusion of the bombing. *See* note 19 *supra*. The injunction was stayed and ultimately reversed by the Court of Appeals for the Second Circuit, after attempts to dissolve the stay in the Supreme Court proved unsuccessful. *See* Holtzman v. Richardson, 361 F. Supp. 553 (E.D.N.Y.), *rev'd sub. nom.* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). *See also* Holtzman v. Schlesinger, 414 U.S. 1304 (1973) (opinion of Marshall, J., denying the application to vacate the stay); Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (opinion of Douglas, J., vacating the stay); Schlesinger v. Holtzman, 414 U.S. 1321 (1973) (opinion of Marshall, J., staying the order of the district court).

25. *See, e.g.*, Luftig v. McNamara, 373 F.2d 664 (4th Cir.), *cert. denied*, 387 U.S. 945 (1967); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion*, 411 U.S. 911 (1973). *See also* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973). Other challenges to executive action were dismissed for lack of standing. *See, e.g.*, Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

26. Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971).

27. See note 18 *supra*.

28. *See* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (the bombing of Cambodia after the withdrawal of United States troops from Vietnam), *cert. denied*, 416 U.S. 936 (1974); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (the mining of Haiphong Harbor).

form; on the other hand, they were reluctant to legitimate extremely questionable assertions of executive authority. The result, however, was that the exercise of the presidential war-making power remained free from effective judicial limitation.

It was only with the passage of the War Powers Resolution[29] in 1973 that a tentative step was taken toward imposing principled restrictions on claims of broad presidential war-making authority. In the resolution, enacted over President Nixon's veto, Congress sought to limit presidential war-making power by requiring termination of the use of troops if Congress fails to approve a presidential initiative within sixty days or if, before the end of that period, Congress orders the withdrawal of forces by concurrent resolution.[30] Significantly, the final form of the resolution omitted provisions, originally proposed in the Senate, that would have limited the circumstances under which the President might authorize hostilities even within the sixty-day period and before Congress acts.[31] Although the purpose of the resolution was to prevent a repetition of the Vietnam experience, its actual effect was unclear. By seeking to limit only the duration of presidential adventures once undertaken, Congress may have conceded to the President a broad power to initiate hostilities that had not previously been recognized or conferred.[32]

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29. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1976)).

30. *See id.* The initial sixty-day period can be extended to ninety days if the President certifies that the extension is required by "unavoidable military necessity respecting the safety of United States Armed Forces" in the course of withdrawal. 50 U.S.C. § 1544(b) (1976). Other sections of the resolution impose consultation and reporting requirements on the President, *see id.* §§ 1542, 1543, and declare that congressional approval of United States participation in hostilities may not be inferred from treaties or statutes, including appropriations acts, without explicit congressional authorization, *see id.* § 1547(a). *See generally* Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 WM. & MARY L. REV. 823 (1975).

31. *See War Powers Hearings*, *supra* note 7, at 2-6; Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 MINN. L. REV. 1, 3 & n.13 (1975). Although section 1541(c) states that the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised only" in specified circumstances, this language appears to be hortatory only. *See* Spong, *supra* note 30, at 837-41.

32. *See* T. EAGLETON, WAR AND PRESIDENTIAL POWER 201-25 (1974). *See also* Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 850 (1975); Dorsen, *Separation of Powers and Federalism*, 41 ALB. L. REV. 53, 57 (1977). One commentator has argued that the War Powers Resolution is deficient because it lacks a method of enforcement other than impeachment. *See* Pollak, *supra* note 12, at 1337-38.

Although not often litigated, other executive assertions of unilateral authority to make foreign policy were continued if not accelerated during the Nixon period. For example, President Nixon followed his recent predecessors in making certain foreign policy commitments by "executive agreement," a practice that has increased substantially in importance since the 1930s. *See, e.g.*, *War Powers Hearings*, *supra* note 7, at 529-30 (describing an executive agreement on United States military bases in Spain). *See generally* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Rovine, *Separation of Powers and International Executive Agree-*

B. *The Pentagon Papers.*

The executive origins of the Vietnam War led to the first great test in the Supreme Court of presidential power under President Nixon. In June 1971 the *New York Times* began publishing documents and commentary drawn primarily from a defense department history of the Vietnam War, commissioned by Robert McNamara late in his tenure as Secretary of Defense. The Pentagon history and the accompanying documents, classified as "top secret," disclosed the steps leading to the initiation and escalation of the war with greater authority and in greater detail than other material then available.[33] The inevitable effect of the *Times* study was to discredit further the government's public version of the war. As a sidelight, the study also showed the negligible

ments, 52 IND. L.J. 397 (1977). In August 1972, however, Congress took an initial step toward monitoring executive agreements when it required the President to report international agreements, other than treaties, to Congress or, in some instances, to committees of Congress. Act of Aug. 22, 1972, Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified at 1 U.S.C. § 112b (1976)).

Executive determinations of foreign policy in the last three decades were also reflected in covert foreign activities undertaken by the Central Intelligence Agency (CIA), including, for example, the financing of friendly political parties in foreign nations and an active involvement in seeking to overthrow certain hostile regimes. *See generally* Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 GEO. WASH. L. REV. 66, 69 (1970); Wise, *Covert Operations Abroad*, in THE CIA FILE 3-27 (R. Borosage and J. Marks eds. 1976). Although the CIA is an executive agency created by statute, there was no clear statutory authority for covert operations such as those described in P. WYDEN, BAY OF PIGS (1979), and W. COLBY & P. FORBATH, HONORABLE MEN: MY LIFE IN THE CIA 108-40 (1978).

In the Hughes-Ryan Amendment of 1974, 22 U.S.C. § 2422 (1976), Congress prohibited the CIA from spending money for covert operations and other foreign activities not "intended solely for obtaining necessary intelligence," unless it received presidential approval and reported the operations to specified congressional committees. *Id.* A year later Congress prohibited any further expenditures by the CIA for covert aid to Angola, for fear that the undertaking would develop into a full scale war as in Vietnam. T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 46-57 (1979).

Following the disclosures of the Nixon years, Presidents Ford and Carter each issued executive orders to regulate the CIA and other intelligence agencies. *See* Exec. Order No. 12,036, 3 C.F.R. 112 (1979), *reprinted in* 50 U.S.C. § 401 app. (Supp. 1978) (President Carter); Exec. Order No. 11,905, 3 C.F.R. 90 (1977), *reprinted in* 50 U.S.C. § 401 app. (1976) (President Ford). More recently, legislation was introduced in the Senate for a new statutory charter for the agency. Proposed National Intelligence Act of 1980, S. 2284, 96th Cong., 1st Sess., 126 CONG. REC. S1307 (daily ed. Feb. 8, 1980). This effort, however, failed in the 96th Congress. *See Effort to Enact Intelligence Charter Is Abandoned by Senate Advocates*, N.Y. Times, May 2, 1980, § A, at 1, col. 2. Instead Congress has passed a more limited bill that alters the reporting requirements set forth in the Hughes-Ryan Amendment, Pub. L. No. 96-450, tit. V, § 501 (to be codified at 50 U.S.C. § 413).

33. The strengths and weaknesses of the Pentagon study as a source of historical investigation are discussed in Kahin, *The Pentagon Papers: A Critical Evaluation*, 69 AM. POL. SCI. REV. 675 (1975), and Westerfield, *What Use Are Three Versions of the Pentagon Papers?*, 69 AM. POL. SCI. REV. 685 (1975). *See also* Roche, *The Pentagon Papers—A Discussion*, 87 POL. SCI. Q. 173, 184 (1972). The study may also be valuable as a case history of the process of executive policymaking. N. CHOMSKY, FOR REASONS OF STATE xxvi, 66 (1973).

role accorded to Congress in planning the Vietnam conflict.[34] Although the study did not cover the period after early 1968, and thus did not discuss the actions of the Nixon administration, the Government sought to enjoin the publication of the "Pentagon Papers."[35]

The government faced several obstacles in attempting to enjoin publication of the *Times* series. Most obvious was the first amendment, which prevents the government from "abridging the freedom of speech or of the press," and which places particularly strict limits on injunctions employed as prior restraints.[36] Perhaps even more fundamental, however, was the absence of a statute authorizing the executive or the federal courts to prohibit the publication of the type of national defense information in question.[37] The *Times* argued that the only manner in which the federal government may regulate most matters within federal control is by lawmaking, which ordinarily emanates from the legislature and not from a federal court upon the request of the executive.[38] Indeed, the newspaper argued not only that no statute empowered the courts or the President to prohibit publication of the Papers, but also that Congress had specifically rejected the proposition that the publica-

34. One of the most striking revelations to emerge from the Pentagon papers was the extraordinary secrecy with which the inner circle of the Johnson administration made [its] fateful decisions of 1964 and 1965. . . .

I was struck by the almost total exclusion of Congress from the policy-making process. Insofar as Congress is mentioned at all in the Pentagon papers as published in the press—and that is not often—it is referred to as an appropriate object of manipulation, or as a troublesome nuisance to be disposed of.

Executive Privilege Hearings, *supra* note 9, at 23 (statement of Sen. Fulbright). "Viewed broadly in the coutext of determining foreign policy, the Pentagon papers portray an ever-broadening, almost boundless unilateral decisionmaking role by the post-World War II executive branch. The papers show decisions being made without the knowledge and consent either of the Congress or the people." *War Powers Hearings*, *supra* note 7, at 599 (statement of Sen. Eagleton).

35. *See* United States v. New York Times Co., 328 F. Supp. 324, 326-27 (S.D.N.Y.), *rev'd*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971). A second action was filed in the District of Columbia against the *Washington Post* after the *Post* printed excerpts from the Pentagon Papers. United States v. Washington Post Co., 446 F.2d 1322, 1327 (D.C. Cir. 1971) (en banc). Later actions were filed against the *Boston Globe* and the *St. Louis Post-Dispatch*. The Government commenced no further suits though other newspapers began printing excerpts from the documents after the litigation was underway. *See* S. UNGAR, THE PAPERS AND THE PAPERS 190-92 (1975).

36. U.S. CONST. amend. I; Near v. Minnesota, 283 U.S. 697 (1931). Although the first amendment refers specifically to Congress, the freedoms of speech and press are generally interpreted to apply to government action in any form. *See* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 277 (1971); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 934-35 (1979).

37. On suits by the United States without statutory authorization, see generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1301-09 (1973). *See also In re* Debs, 158 U.S. 564 (1895).

38. *See, e.g.*, THE NEW YORK TIMES COMPANY V. UNITED STATES—A DOCUMENTARY HISTORY 781-87, 932, 941-42, 1004 (J. Goodale ed. 1971) [hereinafter cited as DOCUMENTARY HISTORY].

tion of national defense information should generally be subject to criminal or other penalties.[39]

In the lower courts the United States attorney asserted that even without a statute the administration possessed "executive power" to secure an injunction against publication of material damaging to the national security.[40] Therefore, he implied, even if Congress had not determined that the type of material in question should be subject to prior restraint, the President and the courts together had the power to make such a determination in the individual instance.[41] Moreover, because the Government further asserted that the court should defer to the President's decision that the Papers were too dangerous to be published, the Government in effect argued that the President possessed the power to suppress the study without either legislative rule or significant judicial review.[42]

Before the Supreme Court the Government similarly contended that the power to secure an injunction arose from the President's authority to conduct foreign affairs and from his position as Commander-in-Chief of the Armed Forces.[43] Also invoking the political question doctrine, though not by name, the Government asserted that the courts should defer to the executive because an assessment of the relevant dangers required "difficult and complex judgments which do not lend themselves to judicial resolution."[44]

The Supreme Court refused to allow the injunction.[45] In nine separate opinions (six opposing the injunction and three in favor of it), the

39. *See* DOCUMENTARY HISTORY, *supra* note 38, at 368-81. The *Times* also argued that Congress had prohibited the publication of defense information only in specific, narrowly-defined circumstances, which were not present in that case. *See, e.g., id.* 368-70. See also note 238 *infra*.

40. DOCUMENTARY HISTORY, *supra* note 38, at 716-21; *see* 328 F. Supp. at 327. The Government also argued that a congressionally-authorized injunctive remedy arises by implication from the espionage provision of 18 U.S.C. § 793 (1976); *see* 328 F. Supp. at 328.

41. *Cf.* DOCUMENTARY HISTORY, *supra* note 38, at 786 (brief of *New York Times*).

42. *See id.* 735-36. Although it rejected the Government's statutory argument, see note 40 *supra*, the district court noted that "even in the absence of statute the Government's inherent right to protect itself from breaches of security is clear." 328 F. Supp. at 328. The district court refused to issue an injunction, however, on the ground that no serious breach of security had been shown. *Id.* at 330.

43. U.S. CONST. art. II, § 2, cls. 1, 2; *see* Brief for the United States at 13-20, New York Times Co. v. United States, 403 U.S. 713 (1971), *reprinted in* 71 LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 133-40 (P. Kurland & G. Casper eds. 1975) [hereinafter cited as LANDMARK BRIEFS]. Despite its position in the lower courts, see note 40 *supra*, the Government did not argue in the Supreme Court that statutory authority existed for the issuance of an injunction. *See* 403 U.S. at 713.

44. Brief for the United States, *supra* note 43, at 18, *reprinted in* 71 LANDMARK BRIEFS, *supra* note 43, at 138.

45. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). For comment on the decision, see Henkin, *supra* note 36.

scope of first amendment protection against prior restraints appeared to be the dominant issue.[46] Yet as a substantial undercurrent in four opinions[47] and the major theme of one,[48] there ran the argument that the President was impermissibly calling upon the courts to make a law relating to speech, in the absence of congressional authority and, arguably, in a manner contrary to the wishes of Congress.[49] Resistance to assertions of executive lawmaking power thus was important to a majority of the Court.[50] In an important opinion that blends the two constitutional themes, Mr. Justice White asserted that when first amendment rights are at issue, the Government's position is especially weak if the President seeks an injunction solely on the authority of his office, rather than in accordance with the guidelines of congressional lawmaking. Justice White implied that certain government action possibly threatening first amendment rights may be constitutionally permissible if authorized by Congress but not if initiated by the President alone.[51] The three dissenters, however, accepted the Government's position that the executive should be allowed to determine when publica-

46. This was also the issue mentioned in the per curiam opinion. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

47. *Id.* at 718-19 (Black, J., concurring); *id.* at 720-22 (Douglas, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 731-40 (White, J., concurring).

48. *Id.* at 740-48 (Marshall, J., concurring).

49. Thus Justice White undertook to demonstrate that no statute provided for a prior restraint of the publication of the Pentagon Papers, though a subsequent criminal prosecution might be authorized. *Id.* at 733-40 (White, J., concurring). Justice Douglas suggested the broader proposition that no federal statute authorized even subsequent criminal punishment for most publications of secret information. *Id.* at 720-22 (Douglas, J., concurring); *cf.* Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 937, 1060 (1973) (supporting this view). Focusing exclusively on the separation-of-powers question, Justice Marshall declared, "The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. . . . It did not provide for government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress." 403 U.S. at 742 (Marshall, J., concurring). Justice Marshall also noted that Congress had "specifically rejected" a proposed statute that would have empowered the President to proscribe publications that he considered dangerous to national security. *Id.* at 745-47.

The applicability of federal criminal statutes to the publication of the Pentagon Papers was never tested: the newspapers were not prosecuted and charges against Daniel Ellsberg, who made the papers available to the *Times*, were dismissed after it became known that agents of the administration had burglarized the office of Ellsberg's psychiatrist and intercepted Ellsberg's conversations on an illegal wiretap. J. LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 329-32 (Viking ed. 1976). See text accompanying notes 93-96 *infra*. *See generally* Boudin, *The Ellsberg Case: Citizen Disclosure*, in SECRECY AND FOREIGN POLICY 291-311 (T. Franck & E. Weisband eds. 1974); Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

50. *See* Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 19 (1971). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17-2, at 1140 (1978).

51. White remarked:

> I . . . agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, *at least in the absence of*

tions thought to endanger national seeurity should be restrained and to enforce such determinations against individuals in the federal courts.[52]

The question of the allocation of policy-making authority, raised in the *Pentagon Papers* case, recalls problems that had been considered in a major case of the Truman era, the famous *Steel Seizure* decision of 1952.[53] At the height of the Korean War, President Truman ordered the seizure of most of the nation's steel mills to avoid a strike that threatened to interrupt the manufacture of necessary war materials. In a suit by the steel companies, the Supreme Court required the Government to relinquish possession of the mills on the ground that the presidential order constituted impermissible executive lawmaking. The Court found that no statute authorized the seizure and, moreover, that Congress had manifested its intention that seizure not be available as a remedy for this type of labor dispute. The opinion of the Court emphasized that the Constitution vests "All legislative Powers herein granted" in the Congress.[54] Correlatively, the President's role is to "take Care that the Laws"—that is, the laws as made by Congress—"be faithfully executed."[55] Although the concurring opinions may qualify this position,[56] the outcome of the *Steel Seizure* case supports the view that within the federal government it is the function of Congress to make

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express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

. . . .

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. . . . To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, *at least without congressional guidance and direction*.

New York Times Co. v. United States, 403 U.S. 713, 731-33 (1971) (White, J., concurring) (emphasis added). For interpretations of Justice White's opinion similar to that in the text, see J. CHOPER, *supra* note 10, at 329; and Junger, *supra* note 50.

52. 403 U.S. at 756-59 (Harlan, J., dissenting, joined by Burger, C.J., and Blackmun, J.). Justice Harlan argued that "the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted." *Id.* at 756. According to Justice Harlan, judicial review of executive-branch acts should cease upon a finding that "the subject matter of the dispute does lie within the proper compass of the President's foreign relations power," and that the head of the appropriate executive department has determined "that disclosure of the subject matter would irreparably impair the national security. . . ." *Id.* at 757. In such a case, an injunction against publication of the material could issue.

53. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The numerous similarities between the problems of the *Pentagon Papers* and *Steel Seizure* cases are examined in Junger, *supra* note 50.

54. U.S. CONST. art. I, § 1, *quoted in* 343 U.S. at 588.

55. U.S. CONST. art. II, § 3, *quoted in* 343 U.S. at 587; *id.* at 632-33 (Douglas, J., concurring).

56. 343 U.S. at 593-628 (Frankfurter, J., concurring); *id.* at 629-34 (Douglas, J., concurring); *id.* at 634-55 (Jackson, J., concurring in judgment and opinion); *id.* at 655-60 (Burton, J., concurring in judgment and opinion); *id.* at 660-67 (Clark, J., concurring in judgment). See note 58 *infra*.

policy, and that presidential lawmaking without congressional authority is narrowly circumscribed.[57] As the concurring opinions emphasized, presidential authority is particularly limited where congressional action manifests an intent that the President not be authorized to act.[58] The prevailing opinions in the *Pentagon Papers* case largely reaffirm this position.[59]

C. *Presidential Impoundment.*

Assertions of presidential lawmaking authority similar to those advanced by the Government in the *Steel Seizure* case were also raised in the impoundment controversy of the Nixon period. Although a number of presidents since Jefferson had refused to spend certain funds appropriated by Congress, President Nixon withheld substantially larger amounts than any other.[60] The large amount of withholding, however, was not the only critical issue. Although the administration ordinarily justified these refusals to spend as a means of general fiscal restraint, the cuts were effected in a manner that weakened or destroyed legislative programs to which President Nixon objected as a

57. "Beyond any nose count or reinterpretation of opinions, the *Steel Seizure* case has achieved a life of its own as a great constitutional decision imposing limits on the executive prerogative beyond any lawyer's narrowing." Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 243 (1972). *But see* Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 851-52 (1975) (supporting "a general 'executive power' " in the "absence of a Congressional determination covering the same policy ground"); Monaghan, *Presidential War-Making*, 50 B.U. L. REV. (Special Issue) 19, 22-23 (1970) (arguing that the Court in the *Steel Seizure* case acknowledged certain presidential emergency powers in the absence of statute).

58. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637-38 (Jackson, J., concurring):

> When the President acts in absence of either a congressional grant or denial of authority, . . . there is a zone of twilight in which he and Congress may have concurrent authority . . . .
>
> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

59. See notes 45-52 *supra* and accompanying text. The result in the *Pentagon Papers* case, prohibiting a prior restraint, must be contrasted with subsequent cases in which courts have issued prior restraints against publications by former CIA employees in violation of Agency secrecy agreements. *See, e.g.*, United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). *See also* Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (discussed in detail in text accompanying notes 287-302 *infra*); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.) (preliminary injunction against the publication of an article describing the structure of the hydrogen bomb, pursuant to a statute explicitly authorizing the injunctive remedy), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

60. Mikva & Hertz, *Impoundment of Funds—The Courts, The Congress and The President: A Constitutional Triangle*, 69 NW. U.L. REV. 335, 336 (1974). In 1973 it was estimated that the "total amount withheld over the last two years may be as high as $25 billion." Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328 (1973).

matter of policy.[61] The president thus asserted the authority to determine, as a matter of policy, which congressional spending programs should be implemented and which should be abolished or curtailed. Similarly, Nixon refused to administer certain programs in accordance with their statutory terms, on the ground that he did not intend to request funds for the programs in subsequent budget messages. Because no funds were to be requested for the future, the administration argued, orderly procedure required that the funds on hand be used to terminate the programs before the end of the current fiscal year.[62]

To the extent that Congress did not authorize the President to withhold funds or terminate programs, taking such action constituted executive lawmaking. A congressional decision to create a program and to budget a certain amount for that program reflects a determination to handle a social or economic problem in a particular manner. An executive decision not to put the statute into effect, or to spend an amount smaller than that required by statute, is equally an exercise of lawmaking power: it is a determination by the executive that the problem should not be handled in the way that Congress has specified.[63] Opponents of executive impoundment argued that the Constitution grants lawmaking power exclusively to Congress; the exercise of that power by the President therefore usurps congressional authority and

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61. *See, e.g.*, L. FISHER, PRESIDENTIAL SPENDING POWER 169 (1975).

