

# SECRECY AND THE RIGHT TO KNOW

MORTON H. HALPERIN\*

DANIEL N. HOFFMAN†

## INTRODUCTION

The public's "right to know" has always been a basic tenet of American political theory. A healthy democracy requires public participation in the formulation and administration of government policy. Full information about policy proposals and debate over alternatives ensure popular consent. Public examination of ongoing programs ensures the government's accountability. Of course, in a country of any size, such tasks can best be performed in a representative forum. Thus Congress, acting in behalf of the public, should first direct, and then oversee executive administration.

More recently, however, a competing set of values seems to have received higher priority. Executive branch officials—especially in the national security agencies—have consistently sought to insulate their activities from public scrutiny. With the growing attention to, and presidential conduct of, diplomacy and defense policy, "national security" has become a broad cloak under which public policy is actually made in private. Full disclosure, it has been suggested, would jeopardize diplomatic, military, and covert intelligence gathering activities. Accordingly, secrecy has been maintained; efforts to illuminate the workings of the executive—whether undertaken by Congress, the press, or the public—have been resisted.

National security is, of course, a legitimate concern. It does not, however, provide the blanket justification for secrecy that is claimed by some members of the executive branch. Rather, it is but one of several considerations to be weighed against the traditional right of Congress and the public to be adequately informed.

The purpose of this paper is to begin weighing these considerations systematically. We begin with several premises: that reduced secrecy is vital to the healthy public debate of national policy; that Congress has, on the whole, an interest in making information public, just as the executive branch has an interest in keeping it secret; that both houses of Congress and their commit-

---

\* Director, Project on National Security and Civil Liberties, Center for National Security Studies, Washington, D.C.

† Assistant Professor of Political Science, University of Vermont.

tees, acting in behalf of the public, are entitled to the information that they consider necessary for the performance of their constitutional functions.

Thus Congress, we shall argue, must regularize its access to and right to release national security information. More than that, it must also restructure the executive branch's classification system. To this end, we shall propose a legislated classification system through which Congress mandates that certain kinds of information be made public and creates an effective monitoring role for the courts—both in ordering disclosure under the Freedom of Information Act<sup>1</sup> and in enforcing secrecy by criminal sanctions or injunctive restraints.

## I

### A LEGISLATED CLASSIFICATION SYSTEM

The classification system we propose has several novel elements, not least of which is that it would be established by legislation rather than by executive order.

Some may argue that the President can judge better than Congress how far reform should go. We believe that it is utterly unrealistic to expect the executive branch to initiate truly effective reform. History teaches that patriotism, idealism, and good character have never been sufficient to generate a sense of actual bureaucratic responsibility for the release of information. We believe the missing ingredient to be clear and specific legal norms.

We resisted this approach for some time, as we suspect many readers will, because we recognized that complex bureaucratic and political problems are not magically resolved by the establishment of rigid, formal rules. Yet, our analysis makes it clear that uncontrolled official discretion is central to the disease, and that curtailment of that discretion must be part of any cure. When the law sanctifies unbridled executive discretion, or when its standards are ambiguous and loosely drawn, officials will feel justified in interpreting the law in a manner that conforms to their own political or bureaucratic interests. If this is true for rules laid down by Congress or the judiciary, it is even more true for executive orders, such as the one which now authorizes the classification system.<sup>2</sup> This casual attitude has been abetted by the conduct of presidents themselves, who, from the beginning, have tended to indulge in impromptu, politically motivated disclosures of ostensibly sensitive information.<sup>3</sup>

In the past, reforms initiated by the executive branch have had little im-

---

1. 5 U.S.C. § 552 (1970), as amended by Pub. L. No. 93-502 §§ 1-3, 88 Stat. 1561 (1974).

2. Exec. Order No. 11652, 3 C.F.R. 339-50 (1974).

3. D. WISE, *POLITICS OF LYING* 117-18 (1973); M. HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 180 (1974).

pact; they are unlikely to have greater effect in the future. We believe, however, that most officials will obey a clear and explicit duty of disclosure, if sanctioned and supervised by the coordinate branches of government and supported by public opinion.

Even the limited benefits that might flow from purely internal, executive sponsored reforms do not appear to be in the offing. In fact, the Ford administration seemed essentially satisfied with the existing system, and, if anything, wanted to tighten its control over information by weakening the Freedom of Information Act<sup>4</sup> and broadening the espionage laws.<sup>5</sup> We realize that the current administration might bring a somewhat different perspective to the problem; but we believe that the presidential and bureaucratic interests in maintaining control over what is released are far stronger than any executive branch incentive to carry out fundamental changes.

Moreover, from a constitutional perspective, there is much merit in the idea of congressional involvement. In the aftermath of Vietnam, it has become clear that the diffusion of information about national security is vital to the constitutional system of checks and balances. This publicity function cannot safely be entrusted to the discretion of officials who operate from a narrow, bureaucratic perspective. The establishment of criteria and procedures regulating the classification of information is a proper legislative function, as we shall argue more fully in the next section. Congress has until now delegated that responsibility to the President; we think the time has come for Congress to reclaim it.

We have stated the case for the principle of a legislated system. It would be most unfortunate, however, if legislation should copy the biased and ambiguous criteria of the Executive Order on Classification.<sup>6</sup> Congress has wisely refrained from enacting proposals along these lines. But no alternative approach has yet gained general acceptance.

Our own proposal is based upon the principles of specificity and balance. In brief, it would assign information to one of three categories: (1) automatically released, (2) presumptively classified, and (3) requiring a balance. No information would be kept secret without an explicit consideration of its potential contribution to enlightened public debate. Moreover, decisions to keep information secret would be subject to independent scrutiny, both within the executive branch and by the courts.