62. *See id.* For example, the administration sought to abolish the Office of Economic Opportunity, a principal agency of the "War on Poverty," created by a Democratic Congress in the 1960s. In resulting litigation the administration was prevented from doing so. Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). The court in *Phillips* pointed out that the President's budget message was precatory only, and that Congress remained at liberty to appropriate funds for Office of Economic Opportunity programs even if the President failed to request the appropriation. *Id.* at 73, 75. The court concluded that the administration's action in curtailing the programs was an impermissible attempt to usurp the lawmaking function of Congress. *Id.* at 76-79.

For a description of the attempted termination of the Regional Medical Programs, 42 U.S.C. §§ 299a-e (1976), see *Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Comm. on Gov't Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 482-85 (1973) [hereinafter cited as *1973 Impoundment Hearings*].

63. Indeed, one administration official seemed to acknowledge this lawmaking: "I think the considerations [in the President's elimination of congressional programs] might be likened to those that the Congress gives to many matters before it. At some point it comes down to judgment." *1973 Impoundment Hearings*, *supra* note 62, at 524 (statement of Roy L. Ash, Director of the Office of Management and Budget). The same official also remarked that in order to remain within the debt ceiling imposed by Congress, the President

> was forced to go through item by item, all of the programs [for fiscal year 1973], and determine to the best of his judgment those that we could best spend the moneys on, those that would have less merit. . . . Certainly we are not drawing the line between good programs and bad programs. . . . What we are doing is to draw the line between good programs and sometimes better programs. . . .

Id. 285, 287.

violates the President's duty to "take Care that the laws be faithfully executed."[64]

Arguments to the contrary by administration officials relied on an inherent presidential lawmaking power of the type rejected in the *Steel Seizure* case.[65] In a statement before a Senate Committee, for example, the Deputy Attorney General contended that the authority to impound funds for the purpose of decreasing inflation constitutes a substantial portion of the executive power vested in the President, and that to deprive him of this power would "convert the Chief Executive into 'Chief Clerk.' "[66] Government spokesmen also argued that the issues of policy involved in fiscal management were extremely complex and consequently the matter of the President's authority to impound was a nonjusticiable political question.[67]

Although no case testing the permissibility of executive impoundment reached the Supreme Court during the Nixon period, assertions of power to withhold funds were generally rejected in the lower federal courts.[68] And in the waning months of the Nixon administration, Con-

64. U.S. CONST. art. II, § 3; *see* Mikva & Hertz, *supra* note 60, at 378-79; *1973 Impoundment Hearings*, *supra* note 62, at 17, 33, 73, 80, 144-45, 244-46, 802.

65. See notes 53-58 *supra* and accompanying text. Assertions of an executive power to interfere with congressional programs, either by impounding funds or refusing to implement certain programs, appear to run afoul of even the narrowest reading of the *Steel Seizure* case, because in exercising such a power the President acts in a manner "incompatible with the expressed or implied will of Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see note 58 *supra*. Indeed, a claim of an impoundment power goes beyond the presidential claims rejected in the *Steel Seizure* case itself, in which any congressional prohibition of presidential action was inferred from Congress's failure to act. Assertion of a constitutional power to impound, in contrast, disregards even explicit requirements set forth by Congress. *See 1973 Impoundment Hearings*, *supra* note 62, at 369 (statement of Joseph T. Sneed, Deputy Attorney General).

66. *1973 Impoundment Hearings*, *supra* note 62, at 369 (statement of Joseph T. Sneed, Deputy Attorney General); *see id.* 838. *See also id.* 272, 299 (statement of Roy L. Ash, Director Designate, Office of Management and Budget).

67. *See id.* 365, 379, 383, 386 (statement of Joseph T. Sneed, Deputy Attorney General). *See also* Mikva & Hertz, *supra* note 60, at 352-55.

In addition, government lawyers argued that the congressional spending legislation itself granted discretion to the President to withhold appropriated funds, and that other congressional statutes, particularly those limiting the national debt and requiring certain allocations to avoid deficiencies, conferred the impoundment power claimed by the administration. *See* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636, 1645-57 (1973).

68. *See, e.g.*, People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973).

In a case decided after President Nixon left office, the Supreme Court held that he could not lawfully refuse to allot $6 billion in sewage treatment funds authorized for 1973 and 1974, because the applicable statute did not permit such discretion. Train v. City of New York, 420 U.S. 35 (1975). The Government did not assert an independent constitutional power to disregard a spe-

gress passed a statute imposing specific restrictions upon any asserted presidential power to impound.[69]

The issues raised by presidential impoundment bear similarities to the problems of the *Pentagon Papers* litigation, in that both matters involved broad claims of executive power. Yet there is also a significant distinction, relevant to other cases of the period as well, that exposes two quite different separation-of-powers problems. In the impoundment cases the President set his own general policies or rules of law on social or economic matters, which executive departments would subsequently enforce in specific instances in the same general manner that the executive branch enforces congressional lawmaking by statute.[70] In the *Pentagon Papers* case, in contrast, the President was attempting not only to formulate legislative policy—that publication of certain forms of national defense information should be restrained—but also to apply that newly-made policy to named entities in a specific instance. Both the making of the policy and its application were undertaken simultaneously; the application of the policy in the individual case was not made pursuant to any general rule set forth in advance. Most important, this application of newly-made policy threatened to infringe a constitutional right, the freedom of the press.

This distinction illuminates the nature of the underlying dispute in each set of cases. In the impoundment cases the issue was basically a struggle over institutional competence—that is, over whether the legislative branch or the executive branch should be allowed to prescribe certain types of general rules on general economic and social matters.[71] In the *Pentagon Papers* case, however, the issue was not only which branch should make general rules of policy, but also whether the liberties of individuals are unduly threatened if the executive is permitted to act in a manner that affects the specific constitutional rights of individuals in the absence of legislative rules set down in advance. As this article shows, issues of greater gravity and complexity are posed in the second class of cases than in the first.[72]

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cific congressional requirement. For a discussion of the decision's limited scope, see Note, *Presidential Impoundment of Appropriated Funds: The Supreme Court's First Pronouncement*, 5 CAP. U. L. REV. 81 (1976).

69. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301-1407 (1976). *See generally* L. Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. LEGIS. 413 (1977).

70. Thus instead of the $11 billion in sewage treatment funds Congress authorized for 1973-1974, there would henceforth be only $5 billion; instead of the Office of Economic Opportunity program authorized by Congress, there would be no such program.

71. For discussion of this point, see notes 163-78 *infra* and accompanying text.

72. See notes 191-249 *infra* and accompanying text. It is useful for understanding the separation-of-powers problems of the Nixon period to focus on the distinction between two kinds of

D. *Warrantless Executive Surveillance.*

1. *"National Security" Wiretapping: The* Keith *Case.* The *Pentagon Papers* case does not represent the only instance in which the Nixon administration asserted power to act against individuals without a general rule, in a way that threatened to violate specific constitutional rights. None of these other assertions of executive power was more important than the claim that the President possesses the constitutional power to undertake electronic surveillance of individuals, without congressional authorization or judicial warrant, in order to defend against perceived dangers to "national security." Because wiretapping and electronic eavesdropping are forms of search and seizure,[73] the fourth amendment ordinarily prohibits the government from undertaking such surveillance without obtaining a warrant from a neutral magistrate on a showing of probable cause to believe that a crime has been commited and that information about the crime will be obtained by the surveillance in question.[74] The Administration contended, however, that the governmental interest in preserving national security against domestic dangers justified an exception to the warrant requirement.[75]

The Supreme Court considered the scope of this important safeguard in *United States v. United States District Court*,[76] the so-called

executive action: (1) the formulation of a general rule that does not threaten individual constitutional liberties and (2) action threatening the constitutional liberties of individuals in the absence of any prior general rule. An intermediate category of executive action—executive promulgation of a general rule threatening constitutional liberties—is also of practical importance and is treated below. See notes 211, 287-301 *infra* and accompanying text.

73. Although the fourth amendment was originally held to restrict trespassory intrusions only, *see* Olmstead v. United States, 277 U.S. 438 (1928), it was extended to nontrespassory electronic surveillance in Katz v. United States, 389 U.S. 347 (1967) (overruling *Olmstead*).

74. *See, e.g.*, Berger v. New York, 388 U.S. 41, 55-56 (1967). Statutory provisions regulating the procedure for initiating and maintaining electronic surveillance in other than national-security cases are set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

75. Beginning with President Roosevelt in 1940, prior administrations had engaged in warrantless wiretapping in national-security cases. For a history of warrantless wiretapping in the United States, see Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749 (1968).

76. 407 U.S. 297 (1972). The issue arose in the prosecution of three persons on charges arising from an alleged conspiracy to destroy government property. In response to a pretrial motion, the Government conceded that federal agents had overheard conversations of one of the accused on a telephone that had been subject to a warrantless wiretap. Judge Keith of the District Court for the Eastern District of Michigan held that the wiretap was illegal and ordered the Government to deliver the records of the conversations to the accused. United States v. Sinclair, 321 F. Supp. 1074 (E.D. Mich. 1971). The Government sought review of the order by a writ of mandamus in the court of appeals, arguing that the warrantless wiretaps were lawful under the President's "national security" power. The court of appeals denied the writ, United States v. United States Dist. Court, 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972), and the Supreme Court granted certiorari, 403 U.S. 930 (1971). *See generally* Alderman v. United States, 394 U.S. 165 (1969).

Keith case. As frequently happens when broad executive power is asserted, the Government invoked threats of severe peril. Because of alleged national-security considerations, the Government argued that its interest in warrantless wiretapping was "not merely law enforcement . . . but protection of the fabric of society itself."[77] The Government found grave danger in politically-inspired bombings that occurred in the United States between 1969 and 1971.[78] Because "[a] fundamental right of any society is to preserve itself,"[79] the Government argued, the vesting of executive power in the President in Article II of the Constitution implies presidential authority to use electronic surveillance to secure information necessary "to protect the government against destruction or such weakening as renders it impotent to function."[80] A judicial warrant requirement would interfere with the executive's responsibility by increasing the risk that sensitive information would be disclosed.[81] Moreover, judges would not be able to evaluate domestic security intelligence adequately, for it "involve[s] matters outside the 'experience or facilities' of the judiciary."[82] Thus the political question doctrine's questioning of judicial competence emerges here also, in a somewhat different form.[83]

A review of the Government's argument in *Keith* suggests some of the risks to individual rights implicit in this claim of executive authority. In its brief the Government implied, for example, that any possible abuse of power in warrantless executive wiretapping would be limited because the Attorney General was personally required to approve the

77. Brief for the United States at 14, United States v. United States Dist. Court, 407 U.S. 297 (1972), *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 591.

78. *Id.* 18, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 595.

79. *Id.* 15, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 592.

80. *Id.* 16, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 592-93.

81. *Id.* 24-25, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 601-02.

82. *Id.* 25-26, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 602-03 (citing T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 89 (1969)). The Government conceded that even without a warrant requirement there might be subsequent judicial review of the executive's decision, but made clear that any judicial inquiry should be "extremely limited." Brief for the United States, *supra* note 77, at 22, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 599.

83. *See* Brief for the United States, *supra* note 77, at 21-23, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 598-600. In a further variation on the political question argument, the Government asserted that any appropriate standard would not in any event be judicially manageable, because "national security" surveillance is primarily undertaken for "intelligence-gathering" rather than for providing evidence for use in a criminal trial. The Government asked rhetorically, "But what standard could a magistrate apply in determining whether to authorize surveillance for intelligence gathering purposes in national security situations?" Reply Brief for the United States at 4, United States v. United States Dist. Court, 407 U.S. 297 (1972), *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 897.

imposition of each national-security wiretap.[84] An opposing brief characterized this aspect of the Government's position in the following dramatic but basically accurate terms:

> [T]he claim of executive power is a claim of arbitrary power uncontrolled by any meaningful judicial review. Only the word of the Attorney General stands between the citizen and his or her liberties. And this word we are asked to accept as unreviewable, as above the law, as long as it is his word.[85]

This statement emphasized the danger of entrusting to any single individual, no matter how conscientious, unrestrained power to act in a manner that might threaten the constitutional rights of others. The Attorney General who authorized the wiretaps at issue in *Keith*, and whose determination the Government argued should be accepted without effective review, was John Mitchell, who was later convicted of concealing the involvement of government officials in another unlawful search and seizure.[86] This fact adds special poignancy to the fears of abuse of power that normally arise when the executive asserts power to act against individuals without legislative rule or effective judicial review.

Assistant Attorney General Robert C. Mardian took a similar position in oral argument in *Keith*, contending that with respect to national-security wiretapping, the Court must rely on the integrity of the executive branch. In making this argument Mardian remarked: "Now, certainly neither this President nor any prior President has authorized electronic surveillance to monitor the activities of an opposite political group."[87] Here also, reliance on the executive would prove a fragile safeguard. At the time of this argument, it was not generally known that Attorney General Mitchell and White House Chief of Staff H.R. Haldeman had, under President Nixon's direction, ordered warrantless

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84. *See* Brief for the United States, *supra* note 77, at 27 n.10, *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 604. This position echoed the remark of William Rehnquist, then Assistant Attorney General, testifying before a Senate Committee on a related problem: "I think it quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information-gathering." *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 603 (1971) [hereinafter cited as *1971 Data Bank Hearings*].

85. Brief for Defendant-Respondents at 44-45, United States v. United States Dist. Court, 407 U.S. 297 (1972), *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 777-78.

86. Mitchell was convicted of conspiracy to obstruct justice and related offenses, in connection with his attempt to conceal the participation of White House officials in the Watergate burglary. *See* United States v. Haldeman, 559 F.2d 31, 51 nn. 3 & 5 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977).

87. Oral Argument, United States v. United States Dist. Court, 407 U.S. 297 (1972), *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 1074.

wiretaps to be placed on the telephones of newsmen and certain employees of the executive branch, including Morton Halperin, a staff member of the National Security Council. Although this surveillance was apparently undertaken to trace the source of information "leaks," the tap remained on Halperin's telephone after he left the government, monitoring his subsequent antiwar activities and his work on Senator Muskie's 1972 presidential campaign. Haldeman received periodic reports of the information derived from the tap, some of which "was apparently used for partisan political purposes."[88]

The danger that supposed national-security wiretapping might be used for domestic political ends was not limited to the unusual circumstances of the Halperin case. At oral argument in *Keith*, for example, the subjects of the wiretap contended that "secret surveillance" had already fallen "on leaders of the anti-war movement, black movements, Catholic activist pacifists, [and] advocates of youth culture,"[89] and that President Nixon's Chief of Staff, H.R. Haldeman, had stated that critics of Nixon's proposals on the Vietnam War were consciously "aiding and abetting the enemy of the United States."[90] If the Attorney General were to agree that these critics threatened the national security, then under the Government's doctrine the warrantless wiretapping of many domestic dissident groups could have been justified.[91]

Events unrevealed at the time of the argument in *Keith* suggested other implications of the Government's position. In an amicus brief the American Civil Liberties Union asked whether the Government's argument for warrantless wiretapping would not logically "extend to other forms of obtaining intelligence such as entering and searching a person's or a group's home, office, or desk without a judicial war-

88. Halperin v. Kissinger, 424 F. Supp. 838, 844-45 (D.D.C. 1976), *aff'd in part and rev'd and remanded in part*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 924 (1980) (No. 79-880). For examples of political intelligence gathered by this and related wiretaps, see SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess., bk. II, at 235-37 (1976) [hereinafter cited as CHURCH REPORT]. *See generally* Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. LEGIS. 119, 132-33 (1977) (other instances of supposed "national security" surveillance used for political purposes).

89. *See* 72 LANDMARK BRIEFS, *supra* note 43, at 1063 (argument of Arthur Kinoy on behalf of wiretap subjects Sinclair et al.).

90. *Id.* 1064. For Haldeman's comments on this remark, see H. HALDEMAN, *supra* note 1, at 251-52 (1978).

91. For an example of widespread intrusive activity based on a similar sort of executive decision, see the discussion of the Army's surveillance of public political activities, notes 109-34 *infra* and accompanying text.

rant."[92] If the Government possessed an unreviewable power to wiretap in national-security cases, the amicus suggested, the Government might also possess an analogous constitutional power to break into a house or office without a warrant to search for information bearing on national security.

The author of this hypothetical argument could not have known that some months earlier three agents of the White House, under the direction of John Ehrlichman and G. Gordon Liddy, had broken into the office of California psychiatrist Louis Fielding in search of medical records relating to one of Dr. Fielding's patients—Daniel Ellsberg, the distributor of the Pentagon Papers.[93] Yet in precisely the extension of the argument in *Keith* foreseen by the American Civil Liberties Union, John Ehrlichman later claimed that the breaking and entering of Fielding's office was "well within the President's inherent constitutional powers."[94] At his trial for conspiring to deprive Dr. Fielding of his fourth amendment rights, Ehrlichman argued, unsuccessfully, that the national-security exception to the guarantees of the fourth amendment permitted him, as a presidential agent, to authorize such a warrantless intrusion.[95] Although the extent of such intrusive activity was not known when *Keith* was argued, subsequent disclosures have made clear that the burglary of Dr. Fielding's office and the Watergate burglary itself were only a few of many warrantless physical intrusions undertaken by executive agencies during both the Nixon period and earlier administrations.[96] The arguments in *Keith*, therefore, also possessed significant implications for the future of this type of activity.

In *Keith*, one of the most important decisions of the Nixon period, the Supreme Court rejected the administration's claim of constitutional power to engage in warrantless wiretapping in domestic "national se-

92. Brief of the American Civil Liberties Union and the American Civil Liberties Union of Michigan, Amici Curiae, at 21, United States v. United States Dist. Court, 407 U.S. 297 (1972), *reprinted in* 72 LANDMARK BRIEFS, *supra* note 43, at 940. *See also* United States v. United States Dist. Court, 407 U.S. 297, 332 (1972) (Douglas, J., concurring).

93. In the resulting criminal action Ehrlichman denied that he authorized the burglary of Dr. Fielding's office, but the jury decided the issue against him. United States v. Ehrlichman, 546 F.2d 910, 915 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

94. N.Y. Times, July 25, 1973, at 28, col. 7, *quoted in* A. SCHLESINGER, *supra* note 6, at 265.

95. *See* United States v. Ehrlichman, 546 F.2d 910, 924-25 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977). See note 102 *infra*.

96. *See generally* CHURCH REPORT, *supra* note 88, bk. II, at 13. For references to alleged burglaries committed by the Federal Bureau of Investigation from 1971 to 1973, see *Aides to Bell Call for Indictments of F.B.I. Officials Over Break-ins*, N.Y. Times, Apr. 1, 1977, at 1, col. 1. Recently, two former FBI officials were convicted for their role in approving warrantless break-ins in 1972 and 1973 to gather information about the Weather Underground, a militant anti-war group. *2 Ex-F.B.I. Officials Are Found Guilty in Break-ins Case*, N.Y. Times, Nov. 7, 1980, at A1, col. 1.

curity" cases.[97] The Court emphasized that the case involved first amendment as well as fourth amendment values because political organizations antagonistic to prevailing policies are the organizations most likely to be suspected by the government of raising domestic national-security dangers.[98] In light of the special values of the first amendment and the vagueness of the concept of national security, the Court concluded that to permit official surveillance of domestic groups on the basis of a decision made by the President without prior judical warrant would create undue dangers of abuse.[99]

Although the *Keith* Court rejected the Government's position, a significant measure of executive power to undertake warrantless surveillance may nonetheless have survived. The Court's opinion did not address the issue of presidential power to impose warrantless wiretaps in *foreign* national-security cases, in which the activities of foreign powers or foreign agents are thought to be involved. The Court carefully set such cases aside,[100] thereby leaving open the possibility that the President may possess inherent power to wiretap without a warrant in a foreign national-security case.[101]

After *Keith* lower federal courts upheld warrantless electronic surveillance in foreign national-security cases decided during the Nixon

97. *See* United States v. United States Dist. Court, 407 U.S. 297, 321 (1972). The Court also rejected the Government's argument that Title III of the Omnibus Crime Coutrol and Safe Streets Act, 18 U.S.C. § 2511(3) (1976), recognized the President's authority to conduct warrantless electronic surveillance in national-security matters. 407 U.S. at 303.

98. 407 U.S. at 313-14.

99. *See id.* at 314. The Court noted that pressures on executive officers by virtue of their prosecutorial duties may make them unreliable in determining when the governmental interest in law enforcement should outweigh the constitutionally protected individual liberty interest. *Id.* at 317.

100. *Id.* at 321-22.

101. Because the line between foreign and domestic security surveillance is not always easy to draw, such a distinction might raise serious problems of application. *See id.* at 309 n.8. *See also* Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 987-88 (1974) (arguing that domestic political activity might consequently be subject to warrantless wiretapping under the guise of foreign intelligence surveillance).

In addition to reserving a possible foreign-security exception to the warrant requirement, the *Keith* Court "recognize[d] . . . the constitutional basis of the President's domestic security role," although it emphasized that that role must be performed consistently with the fourth amendment. 407 U.S. at 320. Because "domestic security surveillance may involve different policy and practical cousiderations from the surveillance of 'ordinary crime'," the Court noted, "the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Id.* at 322. Although this language is not entirely clear, it suggests that the issuance of a domestic national-security warrant need not be constitutionally limited to instances in which the Government can show probable cause to believe that a crime has occurred or is about to occur. *See* Shapiro, *supra* note 88, at 146-47; Note, *supra*, at 995. The Court concluded that a warrant may issue under "such reasonable standards as the Congress may prescribe." 407 U.S. at 324.

period.[102] Moreover, subsequent administrations also claimed inherent executive power to conduct such warrantless surveillance. The Justice Department under President Ford, for example, not only asserted the power to engage in warrantless wiretapping in foreign national-security cases, but also claimed constitutional authority to undertake warrantless break-ins "into private premises" when "foreign espionage or intelligence" was at issue.[103] Similarly, President Carter authorized warrantless television surveillance of the office of a government employee suspected of engaging in espionage on behalf of the Vietnamese Government. Defending the action, the Justice Department again invoked the inherent presidential power said to be implied by the general language of article II of the Constitution.[104]

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102. *See, e.g.*, United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970), *aff'd*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974).

Other lower federal court decisions of the 1970s have imposed limits on the asserted foreign national-security exception. The Court of Appeals for the District of Columbia Circuit, for example, has held that the exception must be limited to the electronic surveillance of individuals who are agents of or collaborators with a foreign state. Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976); *see* 516 F.2d at 613-14 (plurality opinion); *id.* at 700 (Wilkey, J. concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring and dissenting). The *Zweibon* court rejected the Government's argument that an exception should apply to any group whose activities might affect foreign relations and, in consequence, held that the warrantless wiretapping of members of the Jewish Defense League was illegal. Even though the League's activities may have affected relations between the United States and the Soviet Union, the Government did not show that the members of the group were acting as agents of or in collaboration with a foreign power. In dictum a plurality of the court further suggested that *all* warrantless electronic surveillance—even "foreign security surveillance"—is unconstitutional in the absence of "exigent circumstances." *Id.* at 613-14 (plurality opinion); *see* Note, *The Fourth Amendment and Judicial Review of Foreign Intelligence Wiretapping:* Zweibon v. Mitchell, 45 GEO. WASH. L. REV. 55 (1976). For another decision limiting the asserted foreign national-security exception, *see* United States v. Ehrlichman, 546 F.2d 910, 925-27 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) (holding that the foreign-security exception, if it exists, would apply only when the President or the Attorney General specifically authorizes the proposed intrusion; authorization by a lower federal officer would not suffice).

103. United States v. Ehrlichman, 546 F.2d 910, 935 (D.C. Cir. 1976) (Leventhal, J., concurring), *cert. denied*, 429 U.S. 1120 (1977); Zweibon v. Mitchell, 516 F.2d 594, 618 & n.66 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976). *See also* United States v. AT & T Co., 551 F.2d 384 (D.C. Cir. 1976); Exec. Order No. 11,905, 3 C.F.R. 90 (1977), *reprinted in* 50 U.S.C. § 401 app. (1976). However, the Ford administration endorsed a bill designed to provide a limited warrant procedure for electronic surveillance in national-security matters. CHURCH REPORT, *supra* note 88, bk. II, at 135.

104. *See* United States v. Humphrey, 456 F. Supp. 51 (D. Va. 1978), *aff'd sub nom.* United States v. Truong, 629 F.2d 908 (4th Cir. 1980) (upholding warrantless electronic surveillance in part, and warrantless opening of certain envelopes and packages, under the foreign national-security exception). According to press reports, Carter and Attorney General Griffin Bell viewed the cases as an excellent opportunity to reestablish executive power in this area. *See Surveillance Order by Carter Defended*, N.Y. Times, Feb. 11, 1978, at 2, col. 6.

Similarly, an executive order issued by President Carter asserted an executive power to undertake warrantless electronic surveillance, television monitoring, and physical searches, in certain

In 1978, however, Congress enacted the Foreign Intelligence Surveillance Act,[105] which imposes limits on the power of the executive branch to engage in electronic surveillance in foreign national-security cases. The statute sets forth a warrant requirement for most forms of foreign national-security surveillance and establishes special federal courts to hear requests for warrants permitted by the Act. The scope of the warrant requirement and the conditions for obtaining a warrant are set out in a degree of detail that suggests an attempt to achieve a careful balancing of governmental and individual interests.[106] Along with the War Powers Resolution[107] and the Congressional Budget and Impoundment Control Act,[108] this statute is a significant step toward legislative control of a broad range of unilateral powers asserted by President Nixon and other administrations.

2. *Political Surveillance by the Army.* In *Laird v. Tatum*,[109] decided one week after the *Keith* case, the Supreme Court endorsed the Government's view that the judiciary should not intervene to limit the Army's collection and retention of information concerning the public political activities of domestic individuals and groups. Specifically, the Court held that the persons who had been subject to this form of surveillance did not present a justiciable controversy when they sought judicial review of the practice.[110] Although the opinion in *Laird* deals primarily with questions of standing and justiciability, the case illustrates the dangers of permitting executive action that affects individual constitutional interests in the absence of a legislative rule.

Systematic Army surveillance of domestic political activity apparently dated from President Johnson's decision to order the Army to intervene in Detroit's 1967 racial disturbances.[111] The Army subsequently expanded an existing program of surveillance and infiltration

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cases in which it appears that the party being searched may be "an agent of a foreign power." Exec. Order No. 12,036, 3 C.F.R. § 2-201(b) (1979). For the position of the Carter Administration on proposed legislation that ultimately developed into the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 18 U.S.C. §§ 2511, 2518, 2519 (Supp. 1979), see text accompanying notes 261-65 *infra*.

105. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801-1811, 18 U.S.C. §§ 2511, 2518, 2519 (Supp. 1979)). The legislative history of this statute is discussed in the text accompanying notes 260-73 *infra*.

106. See note 272 *infra* and text accompanying notes 260-71 *infra*.

107. See notes 29-32 *supra* and accompanying text.

108. See note 69 *supra* and accompanying text.

109. 408 U.S. 1 (1972).

110. *Id.* at 13-14.

111. CHURCH REPORT, *supra* note 88, bk. II, at 77; Laird v. Tatum, 408 U.S. 1, 5 (1972).

of antiwar organizations.[112] Army intelligence agents photographed speakers and crowds at antiwar rallies, maintained the information in computer files, and distributed the information widely to state and federal government officials.[113] The Army apparently also maintained lists of individuals who were thought, because of their political views, to be likely sources of trouble in the future.[114]

The preamble to the Army's 1968 Intelligence Plan suggests the general orientation of the surveillance program: "Although it cannot be substantiated that the anti-war and the anti-draft movements are acting in response to foreign direction, it must be pointed out that by their activities they are supporting the stated objectives of foreign elements which are detrimental to the USA."[115] Another Army document, also written in the late Johnson years, stated: "The Army is well aware that the overwhelming majority in both the anti-war and the racial movements are sincere Americans. It also realizes that in both groups there is a small but virulent number who are out to tear America apart."[116] Notwithstanding the ostensible focus on that "small but virulent number," the Defense Department later conceded that the Army's surveillance program was "[s]o comprehensive . . . that . . . information related even remotely to people or organizations active in a community in which the potential for a riot . . . was present" might be collected.[117] The program was allegedly concealed for some time from civilian defense-department officials,[118] and the mili-

112. It has been asserted that the "Army practices, while largely expanded in the 1967-70 period, began in 1917." Comment, Laird v. Tatum: *The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244, 266 (1973).

113. Laird v. Tatum, 408 U.S. at 25 (Douglas, J., dissenting). Among the groups apparently observed were the Women's Strike for Peace, the American Friends Service Committee, Americans for Democratic Action, the Congress of Racial Equality, the National Association for the Advancement of Colored People, the National Committee for a Sane Nuclear Policy, and the Southern Christian Leadership Conference. Brief for Respondents at 6-7, 18 n.27, Laird v. Tatum, 408 U.S. 1 (1972), *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 123, 135 n.27.

114. Brief for Respondents, *supra* note 113, at 13-14, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 130-31.

115. *1971 Data Bank Hearings*, *supra* note 84, at 420.

116. *Id.* 383.

117. *Id.* 384. The Church Committee later estimated that the Army retained intelligence files on 100,000 individuals. CHURCH REPORT, *supra* note 88, bk. II, at 6. Senator Adlai Stevenson III, the Reverend Ralph Abernathy, and Representative (now Judge) Abner Mikva were among those subject to surveillance. Note, *Judicial Review of Military Surveillance of Civilians: Big Brother Wears Modern Army Green*, 72 COLUM. L. REV. 1009, 1011 (1972). *See also* Baskir, *Reflections on the Senate Investigation of Army Surveillance*, 49 IND. L.J. 618, 623-27 (1974). For a description of the apparently unchecked proliferation of this program, see Comment, *supra* note 112, at 255-59, 271-74 (1973).

118. Brief of a Group of Former Army Intelligence Agents, Amici Curiae, at 22-23, Laird v. Tatum, 408 U.S. 1 (1972), *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 258.

tary initially evaded subsequent orders by civilian officials that the program be curtailed.[119]

Although the Army was created by statute,[120] and its activities are regulated by statute,[121] no statute specifically authorized the Army to gather information secretly about the political activities of civilians and to infiltrate their political groups, or to create and circulate political blacklists.[122] The Government maintained that the surveillance and information-gathering were necessary for the Army to perform adequately if again called upon to engage in riot control, an activity that is authorized by statute upon presidential order.[123] It is extremely doubtful, however, that Congress intended to approve this extraordinary means of pursuing the authorized end.[124]

Consequently, the Army's surveillance program appears to have been the result of an executive decision, unauthorized and unregulated by Congress. Whether or not the surveillance violated first amendment rights by chilling the exercise of political speech, as the plaintiffs in *Laird v. Tatum*[125] claimed, there were no clear legislative standards to prevent the Army from deciding, as it apparently did, that the activities of even the most innocuous political groups should be monitored.

When the Army program was challenged in the federal courts, the Government's principal response was not that the program was constitutionally valid (though it argued this position)[126] but rather that because the program caused no tangible injury to any specific individual, the controversy was not justiciable and the plaintiffs lacked standing to raise the issue in a judicial forum.[127] Even if the plaintiffs feared that

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119. *Id.* 28-29, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 263-64.

120. *See generally* 10 U.S.C. (1976 & Supp. II 1978) (scattered sections); *see also* U.S. CONST. art. I, § 8, cls. 12, 14-16; *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.")

121. *See generally* 10 U.S.C. §§ 3001-4840 (1976), *as amended.*

122. *See* Laird v. Tatum, 408 U.S. at 16 (Douglas, J., dissenting).

123. Brief for Petitioners at 31-33, Laird v. Tatum, 408 U.S. 1 (1972), *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 91-93; *see* 10 U.S.C. §§ 331-333 (1976). *See also 1971 Data Bank Hearings*, *supra* note 84, at 598-99.

124. On the issue of statutory authorization, see Note, *supra* note 117, at 1043-46.

125. 408 U.S. 1, 3 (1972).

126. Oral Argument, Laird v. Tatum, 408 U.S. 1 (1972), *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 337-38.

127. *See* Brief for Petitioners, *supra* note 123, at 17-42, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 77-102. The plaintiffs, alleging that their political activities had been subject to surveillance by the Army, brought a class action to enjoin the surveillance program. The district court dismissed the complaint as not presenting a justiciable controversy, *see* 444 F.2d at 949, but the court of appeals reversed, *id.* at 959. The Supreme Court granted certiorari, 404 U.S. 955 (1971), and reversed, 408 U.S. 1 (1972).

the Army might later misuse the information it collected (for example, by denying government employment on the basis of political beliefs), a claim based on that hypothetical possibility was not ripe for adjudication.[128]

The Supreme Court agreed that the challenge presented no justiciable claim.[129] Any possible chilling effect imposed on the speech of individuals by having their remarks recorded and kept in Army files was found to be an insufficient predicate for judicial action. The result, though cast in the language of justiciability, implied a determination that the Army's surveillance did not violate the constitutional rights of any individual.[130] The Army's program was thus insulated from judicial review even though no statute authorized the Army to undertake surveillance of private citizens and consequently no legislative guidelines or principles regulated that surveillance.[131]

The extent of the discretion exercised by the Army is suggested by an exchange between Senator Edward Kennedy and Robert Froehlke, an Assistant Secretary of Defense under President Nixon.[132] At a Senate hearing, the two discussed the criteria that a civilian defense-department official might use in approving requests by the Army to engage in political surveillance:

> Senator Kennedy: And what criteria does he [the civilian official] use?
>
> Froehlke: Judgment, his judgment.

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128. Brief for Petitioners, *supra* note 123, at 24 n.23, 40-42, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 84 n.23, 100-02. The Government further argued that if the Army had exceeded its statutory authority in conducting the surveillance, Congress rather than the judiciary was "particularly well suited" to exercise supervisory authority over the program. *Id.* 33-34, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 93-94.

129. Laird v. Tatum, 408 U.S. 1, 15 (1972).

130. *See, e.g.*, Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387, 468 n.348 (1979).

131. Although the Government asserted that the Army had substantially curtailed its surveillance activities, Reply Brief for the Petitioners at 10-14, Laird v. Tatum, 408 U.S. 1 (1972), *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 223-27; Oral Argument, *supra* note 126, *reprinted in* 73 LANDMARK BRIEFS, *supra* note 43, at 338-39, the holding in Laird v. Tatum did not rest on these assertions. *See* 408 U.S. at 10-15. Rather, political surveillance of the type described in *Laird v. Tatum* remains insulated from constitutional attack, so long as no litigant can show that the information collected has actually been used to his detriment. *See, e.g.*, Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 149-51 (D.D.C. 1976).

The reasoning of the Court's opinion also appears to shield "political intelligence" investigations conducted by other federal agencies, such as the Federal Bureau of Investigation. *See, e.g.*, Socialist Workers Party v. Attorney Gen., 510 F.2d 253 (2d Cir.) (FBI's surveillance of a Young Socialist Alliance convention), *application for stay denied*, 419 U.S. 1314 (1974); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973) (FBI's collection and dissemination of information relating to participants in a 1969 anti-war demonstration). For political intelligence gathering by the FBI, see generally CHURCH REPORT, *supra* note 88, bk. II, at 70-76.

132. Froehlke subsequently became Secretary of the Army. Comment, *supra* note 112, at 259 n.90.

Senator Kennedy: Completely a subjective determination?
Froehlke: As of this moment, yes . . . .[133]

Although Froehlke agreed that criteria should be formulated, he presented no clear idea of what criteria would suffice. Indeed, even if civilian executive officials laid down guidelines, such rules would be subject to change by the executive branch itself.

In sum, the Army's surveillance program exemplified executive action undertaken without legislative standards in an area in which the constitutional interests of individuals were potentially threatened. The result, as long as the program remained secret, was an unrestrained invasion of interests related to first amendment rights, even though those interests were not held to present a judicially cognizable first amendment claim.[134]

E. *Executive Privilege.*

Perhaps the most emblematic of the Nixon administration's executive assertions—and the legal claim most clearly associated with the events surrounding that administration's premature conclusion—was that of executive privilege, the doctrine that the executive is empowered to withhold certain information from the courts and Congress and, consequently, from the public. Although earlier presidents had sometimes relied on such a doctrine,[135] by 1973 the Nixon administration had invoked the privilege in response to congressional requests for informa-

133. *1971 Data Bank Hearings, supra* note 84, at 435.

134. In addition to information-gathering by the Army and the Federal Bureau of Investigation, see note 131 *supra*, other executive agencies, such as the Internal Revenue Service, collected political intelligence without authorization and put some of the information to improper use. CHURCH REPORT, *supra* note 88, bk. II, at 6-7, 174. *See* Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1277 & n.71 (1976). Furthermore, the Central Intelligence Agency investigated some domestic political groups, in apparent violation of its statutory charter. CHURCH REPORT, *supra* note 88, bk. II, at 174-75, 703-04, 712-15 (project CHAOS); *id.* 721-26, 727-29 (projects RESISTANCE and MERRIMAC).

The Justice Department also collected political data. *See 1971 Data Bank Hearings*, *supra* note 84, at 894-914; CHURCH REPORT, *supra* note 88, bk. II, at 78-81. Indeed it appears that during the Nixon period the Justice Department sometimes used grand juries to gather information not only for use in contemplated prosecutions, but also to supplement the government's files on suspect individuals and political groups. *See generally* Domer & Cerruti, *The Grand Jury Network*, 1972 NATION 5; Zwerling, *supra*, at 1265-75; Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972). In subsequent legislative action, Congress has imposed limits on the maintenance of certain political intelligence files. Privacy Act of 1974, 5 U.S.C. § 552a (1976). Furthermore, the Justice Department has sought to restrict intelligence activities of the Federal Bureau of Investigation by internal regulation. *See generally* J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS (1979).

135. For general discussions of the historical background of the doctrine of executive privilege, see R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974).

tion more frequently than any previous administration.[136] Moreover, under President Nixon assertions of the privilege assumed their most extended form. Attorney General Kleindienst, in testimony before a Senate committee, argued that executive privilege insulated the testimony and documents of all employees of the executive branch—some 2.5 million persons—and that the privilege could be invoked even against an impeachment inquiry and even with respect to alleged criminal activities by the President or his advisers.[137]

The doctrine of executive privilege has implications for the claims of presidential power reviewed above. First, executive privilege could be invoked to insulate the President's formulation of general policies from scrutiny and evaluation by Congress and the electorate. In some instances, the doctrine and the entire system of executive secrecy may even protect the President from disclosing that a basic choice of policy has been made.[138] If the executive can conceal important policy decisions, the opportunity for unilateral executive action is substantially broadened.[139]

136. Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747, 775 (1975). By Nixon's third year in office "Congress was in fact being denied a vast amount of information that it sought from the executive branch." P. KURLAND, *supra* note 7, at 42. Much of this information was denied without a clear claim of executive privilege. *Developments in the Law—the National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1215 (1972) [hereinafter cited as *Developments—National Security*]. At one point, the Defense Department in November 1969 denied Senator Fulbright's request for a copy of the Pentagon Papers to assist the Senate Foreign Relations Committee in its review of Vietnam policy. R. BERGER, *supra* note 135, at 282 & n.111.

137. R. BERGER, *supra* note 135, at 254-64; P. KURLAND, *supra* note 7, at 43-46. It has been suggested that these contentions may have been "tactical moves to frustrate the Watergate investigations." Schwartz, *Bad Presidents Make Hard Law: Richard M. Nixon in the Supreme Court*, 31 RUTGERS L. REV. 22, 27 (1977). President Nixon made such a claim of privilege when he refused to transmit material to the House Judiciary Committee for use in its impeachment investigation. Nixon's refusal formed the basis of one of three impeachment counts approved by the committee. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. 206-13 (1974).

138. The American bombing of Cambodia, for example, was a basic choice of policy that the administration concealed from Congress and the electorate for a substantial period. Pollak, *supra* note 12, at 1328-38; *see* Holtzman v. Schlesinger, 484 F.2d 1307, 1316-17 (2d Cir. 1973) (Oakes, J., dissenting), *cert. denied*, 416 U.S. 936 (1974). The Central Intelligence Agency also conducted hostilities in Laos for a decade without public disclosure. *See* W. COLBY & P. FORBATH, *supra* note 32, at 191-202; Branfman, *The President's Secret Army: A Case Study—the CIA in Laos, 1962-1972*, in THE CIA FILE 46-78 (R. Borosage & J. Marks eds. 1976). During the war in Southeast Asia there were frequent complaints that "[o]ne of the greatest problems [Congress has] today . . . is getting information as to what the executive is really doing. We have extreme difficulty in finding out what is going on." *War Powers Hearings*, *supra* note 7, at 318 (remarks of Sen. Fulbright). *See also* Berger, *supra* note 32, at 33-34 (noting the State Department's refusal to disclose the terms of certain executive agreements).

139. *See, e.g.*, Cox, *supra* note 135, at 1431.