---

4. Letter from Deputy Attorney General Harold R. Tyler, Jr., to Bella S. Abzug, Chairperson, Government Information and Individual Rights Subcommittee, House Committee on Government Operations, March 15, 1976.

5. Statement by President Gerald R. Ford upon establishing a new classification system for national security information (Exec. Order 11652), 8 WEEKLY COMP. OF PRES. DOC. 542 (March 8, 1972) (hereinafter cited as Ford statement accompanying Exec. Order No. 11652).

6. Exec. Order No. 11652, *supra* note 2.

We will defend this approach against some crucial objections in the next section; here we will describe its workings in greater detail. The principles behind our three broad categories of information can be succinctly stated:

1. **Automatically Released Information.** Information necessary to Congress' exercise of its constitutional powers to declare war, to raise armies, to regulate the armed forces, to ratify treaties, and to approve official appointments must be made available not only to Congress but to the public.<sup>7</sup>

Because we do not feel that this principle meets the criteria of specificity required for effective control, we propose the legislation of specific categories of information that should routinely be made public. Experience and common sense, we believe, provide reliable criteria for anticipating the kinds of decisions that fall into this category; and these criteria should be enacted into law. Specifically, we would include information relating to: (a) United States forces engaged in combat or in imminent prospect of combat; (b) United States forces abroad; (c) nuclear weapons abroad; (d) financing of foreign operations or foreign military forces; (e) commitments to do (a)-(d) or commencement of negotiations contemplating such commitments; (f) intelligence organizations: existence, budgets, and functions; (g) weapons systems: concepts and costs; and (h) actions in violation of law.

It is our judgment that Congress may confidently require this information to be released, without fear of serious injury to the national defense. Beyond any doubt, the constitutional imperative for making this information public outweighs any harm that might result.

2. **Presumptively Secret Information.** There are a few narrow categories of information—mostly technical—the disclosure of which does not appear useful for public policy debate, and which could be expected to give substantial assistance to potential adversaries. Such information is entitled to a heavy presumption of secrecy. Specifically, these categories include: (a) weapons systems: details of advanced system design and operational characteristics; (b) details of plans for military operations; (c) details of ongoing diplomatic negotiations; and (d) intelligence methods: codes, technology, and the identity of spies.

3. **Balancing.** Information not in these clear-cut categories should be made public unless a reasoned judgment is made that the probable costs to national security clearly outweigh the value of the information for public debate.

---

7. See also Brief for American Civil Liberties Union as Amicus Curiae, at 3-14, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Hearings on Government Information Policies and Practices Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 1st Sess. 818-56 (1971).

We are ready now for a more detailed look at the items in the first two categories.

### A. Automatically Released Information

#### 1. *Americans Engaged in Combat or in Imminent Prospect of Combat*

Congress' powers to declare war and to raise funds for the armed forces are of little practical significance if the President can order armed forces into combat without even informing Congress. As the Cambodian bombing incident illustrates, presidents have recently circumvented constitutional procedures by authorizing protracted secret combat operations. In response, Congress has already legislated a stricter requirement for public disclosure in the War Powers Act.<sup>8</sup>

We see little risk to national security from this requirement; certainly, an enemy or potential enemy will ordinarily be aware that United States forces are engaged in combat against them, or are in a combat zone. In any case, we believe that the implications of combat activity create a paramount public interest in disclosure.

The designation of military personnel as "advisors" would not avoid a well-drafted disclosure requirement, since the forces would be in imminent danger of coming under hostile fire. Nor should the President be permitted to conduct such operations in secret simply by using civilian employees of the United States Government or foreign mercenaries. The requirement for disclosure should apply whenever the United States is paying the salaries of those engaged in combat.

Only the fact of combat or introduction of forces would have to be made public. Details of combat plans and operations could be kept secret.<sup>9</sup>

#### 2. *American Forces Abroad*

Congress's power to declare war and the public's right to debate of war and peace can also be vitiated by the peacetime stationing of United States forces on the front line, where they will inevitably be drawn into combat if a war should start. Obviously, the arrival of our forces will not long remain secret in the area where they are stationed. The deployment and redeployment of United States troops overseas should be subject, in general terms, to congressional and public approval.

#### 3. *Nuclear Weapons Abroad*

The logic of a requirement to report that our forces are stationed in a particular country would not extend to a public listing of all their military

---

8. War Powers Act of 1973, 50 U.S.C. §§ 1541-1548 (Supp. IV 1974).

9. We shall not attempt to confront here the technical aspects of drafting legislation that avoids undesired loopholes.

equipment. We propose, however, that the President be required to report publicly the countries in which the United States stores nuclear weapons.

Nuclear weapons are qualitatively different from other explosives. Their use anywhere would injure humanity in profound and lasting ways. The presence of nuclear weapons in a particular country not only implies that they might be used in that country's defense; it also creates a risk of unauthorized use by the host government, or of seizure by domestic dissidents or invading forces.

At present, the executive branch admits publicly that it stores more than seven thousand nuclear weapons in Europe, but declines to identify publicly the European countries in which such weapons are stored.<sup>10</sup> In 1975, Secretary of Defense James Schlesinger stated that nuclear weapons were being stored in Korea.<sup>11</sup> Yet, the executive branch still refuses to indicate if nuclear weapons are stored elsewhere abroad. Senator Stuart Symington has, at congressional hearings, indicated that United States nuclear weapons are stored in Greece, Turkey, Korea, and other countries.<sup>12</sup>

Since the United States stores nuclear weapons in special facilities, their presence in a foreign country is seldom, if ever, a secret from Soviet satellite reconnaissance. Secrecy on this question seems designed to avoid public debate in the host countries as well as in the United States—a rationale reminiscent of the bombing of Cambodia. Such motives as these are simply not sufficient to offset the need for congressional and public debate on the issues presented by the stationing of nuclear weapons abroad.