Even if the presidential choice of policy is known, executive privilege may allow the President to withhold factual information relating to the matter about which the decision was made. Such withholding of information insulates executive policies from informed criticism and evaluation,[140] and in addition may encourage citizens to accept presidential choices on the ground that the decisions must have been based on information that, were it known, would provide satisfactory justification.[141]

Equally significant are the implications of the doctrine of executive privilege when it is applied to information about executive actions that may threaten the constitutional rights of individuals. If, for example, the government, without a warrant, taps the telephones of a disfavored political group, or undertakes searches or burglaries for political purposes, executive privilege might protect the executive from disclosing that such an infringement has occurred.[142] The privilege might also insulate executive officers from legal redress by the victim of the infringement.[143]

Indeed, the President attempted a related type of concealment in the litigation that culminated in *United States v. Nixon*,[144] the decision that led to the disclosure of incriminating White House tape recordings

140. For example, one commentator noted that "as the Pentagon papers demonstrate, knowledge of these [intragovernmental] policy debates and the dissents from the intelligence agencies [disclosed in the papers] might have given Congress and the public a different attitude toward the publicly announced decisions of the successive administrations." THE PENTAGON PAPERS xiii (New York Times ed. 1971) (introduction by Neil Sheehan). *See generally Developments—National Security*, *supra* note 136, at 1215-16; *see also* D. ELLSBERG, PAPERS ON THE WAR 42-135 (1972).

141. This mode of argument was often employed during the Vietnam War. *See* Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 489 n.119 (1971). *See also War Powers Hearings*, *supra* note 7, at 437-39 (testimony of George Reedy).

The assertion of executive privilege also impairs the ability of Congress to monitor the executive's implementation of congressional policies. Of course, the entire apparatus of executive secrecy impairs the ability of Congress to make law with adequate information and an understanding of the relevant problems. *See War Powers Hearings*, *supra* note 7, at 600 (testimony of Sen. Eagleton); *Developments—National Security*, *supra* note 136, at 1211-12.

142. Furthermore, an assertion of the privilege against Congress may conceal the extent of executive activity potentially infringing constitutional rights. See, *e.g.*, the remarks of Senator Ervin and others on the Army's refusal to permit testimony by officers who actually directed the Army's surveillance of political activity. *1971 Data Bank Hearings*, *supra* note 84, at 895-96; *Executive Privilege Hearings*, *supra* note 9, at 5-6 (letters of officials of the Department of Defense), 381-91 (testimony of Sen. Tunney). *See also* United States v. AT & T Co., 551 F.2d 384 (D.C. Cir. 1976).

143. *See, e.g.*, Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978), in which the closely-related privilege for "state secrets" was held to protect executive officials from disclosing whether the National Security Agency had intercepted the plaintiffs' international wire, cable, and telephone messages, even though the interceptions may have violated the plaintiffs' first and fourth amendment rights.

144. United States v. Nixon, 418 U.S. 683 (1974).

and to the resignation of the President. The presidential tapes confirmed that White House officials, including the President, had attempted to conceal the connection of administration personnel with warrantless breakings and enterings, apparently undertaken for the purpose of political surveillance, at the headquarters of the Democratic National Committee in the Watergate office building. When the grand jury and the Watergate Special Prosecutor subpoenaed the tape recordings for use in the Watergate cover-up investigation and trial, the President countered that his constitutional position and role permitted him to withhold the tapes.[145]

In the federal courts, arguments that the President should not have to deliver the tapes took two principal forms. First, President Nixon asserted that the tapes were in his custody and that as President he was completely immune from judicial process.[146] It was this argument in particular that made the President appear to be claiming that he was above the law; the argument conceded, however, that after leaving office, by impeachment or otherwise, the President would be subject to judicial process.[147] Second, the President contended that even if he was subject to judicial process, confidential communications to him were absolutely privileged. The privilege was necessary, he stated, to encourage candid advice by presidential advisers, who might temper their opinions if they believed that their words would become public. Furthermore, Nixon contended that whether the privilege should apply in

145. The Watergate Special Prosecutors made two separate attempts to obtain presidential tape recordings. First, Archibald Cox sought tape recordings and other material for presentation to the Watergate grand jury. The district court's order requiring production of the material was upheld by the court of appeals and Nixon did not seek review in the Supreme Court. *In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1 (D.D.C.), *modified sub nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). In the second case, Leon Jaworski sought additional documents and tape recordings for use as evidence in the cover-up trial. It was the district court's order in this case that was affirmed by the Supreme Court. United States v. Mitchell, 377 F. Supp. 1326 (D.D.C.), *aff'd sub nom.* United States v. Nixon, 418 U.S. 683 (1974).

146. Brief in Opposition at 3, *In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1 (D.D.C. 1973), *modified sub nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); *see In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. at 7 n.17 (quoting the oral argument of Charles Alan Wright). This argument mirrored President Nixon's publicly expressed view "that the President is not subject to compulsory process from the courts." *Id.* at 3.

147. The President argued that a court would disrupt the functioning of the executive branch if it issued compulsory process against the Chief Executive, because process could ultimately be enforceable only by putting the President in jail. *See* Brief in Opposition, *supra* note 146, at 30. This claim of presidential immunity was considered and rejected in litigation concerning the White House tapes sought by Special Prosecutor Archibald Cox. *See In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1, 6-10 (D.D.C.), *modified sub nom.* Nixon v. Sirica, 487 F.2d 700, 708-12 (D.C. Cir. 1973). The argument was not pressed in the subsequent tapes litigation initiated by Special Prosecutor Leon Jaworski and was rejected, at least by implication, in the Court's opinion in *United States v. Nixon*. *See* 418 U.S. at 705-07.

a particular instance was a decision for the President and that this determination was not reviewable by the courts. This argument invokes elements of the political question doctrine in yet another context.[148]

The Supreme Court rejected the President's arguments, though by no means unequivocally.[149] The Court concluded that the Constitution does provide for a "presumptive" privilege of confidentiality, protecting conversations between the President and his advisers, but that the privilege should not prevail in the situation at issue. The Court balanced the constitutional privilege against the need for the information and found that because the information on the tapes was sought for use in a criminal trial and did not pertain to military or diplomatic secrets, the need for the information outweighed the privilege of confidentiality.[150] The Court therefore affirmed the district court's order requiring the President to produce the requested tapes for in camera review; this order led to President Nixon's resignation shortly after the Supreme Court's decision.[151] Although the judgment against the President was spectacular, both as an event in contemporary history and as a step in constitutional development, the constitutional doctrine of executive privilege that the Court established might well protect a future President from having to disclose similar material to a congressional committee, to a court in a civil case, or to government agencies. The need for evidence of presidential conversations in criminal cases, after all, may well be exceptional.[152]

148. In *United States v. Nixon* lawyers for the President also argued that the controversy between the Watergate Special Prosecutor and the President was a dispute "between two entities within the executive branch of the government," and therefore was not justiciable. Brief for Respondeut, Cross-Petitioner Richard M. Nixon, President of the United States, at 27-48, United States v. Nixon, 418 U.S. 683 (1974), *reprinted in* 79 LANDMARK BRIEFS, *supra* note 43, at 504-25. *See* 418 U.S. at 692-97.

149. United States v. Nixon, 418 U.S. at 703-07. For general discussions of the case see Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974); *Symposium:* United States v. Nixon, 22 U.C.L.A. L. REV. 1 (1974).

150. 418 U.S. at 706-13. As a preliminary matter the Court also held that the judiciary, not the executive, was empowered to determine whether the privilege prevailed in the purticular instance. The applicability of the political question doctrine in this context was thus denied. *See id.* at 703-05.

151. The Court issued its opinion on July 24, 1974; Nixon resigned on August 9.

152. *See* 418 U.S. at 711-13. With respect to the perhaps unique Nixon records, however, two claims of presidential privilege have been rejected since President Nixon left office. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (upholding provisions of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §§ 2107, 3315-3324 (1976), and requiring government custody of Nixon's presidential papers and tape recordings); Dellums v. Powell, 561 F.2d 242 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977) (upholding a subpoena of Nixon's tape recordings for use in a civil action filed against former Attorney General Mitchell by persons arrested in the 1971 "May Day" demonstrations). *But see* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (refusing to order the President to deliver Watergate tape recordings to the Ervin Committee).

The equivocal rejection of presidential claims in *United States v. Nixon* seems to be characteristic of cases in which the Court confronts sweeping assertions of executive power.[153] Even when the decision is against the President, the Court often makes significant concessions to the executive's claims. Thus, in the *Pentagon Papers* case,[154] even though the Court refused to enjoin publication, it was implied that a stronger factual case might have empowered the President, without any legislation, to secure an injunction against the newspapers.[155] Similarly, in the *Keith* case[156] the Court did not foreclose the possibility that the President may have the power to impose warrantless wiretaps in the area of foreign national security.[157] Moreover, the Court has declined to prohibit warrantless Army surveillance of public political activity even though there is no legislative authority for such a practice.[158] The *Nixon* case itself echoes these decisions by according constitutional status to a "presumptive" presidential privilege of confidentiality.

Indeed, notwithstanding that the judiciary and Congress have trimmed some of the broadest claims of presidential authority, the executive branch may retain significant unilateral power, including power to act without legislative authority against individuals under circumstances in which constitutional rights may be affected. Presidents since Nixon have continued to assert this power,[159] and recent developments in foreign and domestic affairs are likely to occasion the assertion of even more vigorous executive claims. Confrontations between executive power and individual liberty therefore not only remain possible but also, given the pressures of the President's office, seem very likely to recur. In consequence, it will be valuable to examine the dangers traditionally thought to be presented by executive power in general, and to focus particularly on the manner in which executive action without statutory authority poses serious dangers to individual constitutional rights. This examination may lead to a deepened understanding of

153. *See generally* UNITED STATES v. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT xix (L. Friedman ed. 1974) (introductory essay by A. Westin).

154. New York Times Co. v. United States, 403 U.S. 713 (1971). See text accompanying notes 33-59 *supra*.

155. 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 725-27 (Breiman, J., concurring); *see* Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 7 (1980). *See also* text accompanying notes 287-302 *infra*.

156. United States v. United States Dist. Court, 407 U.S. 297 (1972). See text accompanying notes 76-104 *supra*.

157. See note 101 *supra* and accompanying text. Note, however, the limitations imposed by Congress in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 18 U.S.C. §§ 2511, 2518, 2519 (Supp. 1979).

158. See text accompanying notes 109-34 *supra*.

159. See text accompanying notes 101-04 *supra*.

how the judiciary should review claims of executive authority when those claims threaten the constitutional liberties of individuals.

III. Two Types of Executive Action

Sweeping power reposed in a single executive official has often been viewed as a severe danger to liberty.[160] Whether or not contemporary presidents have attempted anything that could fairly be termed tyranny or dictatorship, the recent claims of presidential authority that we have reviewed may be illuminated by examining why the specter of excessive executive power has often evoked fear.[161] This article earlier distinguished actions of the Nixon administration that made general economic or social policy from actions without a general rule that threatened to invade constitutional rights.[162] In section IV, we will return to the problem of the implications of unauthorized executive action for individual constitutional rights, and the relation of this problem to the doctrine of separation of powers. In this section, however, we examine a preliminary theoretical difference that may be valuable for an understanding of the issues discussed in section IV: the distinction between executive lawmaking in the form of general rules and executive action directed against specific individuals in the absence of general rules set down in advance.

A. *Dangers of Executive Lawmaking in the Form of General Rules or Policies.*

The first type of action is the executive's formulation of general rules or policies for the governance of society—rules that may be

160. Seventeenth- and eighteenth-century libertarian publicists vividly described the dangers of executive tyranny. *See, e.g.*, J. Locke, The Second Treatise of Government ch. XVIII, § 199, at 416-17 (P. Laslett ed. 1960) ("Tyranny is *the exercise of Power beyond* Right . . . [w]hen the Governour, however, intitled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Reveuge, Covetousness, or any other irregular Passion"); C. Montesquieu, The Spirit of the Laws bk. II, ch. 1, at 9 (D. Appleton ed. 1900) ("[A] despotic government [is] that in which a single person directs everything by his own will and caprice"). *See generally* B. Bailyn, The Ideological Origins of the American Revolution ch. III (1967); G. Wood, The Creation of the American Republic, 1776-1787, at 18-45 (1969). *See also* J. Rousseau, The Social Contract 133-34 (Penguin ed. 1968). For expressions of the view that the legislature might also act tyrannically, *see, e.g.*, T. Jefferson, 3 The Writings of Thomas Jefferson 224 (P. Ford ed. 1894) ("123 despots would surely be as oppressive as one").

161. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) ("It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority").

162. See text accompanying notes 70-72 *supra*.

promulgated, like statutes, in general form and in advance of application, for example, by executive order. Rules or policies in this category do not necessarily threaten the liberties of individuals; the category includes rules that would be clearly constitutional had Congress rather than the President adopted them (such as a reduction in expenditures for a social program or the creation of a tariff surcharge).[163]

The clearest danger in executive action of this sort is that the executive may disregard the wishes or interests of the people. Lawmaking contrary to the desires or interests of the majority is one of the classic forms of tyranny, and has often been perceived as resulting from executive rule. As one colonial writer remarked, "Tyranny [is] nothing else but the government of one man, or a few, over many, against their inclination and interest."[164]

Instances of a single individual or small group governing an unwilling populace by force make manifest the danger of executive lawmaking. Even when an executive is elected, however, there is the possibility of this kind of abuse. Indeed it appears that it is primarily to avoid this danger and to enhance majority rule that the Constitution entrusts basic lawmaking power to Congress rather than to the President.[165] Congress is a numerous body whose members represent distinct, relatively compact constituencies, and therefore are likely to reflect the wishes and interests of the people within those districts with some accuracy.[166] The original theory of the Framers apparently was that a legislature reproduces as closely as possible a meeting of the citi-

163. For examples of executive action in this category, see text accompanying notes 172-75 *infra*.

164. O. NOBLE, SOME STRICTURES UPON THE SACRED STORY RECORDED IN THE BOOK OF ESTHER . . . , at 5 (Newburyport 1775), *quoted in* G. WOOD, *supra* note 160, at 22-23. For a distinction between "desires" and "interests" in the theory of representation, see Pennock, *Political Representation: An Overview*, in REPRESENTATION 12-14 (J. Pennock & J. Chapman eds. 1968). It is frequently argued that the desires and interests of the populace may not always coincide. *See, e.g.*, J. PENNOCK, DEMOCRATIC POLITICAL THEORY 260, 264-65 (1979).

165. U.S. CONST. art. I, § 1. Although the President's veto power constitutes a share of lawmaking authority, the veto is a negative check, which does not confer affirmative legislative power. Moreover, the veto can be overridden by Congress. U.S. CONST. art. I, § 7. On the other hand, the threat of a veto may, as a practical matter, give the President power in the shaping of congressional policy. B. ECKHARDT & C. BLACK, THE TIDES OF POWER 57-65 (1976).

166. Madison remarked in the Constitutional Convention that "[i]t was a provision every where established that the Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathize, with the rights of the people in every part of the Community." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (1937). *See also* THE FEDERALIST Nos. 56 (J. Madison), 58 (J. Madison); *cf.* C. MONTESQUIEU, *supra* note 160, bk. XI, ch. V, at 185-86 (representatives should be elected locally rather than "chosen from the general body of the nation").

zens themselves.[167] From a clash of views that resembles the clash of interests within the country there will emerge a result closely attuned to the wishes of the populace.[168]

In contrast, it can be argued, the executive—a single individual—cannot possibly reflect the electorate's wishes as fully as the members of a legislature. As a result there is a greater likelihood that presidential policy choices will deviate from the popular will.[169] Moreover, an individual may be governed by aberrant, whimsical, or self-interested views that could not prevail in a collegial assembly.[170] Finally, decisions by a single individual or a small group may not involve the careful deliberation that occurs in congressional debate and that increases the likelihood that the desires and interests of the populace will be accurately perceived.[171]

President Nixon took a variety of actions that posed the dangers to majority rule inherent in executive policy-making absent authorization by a representative body. For example, he sought to impound funds for legislative programs established by Congress and on occasion at-

167. *See* 1 M. FARRAND, *supra* note 166, at 561; THE FEDERALIST No. 52 (J. Madison) (indicating that "[t]he scheme of representation [is] a substitute for a meeting of the citizens in person").

168. Moreover, the process of legislative deliberation may help to make well-considered decisions and to accommodate the wishes of defeated minorities.

For a critical analysis of the extent to which Congress actually reflects majority views, see Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974); *cf.* Stewart, *Foreword: Lawyers and the Legislative Process*, 10 HARV. J. LEGIS. 151, 166-74 (1973) (emphasizing the limitations of "Congress' lawmaking capabilities").

169. *See, e.g.*, Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 143-44 (1971); Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, LAW & CONTEMP. PROB., Summer, 1976, at 46, 47; *cf.* J. SALOMA, CONGRESS AND THE NEW POLITICS 101 (1962) (arguing that Congress is more responsive than the President because elected more frequently).

It has been argued, however, that "[i]n the exercise of the veto power . . . it often happens that the President more truly represents the entire country than does the majority vote of the two Houses." W. TAFT, THE PRESIDENT AND HIS POWERS 18 (1967). *See also* Myers v. United States, 272 U.S. 52, 123 (1926). Others have seen in the President "the prime organ of a compensating 'national spirit'," redressing the "local spirit" said to be characteristic of Congress. *See* Black, *supra* note 32, at 851; Wechsler, *The Political Safeguards of Federalism*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49, 64 (1961). *See also* T. ROOSEVELT, AUTOBIOGRAPHY 282, *quoted in* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 265 (1957). This view of the representative nature of the presidency has received strong support over the past few decades. *See* Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROB., Spring, 1976, at 102, 104-05.

170. See notes 240-41 *infra* and accompanying text.

171. The bicameral nature of Congress, which often requires two distinct sets of committee hearings and floor debates, may further enhanee the quality of legislative deliberation. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 576 (1964).

tempted to destroy those programs.[172] Furthermore, he imposed economic regulations based on tenuous statutory authority.[173] In foreign affairs, presidential action in undertaking armed hostilities without a congressional declaration of war also falls into this category.[174] The conduct of secret wars and other covert foreign campaigns by executive bodies such as the Central Intelligence Agency similarly threatened to undermine the principle of majority rule.[175]

That policy-making of this sort primarily threatens majority rulemaking suggests that the process of majority rule itself might sometimes be relied on to redress the balance.[176] Thus, it has recently been argued, for example, that all of the disputes discussed in this section should be found nonjusticiable political questions if the President claims that his action rests on independent constitutional authority.[177] Whether or not such a sweeping conclusion is justified, it is arguable that issues of this kind do not require extraordinary judicial solicitude.

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172. See notes 60-67 *supra* and accompanying text.

173. *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975) (finding that the presideutial 10% import duty surcharge is authorized by the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1976)); *cf.* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (upholding "voluntary" agreements between the State Department and foreign steel corporations, limiting the amount of steel exported to the United States). For similar action taken by President Carter, *see* AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 444 U.S. 888 (1979) (upholding an exccutive order denying government contracts to companies failing to observe presidential wage and price standards).

174. *See, e.g.*, J. MADISON, *Letters of Helvidius*, in 6 THE WRITINGS OF JAMES MADISON 145 (G. Hunt ed. 1906) (declaration of war as lawmaking).

175. See note 32 *supra*. The presidential practice of entering into international "executive agreements" may pose related dangers, as it establishes policy without legislative participation, in the form of senatorial advice and consent, which is constitutionally required for treaties. *See* U.S. CONST. art. II, § 2, cl. 2.

Madison argued that the adoption of an agreement between nations must be viewed as lawmaking and, therefore, as an essentially legislative function:

> A treaty is not an execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the executive magistrate. To say then that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In thcory this is an absurdity—in practice a tyranny.

J. MADISON, *supra* note 174, at 145 (emphasis in original). *But see* A. HAMILTON, *Pacificus No. I*, in XV THE PAPERS OF ALEXANDER HAMILTON 33-43 (H. Syrett ed. 1969). Notwithstanding Madison's position, executive agreements connected with the recognition of a foreign nation have been found constitutional and held to override inconsistent state law. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); *cf.* Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) (expressing the view that unilateral termination of a mutual defense treaty with Taiwan is within presidential power as a "necessary incident to Executive recognition of the Peking Government . . .").

176. *See generally* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983 (1975) (discussing legislative veto).

177. J. CHOPER, *supra* note 10, at 275.

As long as the executive rule does not endanger specific constitutional liberties, the primary judicial function of protecting minority rights against majority oppression[178] is not implicated.

B. *Dangers of Executive Action Against Specific Individuals Without a General Rule.*

A second type of executive action occurs when the executive acts against specific individuals in the absence of any general rule set forth in advance.[179] The danger of executive action of the second type is more subtle, and quite possibly more serious, than that of the first. Here the principal hazard is not simply that the executive's policy may contravene the wishes of the majority, but rather that the opportunity for arbitrary or discriminatory action against disfavored individuals is greatly expanded.[180]

According to two writers who have greatly influenced the development of American constitutional theory, tyranny is typified by action of an executive official unrestrained by law. Montesquieu defined a despotic government as one in which a single individual acting without law "directs every thing by his own will and caprice,"[181] and asserted that the essence of political liberty was the individual's right to be ruled by law.[182] This view of tyranny is also embodied in Locke's famous

178. *Id.* ch. 2.

179. In some instances the distinction between the promulgation of a general rule and the taking of specific action in the absence of a general rule may be difficult to draw. Even a single action by the executive may follow an unspoken executive policy; in this sense almost any executive action may be said to presuppose some implicit executive rule of policy. Conversely, it may be unclear whether a promulgated rule is general. It is possible, for example, to draft a statute that refers to no individual by name but can by its terms apply to only one person. *See, e.g.*, I.R.C. § 1240 ("Louis B. Mayer Provision") (repealed 1976). Moreover, it might be argued that a given rule, though covering a large number of persons whose identities are not known in advance, may nonetheless be lacking in generality because it fails to include other cases which, it is thought, a rule of that sort should cover. *Cf.* F. HAYEK, THE CONSTITUTION OF LIBERTY 278-79 (1960) (arguing that special rules for labor picketing and closed- and union-shop contracts constitute an "exemption" of unions "from the general rules of law"). In this article, however, "general rule" refers to a promulgated norm of conduct that is prospective in application, covers a substantial number of cases, and applies to individuals whose identities are not clearly known in advance.

180. See notes 198-208 *infra* and accompanying text.

181. *See* C. MONTESQUIEU, *supra* note 160, bk. II, ch. I, at 9. *See also id.* bk. VIII, ch. V, at 137 ("when [reigning families] do not observe [the laws], it is a despotic state swayed by a great many despotic princes").

182. To Montesquieu liberty "consists . . . of being governed by laws and of knowing that the laws will not arbitrarily be put on one side." R. SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 287 (1961). *See, e.g.*, C. MONTESQUIEU, *supra* note 160, bk. XI, ch. IV, at 180-81:

> Liberty is a right of doing whatever the laws permit . . . .
>
> To prevent [the abuse of power], it is necessary from the very nature of things that power should be a check to power. A government may be so constituted as no man shall

remark that "Where-ever Law ends, Tyranny begins . . . ."[183] Locke's comments on the nature of political liberty reflect the same underlying opinion:

> *Freedom of Men under Government*, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.[184]

An important function of the separation of executive and legislative powers is to prevent this form of tyranny, for the opportunity for such tyrannical action is increased by the amalgamation of governmental functions in the same person or group. If the executive must act in accordance with general rules set down in advance by others, the executive's opportunities for arbitrary action are reduced. But when legislative and executive functions are performed by the same organ—particularly if that organ is an individual—the opportunities for arbitrary or discriminatory action are significantly increased.[185] Such a government is thus tyrannous or despotic even if the majority favors it.

Some of the most conspicuous legal claims of the Nixon administration evoked concerns of this type, as the administration sought to unite legislative and executive functions, and eliminate judicial review, in certain areas. It was an amalgamation of power of this kind that the

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be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.

See also id. bk. XI, ch. IV, at 182; *id.* bk. VI, ch. I, at 90 ("Despotic power is self-sufficient; round it there is an absolute vacuum. Hence it is that when travellers favour us with the description of countries where arbitrary sway prevails, they seldom make mention of civil laws"). According to Montesquieu, the restraints of law promote a sense of security in the individual by removing his fear of unpredictable governmental action. *Id.* 90-91.

183. J. LOCKE, *supra* note 160, ch. XVIII, § 202, at 418.

184. *Id.* ch. II, § 22, at 302 (emphasis omitted). *But see id.* ch. XIV (acknowledging executive prerogative), and Madison's dour response: "[Locke's] chapter on prerogative shows, how much the reason of the philosopher was clouded by the royalism of the Englishman." J. MADISON, *supra* note 174, at 144 n.1.

Other writers share a similar view of the characteristics of liberty. *See, e.g.*, P. KURLAND, *supra* note 7, at 219 (views of Voltaire); *cf.* F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 244 (Free Press ed. 1957) ("[T]he power of executive agencies in totalitarian states to interfere at discretion with life, liberty and property may be taken as the best-known feature of this kind of dictatorship"). *See also* J. RAWLS, A THEORY OF JUSTICE § 38, at 235 (1971) ("[R]egular and impartial administration of public rules [is] closely related to liberty").

185. W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 128 n.1 (1965). *See also* F. NEUMANN, *supra* note 184, at 158, 164-67. For a fuller discussion of this point, see notes 198-208 *infra* and accompanying text. Madison may have had this type of arbitrary, lawless action in mind in the 47th Federalist Paper when, relying on Montesquieu, he remarked, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny." THE FEDERALIST No. 47, at 228 (J. Madison) (1837 ed.); *see* C. MONTESQUIEU, *supra* note 160, bk. XI, ch. V, at 182-83.

President sought in the *Pentagon Papers* case,[186] as the Government tried to restrain publication of specific material by specific newspapers, based not on a general legislative determination that certain categories of speech should be restrained, but on an executive finding in the particular case that publication of the Pentagon Papers would be unduly dangerous. Although the executive sought judicial action, instead of proceeding in a purely executive manner by ordering federal officers to seize the presses, the Government argued that the court should accept the executive's judgment that the publication should be enjoined with little independent judicial scrutiny.[187] Similarly, in the *Keith* case[188] the executive claimed the power to determine, without a general legislative rule, the sorts of information that should be subject to wiretapping and other surveillance, and to act accordingly against individuals without significant judicial review.[189] Furthermore, in its claims that the Army could undertake political surveillance without specific statutory authorization or judicial review, the executive again sought to unite all governmental powers in its hands and to make decisions relating to individuals in accordance with effectively unchecked executive will.[190] These assertions, consequently, raised justifiable concerns about this second form of "tyrannical" action.

Locke and Montesquieu discussed the dangers of this type of executive action long before the framing of the Constitution. Yet executive action of this kind, by its very nature, poses dangers to constitutional liberties. To the extent that executive action without legislative rule expands the opportunity for political retaliation or discriminatory actions, such executive action endangers specific guarantees of the Constitution. It is to the relationship between executive power and the threat to constitutional liberties that we now turn.

IV. Separation of Powers and the Protection of Constitutional Rights

We have thus far explored the dangers of executive power in two areas: the creation of general rules of law by the executive, which threatens the processes of majority rulemaking and consent, and the application of executive power to individuals without guidance from any rule set out in advance, which increases the chance of arbitrary or discriminatory action. Unique problems arise, however, when execu-

186. New York Times Co. v. United States, 403 U.S. 713 (1971).
187. See notes 40-44 *supra* and accompanying text.
188. United States v. United States Dist. Court, 407 U.S. 297 (1972).
189. See notes 77-83 *supra* and accompanying text.
190. See notes 109-34 *supra* and accompanying text.

tive action of either category threatens to impinge on constitutional rights.[191] The assertion of executive power to act without legislative guidance in ways that may affect the constitutional rights of individuals raises concerns about the relationship between individual rights and the separation of powers. Specifically, it stimulates reflection on whether the constitutional requirement of congressional lawmaking has any implications for the protection of individual rights.

Although the point has not been made explicitly in the cases, the Supreme Court seems to have acknowledged that the requirement of congressional lawmaking and the protection of constitutional rights are related. For example, the Court has held that broad or implicit delegations of legislative power do not authorize administrative measures that may encroach on basic constitutional rights. Rather, the Court has required a clear congressional statement that the measures are authorized before finding that the executive has acted within its delegated power; only then will the Court consider the underlying constitutional question.[192] Although this "clear statement" doctrine has sometimes been

191. Although the instances of executive rulemaking examined above did not threaten individual constitutional rights, an example of an executive rule that does so is discussed below in the text accompanying notes 287-302 *infra*. As noted above, executive action without any general rule promulgated in advance poses inherent dangers of action in violation of specific constitutional rights.

192. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958). In *Kent* the Court held that a broad delegation of power to the Secretary of State to issue passports did not authorize the Secretary to withhold a passport on the ground that the applicant was a member of or affiliated with the Communist Party. Justice Douglas's opinion indicated that when executive action invades areas of constitutional concern (here the right to travel and also the rights of political belief and association) the Court will not find executive action to be authorized by Congress without explicit statutory authorization. *Id.* at 129-30. The Court reached a similar result in Schneider v. Smith, 390 U.S. 17 (1968), in which a statute permitting the President to issue regulations "to safeguard [merchant vessels against] sabotage or other subversive acts," *id.* at 18, was held not to authorize executive inquiry into the political associations and beliefs of prospective maritime employees. *See also* United States v. Robel, 389 U.S. 258, 274-77 (1967) (Brennan, J., concurring); Zemel v. Rusk, 381 U.S. 1, 20-40 (1965) (Black, Douglas, and Goldberg, JJ., dissenting); *Ex parte* Endo, 323 U.S. 283, 299-300 (1944); Gewirtz, *supra* note 169, at 74-75. One commentator has suggested that "[t]he clear statement technique could be thought of as operating on a sliding scale: the more vital the individual liberty infringed, the more explicit must be the expression of consent." Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681 n.54 (1975). The principle that delegations of legislative power should be construed narrowly in order to avoid possible constitutional problems is closely related to the principle that ambiguous or unduly general criminal statutes should be construed narrowly in order to avoid such problems. *See, e.g.*, United States v. Rumely, 345 U.S. 41 (1953).

In some decisions that find a lack of administrative authority to take measures potentially affecting the constitutional rights of government employees or employees of government contractors, the Court has raised the possibility that the requisite authorization might come either from Congress or from the President. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (finding no explicit authorization by Congress or the President for a Civil Service Commission regulation excluding all aliens from the federal service); Greene v. McElroy, 360 U.S. 474 (1959) (finding no

viewed as a technique for avoiding a more intrusive judicial decision,[193] it also suggests a suspicion of executive action that may affect individual rights without the explicit guidance of Congress.[194] A related idea emerges in Justice White's concurrence in the *Pentagon Papers* case, in which he indicated that although the Court might have enjoined the publication of the Pentagon Papers had Congress explicitly authorized the injunction, it would not do so at the President's request without such authorization.[195] White's position suggests that there must be express congressional authorization for executive action that possibly infringes certain basic liberties before the Court will even consider an argument that such executive action is constitutional.[196]

These cases imply that in certain instances the Court has viewed a requirement of explicit lawmaking by Congress as a form of protection against executive action for the constitutional rights of individuals. The underlying rationale of this position, however, remains unclear. There has been little analysis of how the separation of powers between Congress and the executive, which is sometimes viewed simply as an allocation of authority between contending units of government or contending social forces,[197] assists in protecting the constitutional rights of individuals. This section of the article undertakes such an analysis, dividing the issues into two parts. The first discusses the dangers to constitutional rights that arise when the executive acts without prior legislative rules. The second explains how a requirement of explicit legislation prior to executive action in areas touching constitutional rights can help safeguard those rights.

A. *The Threat to Constitutional Rights Posed by Executive Action Without Statutory Authorization.*

1. *Threats to First Amendment Rights in Executive Action Without a General Rule.* As we have seen, there are special dangers to individual liberty if the executive acts without any general rule set down in

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congressional or presidential authorization for a Department of Defense security clearance procedure that denied an employee of a government contractor the right to confront witnesses against him).

193. *See* Schneider v. Smith, 390 U.S. 17, 26-27 (1968).

194. *See* United States v. Robel, 389 U.S. 258, 274-77 (1967) (Brennan, J., concurring).

195. New York Times Co. v. United States, 403 U.S. 713, 730-40 (1971) (White, J., concurring). See note 51 *supra* and accompanying text. *See also* L. TRIBE, *supra* note 50, § 17-1, at 1139.

196. *See* Junger, *supra* note 50, at 38.

197. *See, e.g.*, Franklin, *The Passing of the School of Montesquieu and its System of Separation of Powers*, 12 TUL. L. REV. 1, 11 (1937) (viewing the modern doctrine of separation of powers as "a system recognizing the legality of the struggle among human interests to gain control of state power").

advance.[198] Though the opportunity for arbitrary and ad hoc executive action always exists, it is increased if the executive is permitted not only to execute the law but also to make the law at the moment of execution. The danger to constitutional rights that such action can pose is illustrated by examining the special case of executive retaliation against individuals for expressing their political views.

A number of the most controversial actions of the Nixon administration endangered free political expression.[199] In some instances the executive took action to suppress speech;[200] in others the executive took action that did not directly curtail speech but occurred in an atmosphere of political hostility, raising the possibility that the action actually was taken to retaliate against offensive speech or political activity.[201] The experience of the Nixon years demonstrates that the dangers that executive action without a prior general rule poses to speech-related rights are particularly grave because the opportunity for illicit action prompted by political hostility is thereby greatly increased.

This point can be most clearly seen by contrasting such executive action with legislative rulemaking. In legislative action, the legislature approaches problems as issues of general policy and expresses its determination in a general proposition applicable to all. In contrast, when the executive acts against individuals without the guidance of a prior general rule he responds to a specific event with specific individuals in mind. In such instances the executive asks primarily how a specific individual should be treated or a specific situation dealt with—that is, for example, should the *New York Times* be censored? or should Daniel Ellsberg's psychiatric records be obtained through a covert search and seizure? The more general policy issues of how to handle the problems of national-security censorship or surveillance arise only as a by-product of deciding how to handle the specific case.[202] Consequently, when the executive makes such a decision in the absence of a prior rule, there is a significant risk that the individual aspects of the

198. See text accompanying notes 179-90 *supra*.

199. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971).

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

201. See note 89 *supra* (surveillance of dissident groups); note 88 *supra* (wiretapping of journalists).

202. *See, e.g.*, President Nixon's reported instructions to Charles Colson about Ellsberg: "I want him exposed, Chuck. I don't care how you do it. But get it done. We're going to let the country know what kind of a 'hero' Mr. Ellsberg is. . . . I want those leaks stopped. Don't give me any excuses. I want results. I want them now." H. SALISBURY, WITHOUT FEAR OR FAVOR 268 (1980).

case will predominate over the general policy question, thus improperly influencing the choice of policy itself.

The individual case may slant the executive's policy choice in two ways. First, the executive official's hostility to an individual may cause him to overestimate the danger to the government interest at stake, leading to a more oppressive policy choice than would have been chosen in the abstract. Second, the absence of a prior general rule gives greater scope for, and thus encourages, political retaliation against disfavored individuals. The absence of prior general policy allows the executive to act against a person for impermissible political reasons and then to rationalize that action retrospectively by invoking a plausible neutral policy. As Judge Wright remarked, "In a system under which government officials do not have to act in accordance with publicly stated rules, it is very difficult to know when they are acting in accordance with secret, illicit rules."[203]

The executive's position within the federal government increases the possibility that executive action without a general rule, potentially infringing upon first amendment interests, will rest on illegitimate political considerations. As the main recipient of criticism of national policies, the President is often a personal adversary of individuals or groups politically hostile to the government. In seeking to preserve the perceived national interest by moving against such speakers, the President frequently moves to preserve his own political position.[204] Yet there are clear dangers of illicit motivation when an actor makes ad hoc decisions concerning measures to be taken against his own critics.[205] Similarly, the executive may identify with government policies and may feel personally attacked or threatened when those policies are disparaged, even if he is not personally criticized. In a highly sensitive individual, such political or ideological disagreement may evoke an un-

203. Wright, Book Review (K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY), 81 YALE L. J. 575, 589 (1972). Action against an individual that rests upon illicit considerations of political retaliation itself violates the first amendment. *See* Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622, 1642-43, 1652 n.101 (1977).

204. As one commentator has written in a related context:

> It is easy to see how self-interest becomes equated with the national interest. As the practical politician sees it, a discredited administration will undermine the stability of the government and its capacity to deal effectively with problems at home and abroad. It follows that everything must be done to protect the administration from being discredited.

Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 746 (1975).

205. Reliance on the conscientiousness or probity of executive officials as a safeguard against abuses of this kind is likely to be a fragile safeguard. See notes 84-91 *supra* and accompanying text. See also notes 208, 220 *infra*.

reasoning response against the personality of the critic—in short, the punishment of "enemies."[206] Although this phenomenon may have been exaggerated under President Nixon,[207] pressures conducive to this attitude seem to inhere in the executive office itself.[208]

In sum, when the executive acts against an individual without a general rule, he makes policy at the moment of its enforcement, and such action involves dangers of retaliatory or distorted decisions that may threaten first amendment interests. A central purpose of the doctrine that the executive should act in accordance with a prior rule is thus to preserve the generality of lawmaking. The separation of powers diminishes the possibility of passionate, and basically unreviewable, ad hoc executive action against individuals because of their personal qualities, including their political views.[209] The doctrine thus interposes an essential layer of disinterested rulemaking between the *ad hominem* re-

206. For example, one official described the atmosphere in the White House in 1970 in the following language: "It didn't matter who you were or what ideological positions you took. . . . You were either for us or against us, and if you were against us we were against you." J. LUKAS, *supra* note 49, at 11. And Egil Krogh, co-leader of the Nixon White House's "Plumbers Unit," supposedly stated in 1971 that "[a]nyone who opposes us, we'll destroy. As a matter of fact, anyone who doesn't support us, we'll destroy." *Id.* 68. In the course of these political skirmishes, however, executive-branch officials may come to believe that their enemies threaten the nation. *See, e.g.*, J. MAGRUDER, AN AMERICAN LIFE 101 (1974) (ascribing to H.R. Haldeman the view that Vietnam War critics were traitors).

207. *See, e.g.*, J. MAGRUDER, *supra* note 206, at 77 (viewing President Nixon as "a politician who was absolutely paranoid about criticism, who took it all personally, and whose instinct was to lash back at his critics . . .").

208. Other recent presidents took retaliatory action against political critics. According to the Church Report, for example, "[i]n the 1960s President Johnson asked the FBI to compare various Senators' statements on Vietnam with the Communist Party line and to conduct name checks on leading antiwar Senators." CHURCH REPORT, *supra* note 88, bk. II, at 8 (footnotes omitted). *See also id.* 116-17, 230-31 (requests of White House aides, under Johnson and Nixon, for FBI name checks on citizens critical of Vietnam War policy). More recently, President Carter's press secretary telephoned a reporter and made derogatory and apparently false statements about a senator who opposed the administration's position on the qualifications of the Director of the Office of Management and Budget. *Powell Apologizes for Attempting to Spread Rumor Harmful to Percy*, N.Y. Times, Sept. 15, 1977, § A, at 1. Other executive agencies have also succumbed to pressures to retaliate against political opponents. For example, an FBI official recommended the disruption of New Left activities, noting that "the New Left has on many occasions viciously and scurrilously attacked the Director and the Bureau in an attempt to hamper our investigations and drive us off the college campuses." CHURCH REPORT, *supra* note 88, bk. II, at 72-73. *See also id.* 238-39 (dissemination by the FBI of derogatory information about its critics); *id.* 246-49.

209. In this sense the separation of powers thus tends to implement equal governmental treatment of individuals. Of course even when a statute empowers the executive to act, he may enforce the statute discriminatorily. But the danger of arbitrary executive action is substantially greater when the executive acts against an individual without general rule, in accordance with his own ad hoc determination of policy. *See, e.g., The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 204 (1971).

action of the executive and the offensive speaker.[210]

2. *Threats to Constitutional Rights in General Posed by Executive Action Without a Statute*. Executive action without a general rule set forth in advance poses special dangers to political expression. But, for two principal reasons, executive action without a statute poses a more general threat to all constitutional rights. This threat arises from two interrelated executive tendencies: a tendency to exaggerate the strength of the government interest that is opposed to the liberty interest, and a correlative tendency to neglect the liberty interest itself.[211] The central force that furthers an exaggerated executive assessment of government interests in comparison with individual rights is the executive's role as symbol of the government and as advocate of the governmental interest. The President has the constitutional responsibility to represent the government interest in general; subordinate figures such as officials of the Federal Bureau of Investigation and the Department of Defense assert the government interest in their particular fields of responsibility. Because these individuals represent and in many cases identify with the government, there is an undue danger that they will inflate the government interest to its maximum possible value and will quite possibly overvalue it.[212] It was in this sense that Justice Brennan remarked, in considering a conflict between the national-security interest and the interest in the freedom of association, that the judgment of the Secretary of Defense, "colored by his overriding obligation to protect the national defense, is not a constitutionally acceptable substitute for Con-

210. A related requirement of explicit legislative rulemaking has been imposed when the Supreme Court has refused to permit state officials to act under statutes that are vague or that grant officials broad discretion to take action that may infringe first amendment interests. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974). The Court has found that a grant of unchanneled discretion unduly increases the risk that the executive may suppress speech because of its content. *See* Quint, *supra* note 203, at 1652 n.101 (1977); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 872-73 (1970).

In theory the dangers of arbitrary executive action of the type discussed in this section might be diminished by an executive rule promulgated in advance, which, if observed, might restrict executive discretion. It is desirable, however, that such a rule should have the stability of a statute, rather than the uncertainty of an executive rule that the executive itself may change or manipulate. The next section discusses why executive action without statute, in any form, even the promulgation of an executive rule, may pose dangers to constitutionally protected interests.

211. Furthermore, these reasons apply for the most part to the executive promulgation of a general rule potentially threatening constitutional rights, see text accompanying notes 287-302 *infra*, in addition to executive action undertaken without any promulgated rule.