#### 4. *Financing of Foreign Combat Operations or Foreign Military Forces*

The United States transfers military equipment to foreign governments in a variety of ways, including the military assistance program<sup>13</sup> (which can also include transfers of funds to finance combat operations) and foreign military sales programs.<sup>14</sup>

Congress now requires the President to make public the budget figures for intended military assistance grants to particular countries. More recently, Congress, in the Nelson Amendment, has demanded that it receive advance notice of all proposed sales of military equipment.<sup>15</sup> Yet, the executive branch has met this requirement by providing some of the data, including descrip-

---

10. Baltimore Sun, June 15, 1976, at 2.

11. New York Times, June 26, 1975, at 4.

12. *Hearings on Proliferation of Nuclear Weapons Before the Subcomm. on Military Applications of the Joint Comm. on Atomic Energy*, 93d Cong., 2d Sess. 14, 17, 24 (1974).

13. 22 U.S.C. §§ 2301-2321, 2351-2412 (1970), *as amended*, 22 U.S.C. §§ 2303-2443 (Supp. IV 1974).

14. *Id.* §§ 2301-2302, 2344-2412.

15. The Nelson Amendment was the third amendment of S. 1443 of the Foreign Assistance Act of 1973. See SENATE COMM. ON FOREIGN RELATIONS, LEGISLATIVE HISTORY OF THE SENATE COMM. ON FOREIGN RELATIONS, S. REP. NO. 37, 94th Cong., 1st Sess. 29 (1975).

tions of the equipment, in secret.<sup>16</sup> Military assistance can be a prelude to the use of United States forces. For this reason alone, a requirement of public disclosure seems appropriate. Moreover, it is difficult to see how such disclosure would harm national security. The ability of recipient governments to keep the secret is often quite limited and potential enemies are likely to be well aware of United States involvement. Indeed, for prestige or deterrence purposes the recipient nation often deliberately makes public its military gifts from the United States.

The provision of covert assistance to insurgent or irregular forces is a distinct problem, insofar as such programs could not ordinarily be conducted in the open. The debate over these activities is not, properly speaking, about their secrecy, but about the value of engaging in them at all.

5. *Commitments to Do Any of the Above; Commencement of Negotiations  
Contemplating Such Commitments*

The Constitution appears to require that all international commitments be ratified by the Senate. In the modern era, presidents have increasingly made use of executive agreements to circumvent the formalities of treaty ratification. While this procedure may be appropriate in some cases, it would not appear to be so in the case of commitments which could lead to combat activity or other equally grave consequences.

For presidents, such informal commitments have considerable appeal—when the time comes to honor them, Congress may feel bound to stand behind the President's pledge; if not, the United States is not legally liable, and any charges of bad faith are likely to be leveled at Congress, not at the President. But this technique also has certain drawbacks. These were underlined by the controversy over aid to South Vietnam in the spring of 1975. The South Vietnamese plea for military assistance to avert the fall of Saigon was bolstered by disclosures that, in conjunction with the agreement signed at the Paris talks in 1972, President Nixon had promised President Thieu that the United States would respond "with full force" to violations by Hanoi of a ceasefire. The Ford administration was legally and politically in no position to send troops or resume bombing in Vietnam, and did not ask Congress for authority to do so. While pointing to congressional resistance in explanation of his apparent failure to honor the commitment, the President urged Congress to keep faith with Saigon by approving a request for massive weapons assistance. When Congress refused, questions were raised about the value of solemn guarantees from a President of the United States. A timely coordina-

---

16. A provision of the Foreign Military Assistance Act of 1976, as originally passed by Congress, would have tightened this requirement so as to call for public notice in all cases. See SENATE FOREIGN RELATIONS COMM., INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1976-77, S. REP. NO. 876, 94th Cong., 2d Sess. (1976).

tion with Congress concerning the existence and interpretation of this commitment would have mitigated the severe embarrassment occasioned by the episode.

Congress in 1972 required that it be informed of all executive agreements. Unfortunately, the existing legislation<sup>17</sup> permits agreements to be kept secret from the public whenever the executive so prescribes. We believe that the arguments for public debate on actual combat activity apply with equal force at the time of commitments to engage in combat; the same reasoning applies to commitments to engage in other conduct covered by our mandatory disclosure categories. The President and Congress should not keep agreements secret if they could not properly carry them out in secret. A treaty is law, and as such it may vitally affect the legal rights and duties of private citizens. Before any commitment can have this legal effect it must, like the laws passed in Congress, be duly published. The propriety of doing so at the last moment may be compared to a hypothetical procedure by which criminal laws would be secretly made and revealed to the unsuspecting citizen only at the moment of his arrest. If public debate is to be meaningful, it must be timely.

As soon as the United States enters into diplomatic negotiations which could lead to a combat commitment, to the stationing of troops abroad, to a commitment to supply military aid, or to a cessation of hostilities, the fact of the negotiations should be made public. Should the negotiations end in failure, that too should be made public.

Indeed, the general tenor of the United States negotiating position could often be safely made public as well, but we are not prepared to recommend that this be required in all cases.

#### 6. *Intelligence Organizations: Existence, Budgets, and Functions*

Secret operations are an anathema to a democracy. They should be permitted, if at all, only in the most extenuating circumstances. Yet the United States now has intelligence organizations whose very existence is kept secret (National Reconnaissance Office (NRO)), whose budget is not made public (Central Intelligence Agency (CIA)), and whose full range of functions is not known (NRO, CIA, and National Security Agency).

Our proposal would require that this information be made public, to permit Congress and the public to decide whether the organizations should exist, what functions they should perform, and how much they should spend.

The Constitution seems to require that budgets be made public: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."<sup>18</sup> The

---

17. 1 U.S.C. § 112b (Supp. III. 1973).

18. U.S. CONST. art. I, § 9.



national security does not appear to require that the overall budgets of these agencies be kept secret. CIA director William Colby has conceded, for example, that making public the overall CIA budget would not injure national security, although he opposed release of the figure on the grounds that it would generate pressure to release additional data.<sup>19</sup>

Congress authorized the creation of the CIA and defined its functions in very general terms. It is clear that Congress believed it was creating an intelligence evaluation organization, and not an agency which would conduct covert operations abroad or intelligence operations in the United States.<sup>20</sup> These latter functions are purportedly authorized by secret directives occasionally issued by the executive. The National Security Agency was created by a secret presidential directive; it is not known by what means the National Reconnaissance Office was created.

There does not appear to be any justification for creating organizations in secret or keeping their functions secret. The Constitution requires congressional authority for the creation of executive agencies, and congressional oversight of their conduct. The willingness of Congress to delegate these functions to the President has, until recently, vitiated those responsibilities. In 1975 the CIA admitted to carrying out covert operations abroad, and CIA Director William Colby detailed the agency's domestic activities. These disclosures have permitted an unprecedented and welcome public debate, without visible harm to national security. Similarly, it is well known that the NRO conducts satellite reconnaissance and that the NSA monitors electronic signals and attempts to break codes. No harm would result from admitting this publicly.

#### 7. *Weapons Systems—Concepts and Costs*

Once a weapons system has been developed and is ready for production, it may be too late to decide not to deploy it. Often, billions of dollars have already been spent, and enormous bureaucratic and industrial momentum has been built up behind the program. Effective congressional and public control requires timely discussion of proposed new programs.

For example, the fact that the United States was developing MIRVs (multiple warheads) for its strategic missiles was kept secret for many years, precluding public debate on what many consider to be an undesirable escalation of the arms race. By the time the program was made public in 1967, it was too late for opponents to build the public constituency necessary to stop its development.

---

19. *Hearings on the Nomination of William E. Colby Before the Senate Comm. on Armed Services*, 93d Cong., 1st Sess. 181 (1973).

20. See CONGRESSIONAL RESEARCH SERVICE, *LEGISLATIVE HISTORY OF THE CENTRAL INTELLIGENCE AGENCY AS DOCUMENTED IN PUBLISHED CONGRESSIONAL SOURCES* (G. Williams ed. 1975).

Public disclosure would involve only the general outline of the proposed development and the estimated cost of the system, and not its technical detail. Such limited disclosure might involve some cost in alerting a potential enemy to an interesting weapons system,<sup>21</sup> but these uncertain costs are far outweighed by the clear gains of permitting public debate on such large expenditures of public funds.

#### 8. *Actions in Violation of Law*

It is, of course, unrealistic to ask the President to supply Congress with a list of the illegal actions he is undertaking. However, it would not be inappropriate to place an obligation upon an official of the executive branch who learns of unlawful activities to make the information public. For example, under an amendment to the Foreign Assistance Act passed in 1974, Congress prohibited the conduct of covert operations in foreign countries "other than those intended solely for obtaining intelligence," unless the President approved the operation and reported the fact of such operations to the appropriate committees of the Congress.<sup>22</sup> An official learning of a covert operation designed for a purpose other than intelligence, or which had not been approved by the President or reported to Congress, would be obliged to make the information public.

These listed categories represent an attempt to specify with some economy the most critical types of information needed by Congress and the public to participate intelligently in vital decisions on foreign policy and national defense. Upon examination, it is clear that the release of these kinds of information would not have any serious detrimental impact on the national security. It is rarely possible—or even advantageous—to conceal such information from potential enemies. In the past, the secrecy system has largely operated with reference to domestic audiences. Any adverse effects of increased disclosure to foreign governments will be far outweighed by the value of having this information available to Congress and the public.

#### B. Presumptively Secret Information

In addition to legislating categories for mandatory disclosure, Congress should designate certain kinds of information as presumptively secret, because they are not, in general, important to the public and the Congress, while their release could have detrimental effects on national security. In any particular case the presumption of secrecy might be overcome by a showing that there

---

21. This is a subject of considerable debate in the scientific community. See, e.g., the Seitz Report of the Defense Science Board Task Force on Secrecy, July 1970, in *Hearings on H.R. 12004 Before the Subcomm. of the House Government Operations Comm.*, 93d Cong., 2d Sess. 623-42 (1975).

22. 22 U.S.C. § 2442 (Supp. IV 1974).

was a strong need for the information for public debate on a major issue.

Categories of sensitive information which should be presumptively secret because of their limited use to the Congress and the public include the following four.<sup>23</sup>

1. *Weapons Systems: Details of Advanced Weapons Systems Design and Operational Characteristics*

One category of such information is already required to be kept secret by the Atomic Energy Act.<sup>24</sup> That Act specifies that information useful in the manufacture of atomic weapons and other atomic explosive devices should be classified as restricted data.

Technical characteristics of many non-nuclear weapons systems are quite sensibly kept secret. Secrecy makes it harder for other countries to manufacture these weapons, to counteract them, or to exploit their vulnerabilities. Such secrecy need not interfere with the necessary public debate on appropriations measures, provided that enough information is disclosed to establish the cost and the benefits of the system.<sup>25</sup> Likewise, secrecy need not and should not interfere with appropriate public participation in the effort to institute arms control agreements. Like other strategic issues, arms control proposals involve a complex mixture of technical and political questions. While official experts inevitably play a leading role, their progress should not be entirely insulated from public evaluation.