212. Many fourth amendment decisions have acknowledged this tendency in the case of law enforcement officers. *See, e.g.*, McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948). Recent history indicates that this tendency does not significantly weaken as one proceeds up the hierarchy of executive officials. *See* United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972). See note 99 *supra*.

gress' judgment, in the absence of further, limiting guidance."[213]

In addition to this inherent structural bias, the history of the Johnson and Nixon administrations indicates that the upper echelons of the executive branch may feel under seige from hostile outsiders, and may operate in an atmosphere in which anxieties over secrecy and national security predominate over other concerns. A balanced view of the government interest may be difficult to achieve in such a charged atmosphere. Moreover, the pressure to make quick decisions may amplify the bias in favor of the government interest. Officials generally predisposed toward the government interest will be likely, in moments of uncertainty and stress, to err in favor of the Government.[214] Actions so taken, even if reconsidered in a cooler atmosphere, may be difficult to undo.

Though it is the function of counsel and debate to mitigate the danger that decision-makers will act on exaggerated or idiosyncratic fears, nothing in the structure of the executive office requires such debate.[215] Executive decisions, particularly when national security is thought to be at issue, may be made by a small group of hierarchically arranged officials, often working in secret. The isolation of the oval

213. United States v. Robel, 389 U.S. 258, 276-77 (1967) (Brennan, J., concurring).

214. Such a process may have been at work, for example, in the *Pentagon Papers* case. See notes 218, 244 *infra* and text accompanying note 218 *infra*.

215. For an important discussion of the isolation of the presidential office, and the risk that proposed executive action will receive little significant debate, see generally G. REEDY, THE TWILIGHT OF THE PRESIDENCY (1970). Reedy argues that once it appears that the president favors a course of action, his advisers are not likely to challenge or criticize the proposed action:

> White House councils are not debating matches in which ideas emerge from the heated exchanges of participants. The council centers around the president himself, to whom everyone addresses his observations.
>
> The first strong observations to attract the favor of the president become subconsciously the thoughts of everyone in the room. The focus of attention shifts from a testing of all concepts to a groping for means of overcoming the difficulties. A thesis which could not survive an undergraduate seminar in a liberal-arts college becomes accepted doctrine, and the only question is not *whether* it should be done but *how* it should be done.

Id. 12-13 (emphasis in original). See also note 217 *infra* and accompanying text.

Another close observer of the Executive has similarly remarked: "Personalities change when the President is present, and frequently even strong men make recommendations on the basis of what they believe the President wishes to hear." R. KENNEDY, THIRTEEN DAYS 33 (1969). Kennedy adds that conflict and debate are frequently absent when the President receives advice:

> His office creates such respect and awe that it has almost a cowering effect on men. Frequently I saw advisers adapt their opinions to what they believed President Kennedy and, later, President Johnson wished to hear.
>
> I once attended a preliminary meeting with a Cabinet officer, where we agreed on a recommendation to be made to the President. It came as a slight surprise to me when, a few minutes later, in the meeting with the President himself, the Cabinet officer vigorously and fervently expressed the opposite point of view, which, from the discussion, he quite accurately learned would be more sympathetically received by the President.

Id. 112.

office can magnify executive fears and insulate the President from the tempering influence of contrary views.[216] Inherent pressures to defer to the views of superiors, and particularly those of the President, inhibit debate within the higher reaches of the executive branch.[217] Executive action taken without a statute may rest, therefore, on the untested fears of a small number of individuals, and may be commenced without public exposure and evaluation of the dangers thought by the executive to be present.

It is not surprising, therefore, that in several cases of the Nixon era the executive overvalued the government's need to take action potentially touching individual constitutional rights. For example, the supposed damage to the national security involved in the publication of the Pentagon Papers appears to have been illusory, notwithstanding the claims of government officials at the time that publication would be a "disaster" and would jeopardize international relations.[218] The Army's decision to engage in widespread surveillance of antiwar groups, viewed in the most charitable light, stemmed from a fear that antiwar speeches and activity could provoke riots that the Army might be called upon to suppress. Secrecy fostered these anxieties; public debate in Congress would have revealed them as too farfetched to justify the massive military surveillance that the Army undertook. Surely Senator Fulbright was correct in remarking that "[t]otalitarian devices such as military surveillance of civilians cannot long survive in the full light of publicity."[219]

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216. A former member of President Johnson's White House staff has argued that the tendency to treat the White House as a royal court raises "barriers to presidential access to reality," and that the isolation and organized sychophancy of the presidential office may threaten the President's "psychological balance." G. REEDY, *supra* note 215, at 98, 22-23. *See generally id.* ch. 1.

217. Robert Kennedy, for example, applauded the nnusual procedure—involving President Kennedy's absence from certain meetings and the putting aside of executive department ranks—that resulted in "uninhibited and unrestrained" executive debate during the Cuban missile crisis. Kennedy emphasized, however, that it "was a tremendously advantageous procedure that does not frequently occur within the executive branch of government, where rank is often so important." R. KENNEDY, *supra* note 215, at 46. *See also* W. SHAWCROSS, SIDESHOW: KISSINGER, NIXON AND THE DESTRUCTION OF CAMBODIA 81-84 (1979) (discussing how the Nixon administration's careful plan for cross-comment on executive proposals was often disregarded in practice).

218. *See* H. COMMAGER, *supra* note 6, at 134. For testimony of government officials in the *Pentagon Papers* trial, see DOCUMENTARY HISTORY, *supra* note 38, at 550 (testimony of Admiral Francis J. Blouin, Deputy Chief of Naval Operations for Plans and Policy); *id.* 557-59 (testimony of William Butts Macomber, Deputy Undersecretary of State for Administration); *id.* 576-77 (testimony of Dennis James Doolin, Deputy Assistant Secretary of Defense for International Security Affairs).

219. *Executive Privilege Hearings*, *supra* note 9, at 20. The nature of intelligence missions often seems to encourage inflated fears of danger to the government interest. After his service on the Church Committee reviewing intelligence aetivities, Senator Mondale remarked: "Tliey are doing things the way they feel it must be done to protect the Nation as they feel it must be pro-

Fear of domestic unrest, if well founded, is a legitimate ground for action. The Army's surveillance of political groups, however, may have actually resulted in part from the fear that certain vocal individuals or groups espoused political views contrary to the Army's long-range interests.[220] This fear—based on the Army's desire to protect its own political interests—is an illegitimate ground for government action and would never have withstood public and congressional scrutiny. But much secret executive activity, undertaken without statutory authority, seems to have occurred under President Nixon for a similar illicit reason: to protect the political interests of the executive. Such actions of the Nixon administration as maintaining warrantless wiretaps on political opponents,[221] breaking into the Watergate office, and collecting secret information about Daniel Ellsberg, Edward Kennedy, and other "enemies"[222] proceeded from fears for the administration's political survival.[223] To review such actions is to realize that an illicit motive can unbalance the executive's assessment of the strength of the government interests that must be weighed against the constitutional rights of individuals.[224]

In addition to leading the President to overvalue the government's interest, the role of executive places powerful pressures on the President that decrease the likelihood that he will accord sufficient weight to

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tected, from dangers as they perceive them, but what happens is that pretty soon they exaggerate the dangers . . . ." *Electronic Surveillance within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence*, 94th Cong., 2d Sess. 68 (1976) [hereinafter cited as *Electronic Surveillance Hearings*].

220. *See, e.g., Developments—National Security*, *supra* note 136, at 1130, 1271 n.156 (1972) ("Testimony at recent hearings conducted by Senator Ervin into Army involvement in domestic surveillance activities indicated that a military intelligence agent's assignment to infiltrate an organization whose purpose it was to coordinate young adult activities in Colorado Springs apparently had been based wholly on the suspicion that members of the group might influence servicemen against the Army in general and the Vietnam war in particular").

221. See text accompanying note 88 *supra*.

222. See text accompanying note 93 *supra* (discussing the break-in at the office of Ellsberg's psychiatrist). *See also* J. LUKAS, *supra* note 49, at 16-17 (discussing surveillance of Kennedy and related activities); *id.* 17-18 (discussing FBI investigation of reporter Daniel Schorr).

223. *See, e.g.*, R. NIXON, *supra* note 1, at 496 ("Sometimes I ordered a tail on a front-running Democrat; sometimes I urged that department and agency files be checked for any indications of suspicious or illegal activities involving prominent Democrats. I told my staff that we should come up with the kind of imaginative dirty tricks that our Democratic opponents used against us and others so effectively in previous campaigns").

224. Although action taken for illegitimate political reasons may constitute an independent first amendment violation, see note 203 *supra*, the possibility of such an illicit motive on the part of the executive should also be taken into account in assessing whether the executive, acting without statute, will reliably balance the legitimate governmental interest against other specific constitutional interests—such as fourth amendment interests—in a proper initial balancing of the respective interests. See text accompanying notes 232-35 *infra*.

the value of protecting individual liberties. The executive frequently acts as a manager, facing discrete problems that require prompt and effective solutions. Very often the major focus of his actions and thoughts is directed toward solving those immediate problems rather than considering underlying questions of principle.[225] One official, for example, commented as follows on the operation of the White House under Nixon's Chief of Staff, H.R. Haldeman:

> The White House existed in a state of permanent crisis. . . . Haldeman contributed to the constant state of emergency by his administrative style. He never said, "Get me this by next week"; it was always "Get me this by 3 P.M." Everything was important, every detail, and the result was a highly charged atmosphere, one that encouraged a siege mentality.[226]

Such an atmosphere is clearly not conducive to the reflective consideration of the risks to constitutional liberties posed by a course of action that the President may think is crucial to achieving an important goal.

Furthermore, recent history emphasizes that when the executive seeks to enforce the law or to gather intelligence—activities in which risks to individual liberty are almost always present—a single-minded concern for the perceived government interest has frequently encouraged disregard of the countervailing liberty interest. The remarks of William Sullivan, former Assistant Director for Domestic Intelligence of the Federal Bureau of Investigation, appear to apply to a wide range of executive activity in which serious risks to individual rights were often ignored. Reflecting on years of illegal counter-intelligence activities by the Bureau and other agencies, Sullivan remarked: "[N]ever once did I hear anybody, including myself, raise the question: 'Is this course of action which we have agreed upon lawful, is it legal, is it ethical or moral.' We never gave any thought to this line of reasoning, because we were just naturally pragmatic."[227] Regardless of how

225. "[U]sually, of course, since the executive branch consists of people who are actively engaged in doing something, they very rarely go to the question of assumptions." *Executive Privilege Hearings*, *supra* note 9, at 467 (testimony of George Reedy).

226. J. MAGRUDER, *supra* note 206, at 72.

227. CHURCH REPORT, *supra* note 88, bk. II, at 14. *See also id.* 141. In the same vein, an individual involved in the burglary of the office of Ellsberg's psychiatrist remarked: "I see now that the key is the effect that the term 'national security' had on my judgment. The very words served to block critical analysis." N.Y. Times, Jan. 25, 1974, at 16, col. 6 (city ed.), *quoted in* Note, *supra* note 101, at 990 n.59. For similar lack of concern about the legality of certain practices of the Central Intelligence Agency, see the remarks of James Angleton, former chief of counter-intelligence, in testimony before the Church Committee. *Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess., vol. 2, at 77 (1975). For many similar instances, *see* CHURCH REPORT, *supra* note 88, bk. II, at 140-41, 155-57. As the Church Committee put it, with respect to intelligence activities "[t]he question raised was usually not whether a particular program was legal or ethical, but whether it worked."

conscientious an executive official may be, the pressures to be "just naturally pragmatic" can be overwhelming. The institutional preoccupations and hierarchical structure of executive agencies concerned with law enforcement or intelligence tend to foster a state of mind in which "national security" concerns are routinely considered vital and considerations of individual liberty are correspondingly slighted.[228] These tendencies seem to be structural, rather than being confined to the ignorant or venal. As a Senate report stated, "Men entrusted with power, even those aware of its dangers, tend, particularly when pressured, to slight liberty."[229]

B. *Legislative Rulemaking and the Protection of Constitutional Rights.*

In light of these dangers to individual rights posed by executive action without statute, we return to the importance of the requirement of explicit lawmaking by Congress as a safeguard for individual rights. As noted above, such a requirement has been suggested by language in

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Id. 138. *See also* V. MARCHETTI & J. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 249-50 (1974).

228. Again the testimony of James Angleton exemplifies this frame of mind. In the Church Committee Hearings, Angleton testified as follows with respect to a Central Intelligence Agency program of covert openings of mail which Angleton supervised from 1955 until the program was discontinued in 1973:

> Senator MONDALE: All right. What was your understanding of the legality of the covert mail operation?
> Mr. ANGLETON: That it was illegal.
> . . . .
> Senator MONDALE: How do you rationalize conducting a program which you believe to be illegal?
> Mr. ANGLETON: . . . From the counterintelligence point of view, we believe that it was extremely important to know everything possible regarding contacts of American citizens with Communist countries.
> And second, that we believed that the security of the operation was such that the Soviets were unaware of such a program and therefore that many of the interests that the Soviets would have in the United States, subversive and otherwise, would be through the open mails, when their own adjudication was that the mails could not be violated.
> Senator MONDALE: So that a judgment was made, with which you concurred, that although covert mail opening was illegal, the good that flowed from it, in terms of the anticipating threats to this country through the use of this counterintelligence technique, made it worthwhile nevertheless.
> Mr. ANGLETON: That is correct.

Subsequently Mr. Angleton remarked, "I believe very much in a statement made by Director of the FBI, Mr. Kelley, that it is his firm view . . . that certain individual rights have to be sacrificed for the national security." *Hearings Before the Senate Select Comm.*, *supra* note 227, vol. 2, at 61-62 (1975). For a wealth of detail on this point, see CHURCH REPORT, *supra* note 88, bk. II, at 141-46.

For litigation arising from the mail-opening program, see Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (awarding damages under the Federal Tort Claims Act to victims of the program). For general commentary on Angleton and his role in the Central Intelligence Agency, see W. COLBY & P. FORBATH, *supra* note 32, at 334-35.

229. CHURCH REPORT, *supra* note 88, bk. II, at 291.

Supreme Court decisions, but the basis for this view has not been clearly explained.[230] One possible justification for such a requirement may be the importance of assuring that there is majority support for action possibly infringing individual rights.[231] But a more fundamental justification is that structural differences between Congress and the executive necessitate legislative authorization prior to executive action that might encroach on constitutional rights, in order to protect those rights. Such a view rests on the position that constitutional rights are likely to receive more careful and balanced protection when the executive must act pursuant to explicit congressional legislation than when the executive is permitted to act without such legislation.

The protection of constitutional rights depends on the manner in which a balance is struck or an accommodation is made between an asserted government interest and the aspect of constitutional liberty involved.[232] Although the Supreme Court bears the ultimate responsibility for striking this balance, the Court is generally not equipped to make the factual findings that may be required to probe the precise strength of the government's asserted interest. This difficulty is particularly marked when the Court must evaluate broad claims of paramount national interest, particularly claims that the national security interest justifies actions potentially infringing individual rights.[233] The problems in this area, however, are just a special instance of more general limitations of judicial inquiry. As Justice Brennan stated in *Ore-*

230. See notes 192-97 *supra* and accompanying text.

231. When the executive acts without congressional authorization, the branch that is most truly representative, according to traditional constitutional theory, has not indicated its assent. See text accompanying notes 165-71 *supra*. Assurance that proposed government action accords with the will of the majority is most needed, however, when that action potentially infringes individual constitutional rights. There is little justification for a measure that potentially infringes individual rights yet is not even likely to accord with majority will. Some commentators have even suggested that courts should review the process of congressional lawmaking to assure that potential constitutional problems have been fully considered and that the accommodation struck is in fact "the product of a deliberate and broadly based political judgment." Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977). *See also* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

232. Such an accommodation is made even when the applicable technique of constitutional interpretation marks out a category of protected activity, rather than balance the interests in each case. *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

233. In fact, the evaluation of national security decisions is uncongenial to the judicial process. Fact finding in secret, security clearances for lawyers, litigants, and perhaps even judges, and the breadth and diversity of possible inquiry, all make for nonjusticiability. Even if means can be jerrybuilt to produce a factual record, judges are in a poor position to evaluate it.

Nesson, *Aspects of the Executive's Power Over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps*, 49 IND. L.J. 399, 400 (1974) (footnotes omitted).

gon v. Mitchell,[234] "The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication."

When the Court strikes down goverument action as violating a specific guarantee, it determines that no plausible assessment of the government interest is sufficient to override the liberty interest at issue. When the Court upholds goverument action, however, it must as a practical matter rely to some extent on the government's assertion that its interest is strong enough to override an otherwise protected liberty interest.

Although in such cases the Court cannot on its own fully evaluate the strength of the government interest, it does not follow that the Court must accept an initial assessment of the competing interests from any government source.[235] Rather, to fulfill its role as guardian of individual rights, the Court should require the government and liberty interests to be initially balanced by the political branch most likely to be able to evaluate the competing interests without bias or prejudice. That branch is the Congress. The executive, as the special protector of the goverument interest, is ordinarily not an appropriate forum for the adequate initial balancing of goverument interests and individual rights.

Recent history emphasizes that there is substantial danger that the executive will exaggerate the strength of the government interest and diminish or disregard the value assigned to the liberty interest of the individual. The legislative process, in contrast, provides opportunities for more balanced assessment and protection of constitutional liberties.[236] Lawmaking in general form tends to insulate lawmakers from

234. 400 U.S. 112, 247-48 (1970) (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

235. *Cf.* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 19-93 (1969):

> ['Activist' decisions of the Warren Court in criminal procedure seem] wholly justified, not necessarily because every one of the [police] practices under review is evidently intrinsically wrong, but because due process of law ought to be held to require an active judgment by the legislative branch, rather than by the police chief, on how much of our personal liberty and security we must surrender in the interest of a practicable administration of the criminal law . . . .

Id. 90. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309-10 (1978) (Powell, J.) (arguing that the State Board of Regents is not equipped to make findings of past discrimination necessary to justify an affirmative action program that would otherwise violate equal protection), *with* Fullilove v. Klutznick, 100 S. Ct. 2758, 2785-87 (1980) (Powell, J., concurring) (unlike the Board of Regents in *Bakke*, Congress is authorized to make such findings); *cf.* Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1414 (1978) (arguing that legislation by plebiscite should in certain circumstances be unconstitutional, even though the same measure might be upheld if passed by a legislative body, because "[l]egislation by plebiscite is not and cannot be a deliberative process").

236. In this respect the events of recent history confirm a traditional tenet of American constitutional theory:

the grossest forms of momentary or ad hoc passion. The generality of legislative action is also conducive to consideration of policies and constitutional principles free from the distractions of the individual case[237] and with less likelihood of personal or institutional biases unduly favoring the government interest. The necessity of articulating a rule in general form and considering its applications encourages a focus on relevant principles, including constitutional principles.[238]

> In America, as in England, the conviction prevailed [in 1787] that the people must look to representative assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

Myers v. United States, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting). *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654-55 (1952) (Jackson, J., concurring) ("The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations").

237. See text accompanying notes 202-210 *supra*.

238. Many members of Congress have always believed it their duty to evaluate and to weigh government and liberty interests, whether or not the Supreme Court might find the legislation at issue constitutional. For suggested principles to be used by a legislator in considering the question of constitutionality, see Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). The constitutional questions considered in early Congresses are discussed in D. MORGAN, CONGRESS AND THE CONSTITUTION 45-70 (1966).

A particularly significant historical example of congressional balancing in the context of first amendment rights—an example of particular importance for the decision of the *Pentagon Papers* case—was the congressional consideration of the Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917) (current version at 18 U.S.C. § 793-799 (1976)), enacted when the United States entered the First World War. In considering the Act,

> Congress engaged in its most important and extensive debate on freedom of speech and the press since the Alien and Sedition Acts. The preoccupation was not academic. Congressmen feared that President Wilson or his subordinates would impede, or even suppress, informed criticism of his Administration's war effort and foreign policy under the guise of protecting military secrets.

Edgar & Schmidt, *supra* note 49, at 941. Congressional debates on the Act revealed substantial concern about the possible infringement of first amendment rights that can result from penalizing the disclosure or publication of defense information. This concern likely resulted from "solicitude for freedom of the press or political anxiety about the powers of a war-time President. . . ." *Id.* *See also* P. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 75-80 (1979).

In the Act, Congress excluded public dissemination of most forms of national-defense information during peace time from the definitions of criminal offenses under the statute. Edgar & Schmidt, *supra* note 49, at 943-44. Rejecting "a last-minute personal appeal by President Wilson," Congress also refused to enact a section that would have granted the President broad discretion to censor domestic publications in time of war. *Id.* 944. Again, this measure, thought crucial by President Wilson, was apparently defeated because Congress determined that the goals of military security advanced by censorship did not outweigh the interests of freedom of the press. *Id.* 959, 1013. Strong opposition by the press was an important factor in the result. *Id.* 1013.