2. *Details of Plans for Military Operations*

Our scheme would require the United States to reveal that it was engaging in, or about to engage in, military operations against another country. But the public and Congress need not know the precise operational details in order to debate the wisdom of planned or current operations. Such information could be of great value to a potential opponent.

3. *Ongoing Diplomatic Negotiations*

Diplomatic negotiations cannot, in many cases, be carried on successfully if one or both countries continually make public the negotiating positions of both sides. Public negotiations very quickly turn into propaganda sessions; the real negotiations, if they survive, occur quietly behind the facade of the for-

---

23. This list draws from two sources: the ACLU brief in the Pentagon Papers civil suit, *supra* note 7, and the Seitz Report, *supra* note 20. That committee reached the conclusion that a policy of no secrecy would be most desirable; but since that was not politically feasible, they recommended that secrecy be limited to a few categories.

24. 42 U.S.C. §§ 2161-2166 (1970).

25. There is a contrary argument made by the Seitz panel, to the effect that keeping such information secret hinders American research even more than it handicaps potential adversaries.

mal ones, as in the 1968-1972 Vietnam peace negotiations in Paris. On the other hand, the Pentagon Papers episode demonstrates that there is a strong public interest in scrutinizing the competence and sincerity of the negotiating performance of United States officials. While the beginning of negotiations should be announced, the positions put forward in the negotiations may properly be kept secret while the negotiations are under way. The door should be left open, however, for subsequent public evaluation of the transaction.

#### 4. *Intelligence Methods: Codes, Technology, and Spies*

The details of government information gathering should be kept secret. That the United States manufactures codes for use in its diplomatic and military operations is, of course, no secret. The United States government officially denies its interception of messages and its attempts to break codes. This "secret" would be a casualty of our scheme, in that the functions of the National Security Agency would have to be made public. There is, however, no reason why the details of the manufacture of codes, the procedures used to break codes, or the fact that any particular code has been broken should be made public.

We have discussed the need for such disclosures about intelligence gathering organizations as will enable the expenditure of public funds to be evaluated and controlled. There is no need for the public or Congress to know the precise operational details of such programs as satellite reconnaissance or the interception of foreign governmental communications. The latter information is presently protected by statute against unauthorized disclosure.<sup>26</sup>

The identity of individual spies and other information tending to compromise ongoing lawful operations would, of course, be appropriate matter for secrecy as well.<sup>27</sup>

---

26. 18 U.S.C. §§ 798, 952 (1970).

27. A congressional committee has recently made a persuasive case against a rule of absolute, unqualified secrecy even for such kinds of information as these. The White House at one point in September 1975 declared it would withhold from the House Intelligence Committee any information falling in several categories, including: "The identities of secret agents, sources and persons and organizations involved in operations which, if disclosed would be subject to personal physical danger, or to extreme harassment, or to economic or other reprisals"; and "[s]pecific details of sensitive intelligence methods and techniques of collection." A committee spokesman noted that these stipulations would materially frustrate pending investigations of CIA proprietary companies and NSA eavesdropping on United States citizens. Moreover, he cited instances in which the House had successfully demanded the names of secret information sources, in order to evaluate the credibility of reports that the CIA had failed to follow up. The committee therefore did not accept the President's guidelines. Instead, the Committee acknowledged a generalized right of the President to withhold extremely sensitive information from Congress, but only if he could defend each specific deletion and only subject to judicial review. *See* Washington Post, Sept. 30, 1975, at 6, col. 1, § A; *id.* Oct. 1, 1975, at 1, col. 5, § A.

### C. The Middle Category—Balancing

This effort to specify which types of information must be released and which should be kept secret does not pretend to cover the field of national security information. Much information will fall, and properly so, into a middle category requiring case-by-case judgment.<sup>28</sup> In such cases, a classifying official would initially attempt to balance the value of disclosure to the public against the possible harm to the defense or foreign policy of the United States. Such balancing should proceed on the principle that release is required unless a reasoned judgment can be made that the probable costs to national security clearly outweigh the value of the information for public debate.

Having laid down criteria for determining what information should be made public, we postpone our defense of the mandatory disclosure concept until the next section. Here, we turn to the task of designing a legislated system which would effectively implement the suggested criteria. The most difficult problem is to encourage a responsible exercise of the official discretion applicable to the middle category of information.

### D. New Procedures for Classification

Under our proposal, the President would be obliged to publish at stated intervals a report containing all current information in the categories of required public release. He would be required to notify Congress publicly as soon as any change concerning that information occurred.

The classification process would begin with a careful review of any new document by the responsible official. Any information bearing on national security would first be so identified. Then it would be determined whether the information fell into a specific statutory category for automatic release or presumptive secrecy. If not, the information would be marked for release, unless the official concluded that release could result in costs to national security that, even discounted by their improbability, clearly outweigh the value of the information for public debate.

This three-step determination might be reflected in a corresponding three-part designator for each item of national security information. The second subhead would identify the relevant statutory category, if any; the third would indicate the appropriate disposition. Typical examples might be:

- National Security Information/Combat Activity/Release;
- National Security Information/Weapons Design/Withhold; and
- National Security Information/None/Release.

---

28. Some documents may contain matter that is properly kept secret for reasons of "privilege" unrelated specifically to their national security content; for example, advice to a superior, or information about an individual's private life. Yet, information covered by our mandatory disclosure categories would still have to be released, even if included in a document containing other information that is privileged.