Congress's performance in this era, however, was far from fully protective of liberty interests. For example, the 1917 Act contained provisions prohibiting willful obstruction of the recruiting service and attempts to cause insubordination in the military, and excluding certain matter from the mails. These provisions were applied to restrict certain forms of political speech. *See* Schenck v. United States, 249 U.S. 47 (1919). Furthermore, Congress subsequently enacted the Espionage

Unlike executive officers, members of Congress are not by their very position placed in the role of identifying with and defending the government interest as it confronts the individual. Legislators are thus more likely to be skeptical of the government's exaggeration of its own interest. If some members of Congress put forth exaggerated or idiosyncratic fears of damage to the government interest, those fears may be defused by the more level-headed views of others. In any event, the reasonableness of those fears must be tested in public debate,[239] where they are subject to criticism by the press and the electorate as well as by other members of Congress. Moreover, the very number of legislators is likely to check action taken for clearly illegitimate purposes. Hostility or personal pique directed at specific enemies, often a highly subjective phenomenon, is much more likely to be an attribute of individual action than of collegial action.[240] Truly illicit plans cannot easily be organized and maintained among large numbers of diverse personalities representing far-flung interests.[241]

Act of 1918, ch. 75, 40 Stat. 553 (repealed 1921), and other measures that imposed severe penalties on certain forms of dissident speech. *See generally* P. MURPHY, *supra*, at 79-86; Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 38-42 (1941).

239. In addition to floor debate, which is almost always public, recent procedural changes have opened almost all congressional committee meetings to the public. J. CHOPER, *supra* note 10, at 34-35.

240. Although in rare instances Congress has passed statutes that impose burdens on named individuals or groups, courts have ordinarily found such statutes unconstitutional as bills of attainder. *See* United States v. Brown, 381 U.S. 437 (1965) (statute prohibiting members of the Communist Party from becoming officers or employees of labor unions); United States v. Lovett, 328 U.S. 303 (1946) (statute denying compensation to three named government officials). *But see* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (upholding a statute requiring government custody of the executive papers and recordings of President Nixon).

241. *See* THE FEDERALIST No. 55 (J. Madison), at 262 (1837 ed.) (although the legislature should not be too large, "a certain number at least seems to be necessary to secure the benefits of free consultation and discussion; and to guard against too easy a combination for improper purposes . . .").

In the constitutional convention Madison made an analogous point with respect to the possibility of executive corruption:

> Besides the restraints of [the Legislators'] personal integrity & honor, the difficulty of acting in concert for purposes of corruptiou was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events . . . .

2 M. FARRAND, *supra* note 166, at 66.

Barriers that might ordinarily exist in the executive bureaucracy against questionable executive action may be significantly reduced by a President like Nixon, who made substantial efforts to make the bureaucracy responsive to political will and attempted to place the more permanent and decentralized executive departments under the authority of presidential assistants not subject to congressional confirmation. See note 7 *supra*. As Archibald Cox has remarked, "The power of presidential aides is like that of royal courtiers. They are responsive, and responsible, to only one man." Cox, *supra* note 5, at 127.

The legislature's deliberation also helps ensure the adequate assessment of constitutional liberties.[242] The decentralization and openness of legislative procedure provides numerous opportunities for public access, in committee hearings and otherwise, to the process of deliberation.[243] At the outset of the consideration of a particular measure, it may not be apparent that the measure exaggerates the government interest or contains dangerous implications for constitutional rights. The slowness of the legislative process, however, gives groups and their representatives a chance to study the legislation, point out the dangers, assemble public opinion, and educate the members of Congress. The importance of time for education of this sort is crucial. The opportunity for public education and careful analysis is often completely lacking with respect to executive action that may threaten the constitutional rights of individuals, for executive action is not subject to the inherent requirements of time-consuming deliberation.[244]

Finally, congressional procedure frequently allows a minority to obstruct congressional action that may oppress individuals. The minority's ability to do this must be considered in light of the role of the Bill of Rights, which largely protects individuals against the power of the majority.[245] When individual liberties are curtailed, that curtailment often occurs because the majority wants the oppressive action to be taken. In a government based on laws that are responsive to the wishes of the majority, the Bill of Rights is essential to protect the liberties of unpopular individuals against majority oppression. Although the President is elected by a national constituency and may not find it politically necessary to be particularly sensitive to the claims of small or unpopular minorities, an individual senator or representative may find it more important to respond to minority interests—either because

242. Deliberation is an attribute of congressional lawmaking that is acknowledged and fortified by specific constitutional protection. *See* U.S. CONST. art. I, § 6 (speech and debate clause). *See also* note 241 *supra* (quoting THE FEDERALIST No. 55 (J. Madison) on the importance of "free consultation and discussion" in Congress). In a different context one commentator has recently argued that there may be a "federal right to initial legislative decision-making by an appropriate deliberative entity." Sager, *supra* note 235, at 1415.

243. *See, e.g.*, B. ECKHARDT & C. BLACK, THE TIDES OF POWER 130-38 (1976); L. RIESELBACH, CONGRESSIONAL REFORM IN THE 70S at 24 (1977).

244. The decision to seek an injunction against publication of the Pentagon Papers was made in less than two days. *See* S. UNGAR, *supra* note 35, at 107-25. Even so, the Government argued that the courts should defer to the executive's determination that the danger posed by revelation of the documents justified imposition of a prior restraint. See text accompanying note 44 *supra*. *Cf.* Nesson, *supra* note 233, at 416 ("The Halperin [wiretap] . . . was requested, authorized, and installed all on the same day. Such speed was possible because no real justification had to be prepared") (footnote omitted).

245. For a recent exposition of this point, see Oakes, *supra* note 36, at 915-17.

the minorities are heavily represented in his constituency[246] or because popular support for civil liberties in the constituency is unusually strong.

In Congress, particularly in the Senate, a small group of members desiring to stop a particular measure often has power beyond its numbers, especially when majority sentiment for the measure is not overwhelming. This power may be exercised through the committee system, the seniority of certain members, and even through such ordinarily questionable devices as the filibuster.[247] These are techniques that thwart the majority's will, but they may be viewed as legitimate protective devices when used to defend constitutionally guaranteed liberties.[248] They permit the intensity of objection to bills potentially infringing liberty to be registered in a system that may not always be able through its electoral structure to reflect the intensity, in addition to the breadth of support for a particular view.[249]

Although Congress has at times neglected its responsibility to consider the implications of its legislation for constitutional liberty interests,[250] several recent debates about issues raised during the Nixon period illustrate Congress's inherent opportunity to assess carefully the government and liberty interests implicated in a piece of legislation. An important example is the continuing controversy over revision of the Federal Criminal Code. Early proposals for a revised code were introduced in Congress during the Nixon administration, and certain of these proposals raised issues closely related to some of the important constitutional problems of that era. In the *Pentagon Papers* case, as we have seen, the executive, in the absence of a statute, unsuccessfully claimed power to censor national-security information through judicial action.[251] Apparently in response to this and other failures to prevent

246. *See, e.g.*, Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 107-09 (discussing the impact of Spanish-speaking residents on New York Senators' support for a federal statute extending the franchise to certain Spanish-speaking citizens).

247. For a general discussion of these devices, see Choper, *supra* note 168, at 821-29. *See also* R. LONGAKER, THE PRESIDENCY AND INDIVIDUAL LIBERTIES 35-36 (1961); Sandalow, *supra* note 231, at 1192.

248. *Cf.* Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1131 (1977) (arguing that democracy should be primarily viewed as concerned with preserving liberty and only secondarily and derivatively viewed as embodying the concept of majority rule).

249. *Cf.* A. BICKEL, THE MORALITY OF CONSENT 103 (1975) (viewing civil disobedience as a legitimate device for registration of "intensity rather than numbers"). *But see* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 408 (1978) (discussing the ways in which the electoral system itself registers intensity).

250. *See, e.g.*, D. MORGAN, *supra* note 238, at 246-68 (describing the passage of the Communist Control Act of 1954 as occurring in an atmosphere of "alarm and partisan strife," *id.* 265).

251. New York Times Co. v. United States, 403 U.S. 713 (1971). See text accompanying notes 33-59 *supra*.

disclosure of classified material, the Nixon administration's proposed code contained restrictions on the flow of certain government information.[252] The administration's bill and a successor proposal included a provision resembling an "official secrets act," which would have made it a criminal offense for past or present government employees to disclose a broad range of classified information to persons "not authorized to receive it."[253] Thus, this provision would have created a mechanism to enforce the federal classification system, which lacks statutory enforcement authority except in narrow areas.[254] Furthermore, the proposed legislation expanded the definition of espionage so that the publication of the Pentagon Papers might have been classified as espionage punishable by imprisonment for thirty years.[255]

The Nixon administration and successor proposals evoked sustained protest. The slowness of congressional action allowed time for study of a document of hundreds of pages and enabled interested

252. The original Nixon administration bill was S. 1400, 93d Cong., 1st Sess. (1973). It was followed in the Ninety-fourth Congress by S. 1, 94th Cong., 1st Sess. (1975), which incorporated many portions of the earlier proposal. *See generally* Crystal, *The Proposed Federal Criminal Justice Reform Act of 1975: A Civil Liberties Critique*, 6 SETON HALL L. REV. 591, 592-94 (1975). *See also* Murphy, *Knowledge is Power: Foreign Policy and Information Interchange Among Congress, the Executive Branch, and the Public*, 49 TUL. L. REV. 505, 552-54 (1975).

253. S. 1, 94th Cong., 1st Sess. § 1124 (1975) (disclosing classified information). Specifically, section 1124 made it an offense for any person "being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant," to communicate "such information to a person who is not authorized to receive it." *Id.* S. 1 set forth a cumbersome bureaucratic procedure which, if followed, would have permitted a defendant to raise the defense that the material in question had been improperly classified; S. 1400, 93d Cong., 1st Sess. (1973), see note 252 *supra*, permitted no such defense. For analysis of this proposed section, see Crystal, *supra* note 252, at 607-13. *See also* Nesson, *A Step Toward an Autocratic State*, TRIAL, Sept.-Oct., 1973, at 27, 30 (discussing S. 1400); Comment, *Civil Liberties and National Security: A Delicate Balance*, 68 NW. U.L. REV. 922, 935-41 (1973) (discussing S. 1400).

254. For example, present law penalizes certain disclosures of classified information by a government employee to a foreign agent or member of a "Communist organization," 50 U.S.C. § 783(b) (1976), and certain disclosures of classified information relating to codes or code-breaking activity, 18 U.S.C. § 798 (1976). *See also* 5 U.S.C. § 552(b)(1)(A) (1976) (excluding "properly" classified information from disclosure under the Freedom of Information Act); 42 U.S.C. § 2271 (1976) ("Restricted Data" relating to atomic energy).

255. The proposed espionage provision would, among other things, have penalized a person who, "knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power . . . communicates such information to a foreign power . . . ." S. 1, 94th Cong., 1st Sess. § 1121(a) (1975). The proposal defined "communicate" in a manner designed to include newspaper publication: "to impart or transfer information, or otherwise to make information available by any means, to a person or to the general public." *Id.* § 111; *see* Crystal, *supra* note 252 at 602-05.

On the breadth of the administration's proposals, see generally Edgar & Schmidt, *supra* note 49, at 1083: "The consequence of S. 1400's enactment would be to prohibit virtually all public and private speech about national defense secrets, leaving to prosecutors and juries to choose victims among those who engage in reporting and criticism of our defense and foreign policies."

groups to detect and publicize the measures that potentially threatened constitutional liberties in this massive proposal. Ultimately, Congress rejected these proposals, largely because of fears that they might endanger liberty of the press.[256] After substantial reworking, the Senate passed a version of the criminal code revision during the 95th Congress, but the House did not vote on the measure.[257] Revised versions of the proposed code were again introduced in the 96th Congress and again failed.[258] The drafters of these more recent proposals have omitted the official-secrets provision and the expanded definition of espionage proposed by the Nixon administration. Whether or not the Nixon proposals would have been held unconstitutional by the Court, it is significant that they were omitted in Congress because of their threat to individual liberties, either because members of Congress doubted their constitutionality or because they were thought to be too hazardous to the liberty interest, even if constitutional.[259]

A second recent example of congressional balancing of the government and liberty interests, also related to problems of the Nixon period, is found in the progress of the bills that evolved into the Foreign Intelligence Surveillance Act of 1978.[260] After President Nixon's resignation, both the Ford and Carter administrations asserted that the executive was empowered to engage in electronic surveillance without judicial

256. *See, e.g.*, Mullen, *The Proposed Criminal Code and the Press*, 47 GEO. WASH. L. REV. 502, 505 (1979) ("[O]pposition by the press to the proposed espionage offenses was the principal reason for the failure of the Senate Committee on the Judiciary to consider the proposed Code in the Ninety-fourth Congress"); *id.* 522 ("Controversy over the Code's effect on the press was largely responsible for delaying action on the Code in the Ninety-fourth and Ninety-fifth Congresses").

257. S. 1437, 95th Cong., 2d Sess. (1978); *see* Mullen, *supra* note 256, at 502 n.3.

258. *See* Mullen, *supra* note 256, at 502 n.3. The Senate bill was S. 1722, 96th Cong., 1st Sess. (1979). The House bill was H.R. 6915, 96th Cong., 2d Sess. (1980).

259. Nevertheless, subsequent proposals for a federal criminal code retained other provisions that may endanger individual rights; consequently, vigorous debate over these proposals has continued. *See, e.g., Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. of the Judiciary*, 95th Cong., 1st & 2d Sess. 1190-1211 (1977-1978) (statement of representatives of the American Civil Liberties Union criticizing provisions of the proposed code). *See generally* Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, LAW & CONTEMP. PROB., Winter, 1977, at 1. Whether or not such provisions are ultimately enacted, they will have been subjected to the public scrutiny and evaluation that often characterizes legislative action but is frequently absent from executive attempts to make policy impinging on the constitutional rights of individuals.

260. Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811, 18 U.S.C. §§ 2511, 2518, 2519 (Supp. III 1979)). *See generally* Shapiro, *supra* note 88; Note, *Criminal Procedure—Foreign Intelligence Surveillance Act of 1978: A New Charter for Electronic Intelligence Gathering*, 58 N.C. L. REV. 171 (1979).

warrant or legislative authorization in foreign-intelligence cases.[261] In 1977 the Senate considered legislation to regulate this form of activity.[262] The Carter administration had collaborated in preparing the proposed Senate bill and strongly supported the measure.[263] Although the Senate bill required a judicial warrant for most foreign-intelligence wiretapping, controversy surrounded the minimal showing that would be demanded of the executive to obtain a warrant. The proposed legislation did not require that a judge find probable cause to believe that the surveillance would lead to information about a crime,[264] though such a finding is ordinarily required to obtain a warrant for electronic surveillance when national security is not at issue.[265]

Throughout committee hearings senators and others who feared dilution of fourth amendment rights criticized the proposed legislation for permitting the executive to undertake surveillance when no violation of law appeared likely.[266] Although Attorney General Griffin Bell and the Justice Department argued vigorously for this standard in the Senate bill,[267] they offered no persuasive justification for the absence of the usual "criminal standard."[268] In light of the administration's inability to explain the need for the less restrictive test, the Senate

261. See text accompanying notes 103-04 *supra*. *See also* Pear, *U.S. Officials Define Policy on Searches*, N.Y. Times, Nov. 9, 1980, § 1, at 34, col. 1 (the Carter administration reaffirms its authority to act without a warrant in foreign natioual-security cases).

262. S. 1566, 95th Cong., 1st Sess. §§ 2521-2525 (1977) (version of May 18, 1977), *reprinted in Foreign Intelligence Surveillance Act of 1977, Hearings on S. 1566 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 142-50 (1977) [hereinafter cited as *Hearings on S. 1566*]. For the history of earlier legislative proposals directed toward similar ends, see A. THEOHARIS, SPYING ON AMERICANS 117-19 (1978); Shapiro, *supra* note 88, at 120-24.

263. Shapiro, *supra* note 88, at 124; *see Hearings on S. 1566*, *supra* note 262, at 34-38, 42-46.

264. *See* S. 1566, 95th Cong., 1st Sess. §§ 2521(b)(2)(B)(iii), 2525(a)(3) (1977) (version of May 18, 1977), *reprinted in Hearings on S. 1566, supra* note 262, at 134, 146.

265. *See* 18 U.S.C. § 2518(3) (1976). *Cf.* Berger v. New York, 388 U.S. 41, 55 (1967) (fourth amendment probable cause ordinarily requires belief that "an offense has been or is being committed").

266. *Hearings on S. 1566*, *supra* note 262, at 21-24, 35-38, 42-43 (questioning of Attorney General Bell and FBI Director Kelley by Senators Kennedy and Abourezk); *id.* 61-62, 66 (questioning of CIA Director Turner and Secretary of Defense Brown by Senator Kennedy); *id.* 74-82 (statemeut of John Shattuck); *id.* 85-87, 89-91, 96-97, 99-100 (statement of Morton H. Halperin); *id.* 102-03 (statement of Esther Herst).

The absence of a "criminal standard" for surveillance had also been a focus of debate on a predecessor bill, S. 3197, 94th Cong., 2d Sess. (1976), in the Nmety-fourth Congress. *Electronic Surveillance Hearings*, *supra* note 219, at 52-70 (1976) (statement and testimony of Walter F. Mondale); *id.* 93-95 (questioning of Attorney General Levi by Senator Bayh); *id.* 118 (testimony of Robert F. Drinan); *id.* 129-31 (testimony of Aryeh Neier); *id.* 166, 172 (testimony of Herman Schwartz).

267. *Hearings on S. 1566*, *supra* note 262, at 34-38, 42-46. *See also id.* 8-10.

268. *See* Shapiro, *supra* note 88, at 150-65.

adopted an amended version of the bill requiring that for most foreign-intelligence surveillance of American citizens and resident aliens, the executive must show probable cause to believe that the target of the surveillance has committed or is about to commit a crime (or, in the case of certain intelligence-gathering activities, that those activities involve or may involve a criminal offense).[269] With respect to such "U.S. persons," this standard approaches the probable-cause standard applicable in ordinary criminal investigations.[270] The Senate provisions setting forth the more restrictive "criminal" standard were substantially included in the legislation as ultimately enacted.[271]

The history of this legislation exemplifies the predisposition of executive officers to favor the supposed national-security interest over individual rights and their tendency not to analyze carefully whether particular rules that might infringe the constitutional rights of individuals are necessary to accomplish the government's purpose. Similarly, the history presents an excellent example of congressional testing of the executive's national-security claims and the ultimate rejection of an important part of the executive's position as untenable. The result was quite probably a more objective weighing of the government and liberty interests and, in this case, movement toward the protection of fourth amendment values.[272] It is this type of careful testing by public legislative debate that should be required whenever the executive seeks to take action in an area that may involve the infringement of constitutional rights.[273]

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269. S. 1566, 95th Cong., 2d Sess. §§ 2521(b)(2)-(4), 2525(a)(3), 124 CONG. REC. S6014, S6016 (daily ed. Apr. 20, 1978).

270. *See* Note, *supra* note 260, at 180-81. No showing of a possible criminal violation is necessary, however, for electronic surveillance of certain foreign government groups, S. 1566, 95th Cong., 2d Sess. § 2521(b)(1), 124 CONG. REC. S6014 (daily ed. Apr. 20, 1978), or certain foreign persons acting on behalf of a foreign government, *id.* § 2521(b)(2)(A), 124 CONG. REC. S6014 (daily ed. Apr. 20, 1978). Fourth amendment and due process problems are thus raised by the treatment of certain foreign government groups and foreign persons in accordance with a less protective standard. *See generally* Shapiro, *supra* note 88, at 167-80 (1978). Additional issues are raised by the application of the less stringent standard to foreign or domestic entities that are "directed and controlled by a foreign government or governments." S. 1566, 95th Cong., 2d Sess. § 2521(b)(1)(F), 124 CONG. REC. S6014 (daily ed. Apr. 20, 1978).

271. *See* 50 U.S.C. §§ 1801(b)-(d), 1805(a)(3) (Supp. II 1978).

272. The statute as enacted also provides for various special problems. *See, e.g.*, 50 U.S.C. § 1805(e) (Supp. II 1978) (emergency orders); *id.* § 1805(f) (testing of equipment). Whether or not one agrees with the manner in which the balance is ultimately struck in each category, the statute reveals a careful attempt to adjust the of government and liberty interests.

But see Hentoff, *Secret Crimes, Secret Courts, and the Complicity of the ACLU*, Village Voice, Mar. 24, 1980, at 30-31 (arguing that the safeguards of the Foreign Intelligence Surveillance Act are inadequate).

273. Congress has limited other assertions of the government security interest advanced by the executive during the Nixon period. For example, Congress amended the Freedom of Information

V. THE REQUIREMENT OF EXPLICIT CONGRESSIONAL AUTHORIZATION

The above discussion leads to the conclusion that when executive action threatens constitutionally protected rights, the action should ordinarily be found unconstitutional on separation-of-powers grounds if not clearly and explicitly authorized by Congress. The Court should strike down executive action that may threaten individual rights when Congress has not explicitly authorized such action, even if with congressional authorization the Court might find the action constitutional.[274] This analysis would assure the protection of congressional balancing when individual rights are at stake.[275]

To a certain extent, the goal of protecting constitutional rights by requiring legislative authorization of executive action may be achieved through a stringent application of the "clear statement" doctrine. In criminal law this doctrine requires that ambiguous or vague statutes be construed narrowly to avoid applications that might infringe constitutional liberties. In administrative law the doctrine mandates that delegations of authority possibly infringing on constitutional rights be made in the clearest possible terms.[276] In either area the Court should not find that Congress has considered, and thus approved, a possible

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Act, 5 U.S.C. § 552 (1976), to limit the absolute exemption for classified information established by the Supreme Court in EPA v. Mink, 410 U.S. 73 (1973). *See generally* Clark, *supra* note 204. Also of interest is the response of Congress to section 509 of the proposed Federal Rules of Evidence. As proposed by the Supreme Court, the rule contained evidentiary privileges insulating the government from the disclosure of a "secret of state" or other "official information" in the course of litigation. FED. R. EVID. 509 (Sup. Ct. version), *reprinted in* 56 F.R.D. 183, 251-52 (1972). Pressure from the Justice Department, then under Richard Kleindienst, apparently played an important role in the broadening of the proposed government privilege for state secrets and in the insertion of the privilege for official information. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 509-4, 509-5 (1979). As President Nixon was contemporaneously asserting analogous claims of executive secrecy in investigations relating to the Watergate affair, the proposed government privileges were subjected to sharp attack in congressional hearings and elsewhere. *See* Berger, *supra* note 136, at 775-80. Ultimately, after intense debate, Congress deleted all of the provisions in the proposed Federal Rules creating specific privileges.

274. Professor Junger derives a similar proposition from the opinions in the *Pentagon Papers* and *Steel Seizure* cases: "The doctrine of the separation of powers denies the Executive the constitutional power to take action on his own authority if that action is one which would be of doubtful constitutionality had it been authorized by Congress." Junger, *supra* note 50, at 38 (emphasis omitted). His approach to the problem, however, and his justifications for the principle derived from those cases are quite different from the approach and underlying principles suggested here.

275. Although this view emphasizes the opportunities for protection of constitutional rights that are present in congressional deliberation, adoption of the position suggested here certainly does not imply that all action taken pursuant to explicit congressional authorization is constitutional. If the Court finds the executive action to be specifically authorized by statute, the Court must then proceed in the customary manner to subject to rigorous judicial scrutiny the congressional lawmaking that threatens to encroach upon constitutional rights.

276. See note 192 *supra* and accompanying text.

deprivation of constitutional liberties without specific statutory language so indicating. Without such an assurance it is not clear that the safeguards of the legislative process, described above, have been applied to the potential constitutional infringement at issue.[277] The "clear statement" doctrine, therefore, is properly viewed not simply as an aspect of the judicial policy of avoiding constitutional questions unless absolutely necessary, but primarily as an aspect of the protection of individual rights that is implicit in the requirement of congressional, rather than executive, lawmaking.[278]

In addition, the doctrine of inherent executive powers should ordinarily have no role when the executive seeks, in the absence of statute, to impose burdens on individuals that might infringe on their constitutional rights.[279] Thus in the *Pentagon Papers* case,[280] the Court should have discussed the first amendment issue only to show that granting an injunction posed possible constitutional problems. Once the possibility of a first amendment violation became clear, the Court should have denied the injunction because Congress had not specifically authorized a prior restraint of speech in such circumstances. In resolving the case on this ground, the Court need not decide whether an injunction would be constitutional if congressional authority were present.[281] Similarly, prior to the passage of the Foreign Intelligence Surveillance Act of

277. *Cf.* A. BICKEL, THE LEAST DANGEROUS BRANCH 181-82 (1962) ("Legislators are likely to be more acutely aware of just what they are being asked to do if the language of a bill clearly defines what is aimed at than if the language is relatively broad . . ."). Moreover, without a requirement of a clear congressional statement, the executive has too much opportunity to act arbitrarily. If the executive is permitted to interpret an ambiguous statute to cover the specific type of activity involved, he makes law for the particular case, and that executive action increases the danger that individuals will be penalized arbitrarily or on the basis of political or personal hostility. Consequently, if the executive acts under a vague statute in an atmosphere of political hostility, that action raises many of the issues presented by executive action without a statute, discussed in section IV(A)(2) above. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections"). See note 210 *supra*. *See also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

278. See note 232 *supra* and accompanying text.

279. It has been asserted that there is an area of possible concurrent power, in which the President might ordinarily act alone if Congress has not yet acted in an inconsistent manner. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The analysis presented here would deny the President the power to act in that area in a manner that might threaten constitutional rights without explicit congressional authorization.

The requirement of prior congressional authorization proposed here could not logically be applied, however, in the very narrow class of cases in which the President is empowered to act and Congress is constitutionally *barred* from acting. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637-38 (Jackson, J., concurring).

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

281. For a similar argument in the *Pentagon Papers* litigation, see DOCUMENTARY HISTORY, *supra* note 38, at 624-27 (argument of Alexander Bickel for the New York Times in district court).

1978,[282] the Court should have found foreign national-security wiretapping in the United States unconstitutional because it threatened fourth amendment—and in some instances first amendment—interests and lacked clear statutory authorization. Now that Congress has passed a statute authorizing and regulating foreign national security wiretapping,[283] it may become necessary for the Court to review wiretaps imposed in accordance with the statute to determine whether they comply with the fourth amendment. In the absence of such a statute, however, it should not have been necessary for a court to reach the underlying fourth amendment issue.[284]

Although some decisions of the Supreme Court are consistent with the foregoing analysis,[285] others deviate from this position. A line of recent Court decisions, for example, has upheld intrusive executive activity potentially infringing on fourth amendment interests, even though the measures in question were not clearly authorized by statute.[286] The analysis proposed here also casts serious doubt on the result in *Snepp v. United States*,[287] in which the Supreme Court imposed a constructive trust on the profits of a book published by a former Central Intelligence Agency (CIA) agent without the agency's permission. To illustrate the impact of the position urged here on contemporary doctrine, it is useful to conclude with a discussion of this decision.

The defendant in *Snepp* had participated in the American withdrawal from South Vietnam in 1975, and he subsequently published a

282. Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (Supp. III 1979)).

283. See text accompanying notes 260-71 *supra*.

284. Similarly, under the theory of this article, Army surveillance of the public political activity of individuals is unconstitutional because it threatens first and fourth amendment interests without explicit statutory authority. Under Laird v. Tatum, 408 U.S. 1 (1972), however, an individual who seeks to challenge such surveillance on constitutional grounds does not present a justiciable controversy in the federal courts. See text accompanying notes 126-31 *supra*. Because *Laird v. Tatum* does not clearly state that an article III "case or controversy" is lacking, however, Congress may have the power to grant standing to persons aggrieved by the collection of data relating to their public political speech. *See* Flast v. Cohen, 392 U.S. 83, 131-33 (1968) (Harlan, J., dissenting). For statutory limitations on political intelligence-gathering, enacted to curb abuses of the sort described in *Laird v. Tatum*, see Privacy Act of 1974, 5 U.S.C. § 552a(e)(7), (g) (1976).

285. See note 192 *supra* and accompanying text.

286. *See* Dalia v. United States, 441 U.S. 238 (1979) (covert entry to install an electronic eavesdropping device); United States v. New York Telephone Co., 434 U.S. 159 (1977) (an order that a third party cooperate in the installation of a pen register); United States v. Ramsey, 431 U.S. 606 (1977) (opening of international mail without a search warrant); *cf.* United States v. Euge, 444 U.S. 707 (1980) (compelled execution of handwriting exemplars). In his dissent in *Dalia*, Justice Stevens remarked that before deciding "serious constitutioual issues" the Court should require "unambiguous" congressional authorization. "Without a legislative mandate that is both explicit and specific, I would presume that this flagrant invasion of the citizen's privacy is prohibited." 441 U.S. at 279 (Stevens, J., dissenting).

287. 444 U.S. 507 (1980) (per curiam).

book expressing his view that many Vietnamese adherents of the agency had been unjustifiably abandoned in the withdrawal.[288] Although Snepp, like other agents, had signed a secrecy agreement requiring him to submit manuscripts based on information acquired while he was an agency employee to the agency for clearance before publication, Snepp failed to seek clearance.[289] The United States sued Snepp for damages and the imposition of a trust on profits, asserting that publication of the book without prior clearance violated the secrecy agreement and a fiduciary duty of employees, including government employees, to respect the confidences of their employers.[290]

As in the *Pentagon Papers* case, there were two constitutional issues. First, Snepp claimed a first amendment right to publish the book without prior clearance and argued that any waiver of this right in the secrecy agreement was invalid under the first amendment. As in the *Pentagon Papers* case, however, there was a second issue that was not primarily stressed yet might be considered more fundamental. Although the Government's action against Snepp potentially affected his first amendment rights, it was undertaken without explicit statutory authority. Congress has not explicitly authorized contracts indefinitely limiting the right of former CIA agents to publish material about their experiences in the agency; nor has Congress created an employee's fiduciary duty that might severely limit the exercise of first amendment rights. The National Security Act of 1947 obliges the Director of Central Intelligence to take measures to protect "intelligence sources and methods from unauthorized disclosure,"[291] but this statute, which could be read as directed to internal agency procedures, is far from an explicit

288. F. SNEPP, DECENT INTERVAL (1977).

289. Snepp apparently took active steps to conceal from the Central Intelligence Agency that publication of the volume was imminent. United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978), *aff'd in part & rev'd in part*, 595 F.2d 926 (4th Cir. 1979), *rev'd in part*, 444 U.S. 507 (1980) (per curiam) (reinstating district court's judgment). Publication without clearance by the agency was also alleged to violate a "termination secrecy agreement" Snepp signed when he resigned from the agency. *See* 595 F.2d at 930 n.2.

290. Because the book was actually in print before the agency knew that publication was imminent, the agency was unable to seek an injunction against the publication of the book, a course it had successfully pursued in an earlier instance. *See* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

After the Supreme Court decision in *Snepp*, the Government filed a similar action against John R. Stockwell, a former CIA agent who published a book describing the agency's actions in Angola without prior submission of the manuscript to the agency. *Third Ex-C.I.A. Agent Sued by U.S. for Profits*, N.Y. Times, Mar. 4, 1980, § A, at 13, col. 4. The government has also sought to recover profits of books published by Philip Agee, another former agent whose manuscripts were not submitted to the CIA for review. *Judge Rules that U.S. Can Continue Its Suit For Agee Book Profits*, N.Y. Times, Apr. 3, 1980, § B, at 9, col. 6.

291. 50 U.S.C. § 403(d)(3) (1976).

authorization of a comprehensive contract requiring all former agents to submit proposed publications to the agency with sanctions to be enforced in the federal courts. Nor, of course, does the statute specifically authorize such extraordinary contract remedies as a prior restraint of publication or an imposition of a constructive trust on profits resulting from publication.[292]

The lower courts largely skirted the first amendment and statutory issues and concentrated instead on narrower questions of contract and fiduciary law and the nature of the appropriate remedy.[293] Similarly, in holding for the Government, the Supreme Court rejected in a cursory footnote the arguments that enforcement of the contract violated the first amendment and that there was no statutory authority for the agreement.[294] Instead, the per curiam opinion found that Snepp had breached a fiduciary obligation to the agency, and concluded that a constructive trust should be imposed on all profits derived by Snepp from the publication. The Court also approved an injunction prohibiting Snepp from publishing other material about the agency without prior submission for review.[295]

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292. In contrast, in the Atomic Energy Act of 1946, 42 U.S.C. §§ 2277, 2280 (1976), Congress explicitly authorized an injunction against certain disclosures of information relating to atomic energy.

293. The district court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the secrecy agreement." United States v. Snepp, 456 F. Supp. at 179. The court accordingly imposed a constructive trust for the benefit of the government over all profits Snepp derived from the book. *Id.* at 182. The district court also ordered Snepp not to publish any further information about the CIA without prior approval of the agency if the information was obtained during the course of his employment. *Id.* at 182.

The court of appeals reversed the district court in part. United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), *rev'd in part*, 444 U.S. 507 (1980) (per curiam). The court held that Snepp's action, though a breach of contract, did not violate his fiduciary duty to the agency. Consequently, the imposition of a constructive trust was held to be improper. 595 F.2d at 935-36. The court found, however, that the government was entitled at least to nominal damages for breach of contract, and remanded the case to the district court for further proceedings to determine whether compensatory or punitive damages were appropriate. *Id.* at 936-38.

294. *See* 444 U.S. at 509 n.3. The somewhat fragmentary nature of the per curiam opinion might be explained by the fact that, in an extraordinary action, the Court granted the defendant's petition for certiorari and the government's cross petition and issued its judgment in the case without hearing oral argument or receiving full briefs on the issues involved. *See id.* at 524-25 (Stevens, J., dissenting).

295. In a dissenting opinion, Justice Stevens (joined by Justices Brennan and Marshall) argued that the Court's imposition of a constructive trust was "not supported by statute, by the contract, or by the common law." *Id.* at 517. The basis for his argument was that, as the Government conceded for the purposes of the litigation, Snepp had not published any classified information in his book. *Id.* at 517-23. Stevens also argued that because a secrecy agreement is a prior restraint on speech, "an especially heavy burden [is imposed] on the censor to justify the remedy it seeks." *Id.* at 526.

This result, which allows severe burdens on potential first amendment interests without explicit legislative authorization, violates the principles discussed above. To enforce the executive's secrecy agreement risks the restriction of first amendment interests through biased government balancing. The policy embodied in the secrecy agreement was apparently established by the CIA, an agency that represents the government in highly adversarial settings and that, as recent history shows, has routinely ignored liberty interests.[296] Consequently, there is an undue risk that when the CIA framed the agreement, it overvalued the government interest and gave insufficient weight to the first amendment interests of the agent and the public.[297] The first amendment interests might suggest, for example, that even if the agency must approve some manuscripts before publication, prohibition of publication should be limited to particularly dangerous types of classified information for specified periods after classification, or that the entire requirement of prepublication review should be limited to a defined period following the termination of the agent's employment.[298] Such interests might also suggest that manuscripts should be reviewed by an independent board rather than by the agency.[299] The point is not that the Constitution necessarily requires any of these particular, less intrusive solutions, but that when an executive agency whose own interests are implicated makes an accommodation between government interests and constitu-

296. See notes 227-28 *supra* and accompanying text.

297. For a discussion of CIA secrecy agreements and the public's first amendment interest in the receipt of information, see Comment, *National Security and the First Amendment: The CIA in the Marketplace of Ideas*, 14 HARV. C.R.-C.L. L. REV. 655, 682-85, 702-03 (1979). *See generally* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

The argument that the public has a strong first amendment interest in informed criticism of the agency and, more generally, in a broad range of information about what the agency is doing, is not always likely to receive very careful or sympathetic consideration within the agency itself. Similarly, that much information is routinely over-classified is not likely to be enthusiastically considered by an agency that may itself be responsible for substantial amounts of over-classification. *Cf.* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.) (an initial assertion of classified status for information that was ultimately acknowledged to be publishable), *cert. denied*, 421 U.S. 992 (1975); Nesson, *supra* note 233, at 402-06 (detailed analysis of the tendency toward overclassification).

298. The breadth of the CIA secrecy agreement may be contrasted, for example, with the careful balancing of interests by Congress that is evident in the Foreign Intelligence Surveillance Act of 1978, 18 U.S.C. §§ 2511, 2518, 2519, 50 U.S.C. §§ 1801-1811 (Supp. III 1979). In enacting this statute Congress attempted, with information and comment from numerous sources representing the government and liberty interests, to accommodate the respective weights of these interests in various circumstances. See notes 260-71 *supra* and accompanying text. For a recent attempt by the Justice Department to define the circumstances in which CIA secrecy agreements will be enforced, see Department of Justice Press Release, Attorney General's Guidelines for Litigation to Enforce Obligations to Submit Materials for Predissemination Review (December 12, 1980).

299. *See Independent Censor Is Opposed by C.I.A.*, N.Y. Times, Apr. 17, 1980, § A, at 18, col. 1.

tional rights, there is undue danger that the balance it strikes will be improperly distorted in favor of the governmental interest.[300] Moreover, agency promulgation of such a rule raises the danger of the influence of an illegitimate interest. The CIA may have sought to further not only the legitimate interest of preserving the confidentiality of intelligence information, but also the illegitimate desire to protect itself from a form of political attack that may be particularly powerful because its source is one of the agency's former employees.[301]

If a court were to rely on the agency's balancing of interests, it could not be sure that a fair initial assessment of the government and liberty interests had been presented to it. The agency can offer only a secretive and highly self-interested decision about what the government interest requires. In consequence, absent a clear legislative determination about contractual restrictions on publication for former CIA employees, a court should not reach the question of whether a particular contractual rule unduly infringes on first amendment rights. Rather, in accordance with the principles set forth above, a court should require an explicit congressional authorization of such a contract and deny enforcement of any such contract set down by the executive alone in the absence of specific legislation.[302]

300. The judiciary's lack of expertise or opportunity for full factual investigation, however, makes it unable to weigh these interests with the care and in the detail possible in legislative consideration. Although a court can recognize that the government interest in this area is important, it cannot fully evaluate how important certain types of secrecy are to the conduct of foreign affairs. The court is therefore likely either to strike down the regulation in accordance with some general constitutional rule or, as in *Snepp*, to uphold the regulation on the basis of the government's (here, the executive's) assertion of the strength of its own interest. Since determining the precise weight of the government's interest is crucial when government action is upheld against a plausible liberty claim, the initial determination should be made not by the executive branch in accordance with its own interest, but rather by Congress in the form of rules that are likely to reflect a more disinterested and careful weighing of the government interest against the liberty interest in specific categories. See text accompanying notes 230-73 *supra*.

301. Such an illegitimate interest might encourage an absolute rule of review and a flat rule prohibiting disclosure of all classified information, as opposed to a more narrowly drawn rule designed to protect against disclosure of only the most important types of classified information. Such an interest might also lead the agency to take an inflexible stand against review by an independent board rather than by the agency itself.

302. The recent case of Agee v. Vance, 483 F. Supp. 729 (D.D.C.), *aff'd sub nom.* Agee v. Muskie, 629 F.2d 80 (D.C. Cir.), *cert. granted*, 101 S. Ct. 69 (1980) (No. 80-83), raises issues similar to those discussed above. In 1975 Philip Agee, a former CIA agent, published a book describing CIA activities in Central and South America and disclosing the names of many alleged agents. P. AGEE, INSIDE THE COMPANY: CIA DIARY (1975). Later Agee co-authored similar books about the agency's activities in Europe and Africa. In 1979, after it was rumored that Agee had been invited to participate in an international tribunal relating to the Americans held hostage in Iran, the State Department withdrew Agee's passport. *Plea by Ex-C.I.A. Agent to Restore Passport is Denied*, N.Y. Times, Jan. 1, 1980, § A, at 6, col. 4. The State Department based its action on a regulation purporting to authorize denial of a passport to anyone whose "activities abroad

VI. CONCLUSION

It is appropriately the function of courts to ensure that the executive does not act in areas of potential constitutional concern without explicit legislative authority. In enforcing this doctrine the courts are not primarily vindicating an interest held by Congress in opposition to the executive. Nor is the doctrine primarily a judicial technique to avoid difficult or intrusive constitutional questions. Rather, in preventing the executive from threatening protected areas in the absence of explicit legislative rules, the Court is exercising its traditional function as protector of the specific constitutional rights of individuals. By requiring explicit legislation before the executive can take action that threatens individual liberty, the Court enforces a constitutional safeguard that is important in vindicating the interests protected by the Bill of Rights.

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are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." 22 C.F.R. §§ 51.70(b)(4), 51.71(a) (1980). This regulation, in turn, was said to be authorized by a statute stating that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . . ." 22 U.S.C. § 211a (Supp. II 1978). Because the statutory language does not explicitly authorize the regulation, the Secretary argued "that a long-standing historical practice involving passport denials based on national security and foreign policy interests exists, and that this historical practice, unquestioned by Congress, confirms the validity of the regulation." Agee v. Vance, 483 F. Supp. at 731.

Because the statute and the regulation were drawn in broad terms, there were no clear guidelines set forth in advance to channel the exercise of executive action. The withdrawal of Agee's passport, therefore, is an example of executive action directed against the arguably protected constitutional interests of a specific individual without any clear rule set down in advance. Consequently, because the relevant policy and its application in the specific case are made simultaneously, the case presents dangers of the overestimation of the governmental interest influenced by the presence of an offensive individual, and also the possible implementation of illicit desires to punish political views of the individual in question. *Cf.* Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980) (acknowledging, in a separate litigation, that a substantial issue is raised by Agee's allegation that the CIA secrecy agreement has been discriminatorily enforced against speech unfavorable to the agency). In contrast, a more neutral determination of general policy in the abstract is likely to be present in an explicit congressional rule. See note 277 *supra* and text accompanying notes 198-210 *supra*. Furthermore, the lack of clear legislative determination on this issue denies Agee an initial policy determination, by a body more likely to exercise disinterested judgment, on whether the withdrawal of a passport is a justifiable infringement on liberty in response to fears of injury to the national-security and foreign-policy interests asserted by the Secretary. Because the executive itself is the focus of Agee's attack, it is less likely to weigh the government and liberty interests in an even-handed manner. See text accompanying notes 203, 211-29 *supra*. The district court ordered the Secretary to restore Agee's passport, finding that the withdrawal was not authorized by statute. 483 F. Supp. at 731-32. The court of appeals affirmed this judgment. Agee v. Muskie, 629 F.2d 80 (D.C. Cir.), *cert. granted*, 101 S. Ct. 69 (1980) (No. 80-83).