For the purpose of determining whether information is to be made public, only this system of designation would be used. The President would be permitted to establish or maintain additional designations to control distribution and storage of information that is properly withheld from the public under the above criteria. The names and meanings of all special designators, however, would be made public.

New legislation should reinforce the Nixon Executive Order's attempt to limit the agencies and the number of individuals who can classify information. It should require a classifier personally to sign the order which classifies the information, and to specify clearly which specific pieces of information in each document fit which categories. Where a document has merely copied a sentence or piece of information that had previously been classified, the new document must specify the original document, identify the original classifier as well as the derivative classifier, and indicate clearly which information is derivatively classified.

Congress should provide for administrative sanctions for willful failure to follow these procedures. Even more essential, it should provide that no criminal or administrative sanctions may be imposed on anyone who publicly releases, receives, or possesses information that was improperly withheld from the public.

Our proposal would also provide for the routine release of all information three years after classification, unless the head of the agency concerned specifically determines that the information merits reclassification. The decision in that event, however, would be left to an independent classification review board.

#### E. A Classification Review Board

Congress should create an independent Classification Review Board to assist it in overseeing the administration of a legislated classification system. The agency might be headed by a board of seven members, nominated by the President and subject to Senate confirmation. They should be appointed for extended, staggered terms. A number of different functions would be assigned to this board, in pursuance of which it would have unqualified access, by subpoena if necessary, to all national security information.

The board would be notified automatically of all classification decisions and would be responsible for maintaining an unclassified index of all withheld information. Provisions for such an index are found in the implementing directives under the current Executive Order, but the task has not been accomplished. Since the criteria and procedures outlined here would lead to a substantial reduction in the amount of information withheld, indexing would become substantially easier to carry out.

The Classification Review Board would be responsible for the release of

information more than three years old. The head of the classifying agency would be able to apply to the Review Board for extension of the period of secrecy. If the classifying agency head personally certified that certain information must be kept secret in the interest of national defense or foreign policy, admittedly the Review Board would be likely to concur. Still, the procedure provides some further protection against bureaucratic abuse.

The Board should also be empowered to seek release of information less than three years old. Whether acting on its own initiative, on the request of a member of Congress, or on the appeal of a citizen pursuant to the Freedom of Information Act,<sup>29</sup> the Board would first request reclassification by the classifying agency and would then make its own review of the agency's disposition. In cases under the Freedom of Information Act, the Board's decision would of course be subject to judicial review. Congress might wish to provide for judicial review of Board decisions in other instances as well.<sup>30</sup>

Another function of the Classification Review Board would be to delete properly classified information from documents, particularly studies produced by the intelligence community, and their public release. The Central Intelligence Agency, the Bureau of Intelligence and Research in the State Department, and, to a lesser extent, the intelligence agencies in the Department of Defense produce many analyses of world events which would be of great value to Congress and the public. These documents are often classified merely because they contain a relatively small amount of information obtained from clandestine sources. In many cases, an unclassified version of these documents could be produced with a very small amount of effort. At the present time, there is no staff with either the responsibility or the resources to perform this function. The Classification Review Board, in cooperation with the intelligence community, could render a valuable service in this connection.

The Interagency Classification Review Committee established by President Nixon's Executive Order has had little impact, because it performs in a largely passive manner and without high visibility. Moreover, its caseload has been modest and its attitude relatively accepting of the bureaucratic fetish for secrecy. We expect that a more independent agency with more initiative and responsibility would have substantially greater effect.

## II

### THE ROLE OF THE COURTS

We turn now to a consideration of the role which Congress should assign to the courts in the new system. We discuss first the Freedom of Information Act, then espionage and prior restraint.

---

29. 5 U.S.C. § 552 (1970), *as amended*, Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 93-579, 88 Stat. 1897 (1974).

30. Below we consider the role in our system of the Freedom of Information Act.

A. The Freedom of Information Act<sup>31</sup>

Under our proposal, the executive branch would be routinely required to make public certain categories of information. It would be permitted to keep other information secret only after balancing the public's right to know against any damage expected to flow from disclosure. Bureaucratic performance under these guidelines would be greatly facilitated by conditions of high visibility. In addition to the independent review board that we have proposed, a most effective mechanism would be one encouraging the press and the public to take the initiative in requesting particular information, forcing a timely review of the need for secrecy, first by the classifying agency and ultimately by the courts.

This mechanism is, of course, already established in the Freedom of Information Act (FOIA). Yet, a number of changes in the Freedom of Information Act would flow naturally from adoption of the sort of classification system that we propose. The FOIA would have to be amended so that the (b)(1) exemption for national security information referred to classification criteria that was established by legislation rather than by executive order.<sup>32</sup> Legislation would also be needed to clarify the role of the proposed Classification Review Board in processing FOIA requests. One possibility would provide for an appeal to the Review Board prior to judicial review, when the agency refuses to release a requested document. A more expeditious approach would involve the Board directly in judicial proceedings under the Act. The courts might wish to call upon the Board from time to time for various sorts of assistance, such as the location of documents or the provision of expert testimony. However, it would be counterproductive to compromise the Board's independence by placing it in the position of representing the interests of the executive branch in litigation. Even more unfortunate would be the erosion of judicial independence that might result from excessive reliance on the advice of the Review Board. Thus any provision for Review Board participation in judicial proceedings must be drafted with great care.

The most far-reaching consequence of the new classification system for FOIA litigation would involve no special amendments to the Act itself. It would flow directly from enactment of the new classification criteria. The court's first task would now be to determine whether the requested information fell into a required disclosure category. If it did, the inquiry would end there. Otherwise, the court would balance the respective public interests in secrecy and disclosure—rather than simply evaluating, as under the present system, the degree of harm that might flow from disclosure.

---

31. 5 U.S.C. § 552 (1970), *as amended*, Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 93-579, 88 Stat. 1897 (1974).

32. In that event the (b)(3) exemption relating to information authorized by legislation to be kept secret would be redundant as far as national security information is concerned.



We would argue that this new balancing task, far from presenting insuperable difficulties, will often be a more congenial task for the courts than is the judgment required by the current system. The balancing of asserted governmental interests (*e.g.*, law and order) against the imperatives of free and full debate is familiar to the courts in the context of first amendment cases. Often these cases can be disposed of without the need for close analysis of the governmental interest involved, simply on the strength of the competing first amendment interest. In FOIA cases, likewise, the court would often be able to find that the interest in disclosure is entitled to prevail, even if the harms asserted by the government would in fact come about.

We recognize that cases of some sensitivity will arise from time to time; but in the context of clearly legislated guidelines the courts will be conceptually and politically well-equipped to proceed. Indeed, we think the judicial function has been far more unkindly used by executive attempts to enforce secrecy by *ex parte* proceedings, secret evidence, and other departures from traditional notions of due process.<sup>33</sup>

#### B. Criminal Penalties for Disclosure of Classified Information

The secrecy system has never depended to any significant degree on the threat of criminal penalties. The Federalists' short-lived experiment with criminal libel trials did not encourage later administrations to do likewise. Until 1911 the United States had no espionage laws at all. The present laws,<sup>34</sup> which in essence date from 1917, were directed primarily at outright spying. Despite some ambiguity in the laws, officials of the Justice Department and legal advisers of national security agencies did not believe that leaking was a crime unless there was a specific intent to injure the national defense. Before 1972, espionage indictments were brought only when it could be charged that information was passed directly to foreign agents. While officials receiving clearances were routinely warned that unauthorized disclosures could entail unspecified criminal penalties, these admonitions lacked visibility and credibility. They had little effect on the conduct of career officials and even less on that of political appointees.

The indictment of Daniel Ellsberg and Anthony Russo in connection with the disclosure of the Pentagon Papers marked the first effort to use the espionage laws to punish unauthorized publication.<sup>35</sup> Although that indictment

---

33. Constitutional objections to the Freedom of Information Act are discussed in the next section.

34. 18 U.S.C. §§ 793-798, 952; 42 U.S.C. §§ 2271-2279, 50 U.S.C. App. 781 (1970).

35. Ellsberg was indicted for (among other things) possession of classified government documents in violation of 18 U.S.C. § 793 and conversion of such documents to his own use in contravention of 18 U.S.C. § 641 (1970). *United States v. Russo*, Crim. No. 9373-CD-WMB (C.D. Cal., filed Dec. 29, 1971).

bore the taint of Watergate and did not result in a conviction, Justice Department officials continue to assert that it rested on a sound legal basis. Officials who would release secret information to the press must reckon with the threat of indictment.

In the context of the present classification system, the claim that all classified information is protected by criminal sanctions is simply intolerable. The threat of prosecution, if taken seriously, would have a broad chilling effect on public debate; this cannot be justified by the goal of preventing serious harm to national security. To remove the ambiguities that make this threat possible, Congress should repeal the laws on which the executive branch relies.<sup>36</sup> The national security would be adequately served, as it has always been, by criminal laws confined to actual spying.

The objections to criminal penalties for disclosing classified information would not be quite so overwhelming if Congress adopted a new classification system such as the one we propose. Nevertheless, we have serious reservations both as to the need for such penalties and as to their impact. The nation survived two world wars and the Cold War without sweeping restrictions on public debate; we see no need in this period of detente for a new "Official Secrets Act."

Certainly there should not be criminal penalties for any and all disclosures of classified information. Even under a vastly improved classification system, there will be many difficult decisions and many opportunities for official error. The threat of prosecution for misclassification or for leaking will not encourage careful and objective judgments. Instead, it will perpetuate the timid, self-protective attitude that now prevails. Frequent prosecutions would surely dull both public debate and bureaucratic efficiency, while occasional and selective enforcement would undermine the credibility of deterrence and invite charges of politically motivated discrimination.

A better case can be made for criminal sanctions limited to the release of information designated by law as presumptively classified. Atomic energy and cryptographic information, in particular, are relatively narrow and well-defined categories. We think this highly technical information can be strictly protected without serious danger of interference with public debate. Criminal laws for this purpose already exist; they have rarely if ever been invoked and we see no urgent need to change them. Nevertheless, we would not recommend extending this approach to our other categories of presumptively classified information. Cases will inevitably arise where information that arguably falls into a presumptively classified category is essential for legitimate public debate. The social cost of deterring disclosure in such cases outweighs the limited contribution to national security that criminal penalties would make.

---

36. We refer, in particular, to 18 U.S.C. §§ 793(d), 793(e) (1970).

Enforcement must always be evenhanded. If there are to be criminal sanctions for disclosure of presumptively classified information, there must also be criminal penalties for withholding information that Congress has designated for release. Surely the threat of prosecution is a crude and ineffective technique for compelling disclosure of such information. Officials will not expect the Justice Department to prosecute unless public opinion is very much aroused. Yet if Congress and the public are vigorous in demanding release of needed information and condemning those who resist, it will not be necessary to resort to criminal penalties. The Freedom of Information Act now provides for administrative sanctions in cases of flagrant overclassification; Congress could easily provide administrative sanctions for irresponsible disclosure as well. We think this a more credible and appropriate approach than criminal penalties to the problem of evenhanded enforcement of a new classification system. Criminal penalties may safely be reserved for cases of outright spying, as in fact they have been ever since Jefferson's day.

It cannot be overstressed that the most effective protection for legitimate secrets would come from a rebirth of respect for the classification system, brought about by a stripping away of unnecessary secrecy. As Mr. Justice Stewart put it in the *Pentagon Papers* case:<sup>37</sup>

[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

### C. Prior Restraints

As the Supreme Court emphasized in the *Pentagon Papers* case, proposals for prior restraint come before the courts bearing a heavy presumption against their constitutionality. When the first Congress approved the Bill of Rights, the first amendment's injunction against laws abridging freedom of the press was explicitly directed at schemes for prior censorship on publication. Indeed, we think a persuasive case could be made for the proposition that all prior restraints on publication are unconstitutional.<sup>38</sup>

The nation has survived for nearly two hundred years without resorting to formal prior restraints. Even in wartime, voluntary press self-censorship was found sufficient to protect the national security. In the Internal Security Act of 1950,<sup>39</sup> the high point of Cold War anti-subversive legislation, Congress

---

37. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

38. See generally the discussions listed in 1 T. EMERSON, D. HABER, & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 64 (1976), and the concurring opinions of Justice Black and Douglas in the *Pentagon Papers* case, and the cases cited therein, 403 U.S. at 714-20, 720-24.

39. Ch. 1024, 64 Stat. 987 (1950-1951).

stated flatly that nothing in the Act should be read as authorizing prior restraints.<sup>40</sup> Only in the Atomic Energy Act did Congress make provision for court injunctions against disclosure.<sup>41</sup> That very narrow provision has never been invoked, and its constitutionality remains to be tested in court.

Despite the absence of legislative backing for prior restraints, the executive branch has recently made two bold attempts to enjoin publication of national security information. In the *Pentagon Papers* case the Supreme Court, while denying the requested injunction, intimated that such an order would be appropriate if the government could prove that publication would inevitably cause direct, immediate, and irreparable harm to the national security.<sup>42</sup>

If Congress adopts a new classification system, including presumptive secrecy for specific kinds of information, the executive branch may well assert that all such information has been determined by Congress to meet the Supreme Court's standard for prior restraints. Yet, the argument for presumptive secrecy is not that disclosure would necessarily be disastrous; it is simply that the information is of little value to the public and of some value to foreign governments. We believe that very little of this information, in fact, meets the Supreme Court's rigorous test. To remove all doubt, a new classification act should expressly disclaim any intent to authorize prior restraints.

Before the *Marchetti* decision, the congressional hands-off attitude toward prior restraints seemed satisfactory. In that case, however, the Court of Appeals upheld a permanent injunction, requiring Marchetti to submit all his writings to the CIA so that classified information could be deleted.<sup>43</sup> The court justified this wholly unprecedented order by invoking secrecy agreements Marchetti signed during his tenure as a CIA official. Congress has not authorized such agreements, much less the sweeping waiver of first amendment rights they are now said to entail. We think Congress should act to limit the impact of secrecy agreements, exercising its power to regulate the terms of government employment.<sup>44</sup>

The guidelines we would recommend flow naturally from the approach that has been adopted in this paper. Because of the special constitutional status of prior restraints, the degree of threatened harm must, of course, be exceedingly great before such action can be justified. Mr. Justice Stewart's standard of "direct, immediate and irreparable damage"<sup>45</sup> is strict enough in

---

40. *Id.* § 1(b).

41. 42 U.S.C. § 2280 (1970).

42. This is a paraphrase of Mr. Justice Stewart's opinion now generally cited as reflecting the view of a majority of the Court; see *New York Times Co. v. United States*, 403 U.S. at 730.

43. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). See also *Knopf v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

44. A bill to overturn Marchetti was introduced by Rep. Bingham in July 1975; see 121 CONG. REC. H7167 (daily ed. July 21, 1975).

45. *New York Times Co. v. United States*, 403 U.S. at 730 (Stewart, J., concurring).

this respect, provided, as Mr. Justice Brennan urged, that the Court must be persuaded that the harm will result before it grants even a temporary restraining order.<sup>46</sup> We submit, in addition, that the courts should be required to balance the expected harm, however great, against the value of the information to the public. It seems to us that the first amendment requires no less.

This concludes the presentation of our proposals. Although they are based on principles already implicit in the congressional reforms of recent years, our proposals would radically transform the current classification system. That system rests on executive order; it does not allow independent review; its standards are vague; it does not require any information to be made public, or even any consideration of the public's need to know; it is supported by biased and potentially repressive sanctions; and finally, its irrationality has dissipated its authority to the extent that legitimate secrets are believed by many to be inadequately protected. Our system is designed to cure each of these defects.

The scheme we propose will strike some as dangerous; others may doubt that it goes far enough. Finally, there are sure to be claims that it is unconstitutional. We think that all of these objections are mistaken. We believe that our proposed system would greatly improve the flow of information to Congress and the public, without causing undue prejudice to the national security or the constitutional prerogatives of the executive branch. We discuss these issues in the concluding section.

### III

#### THE PROPOSED SYSTEM OBJECTIONS, DANGERS, & OPPORTUNITIES

The executive branch has always resisted proposals to curb the secrecy system by legislative action. It has used both legal and pragmatic arguments to persuade Congress and the public that legislative reforms would be unworkable and improper. There is every reason to expect that our own proposals will meet with similar objections. Thus it may be helpful to explain why we find them unpersuasive.

##### A. The Constitutional Argument

The modern growth of presidential power has required corresponding innovations in constitutional doctrine. Recent Presidents have sponsored a remarkable development in the theory of implied or inherent presidential powers—powers that are not expressly granted by the Constitution, but are said to be justified by necessity. Originally, such powers were invoked in emergencies that arose when Congress was not in session, with the under-

---

46. 403 U.S. at 727 (Brennan, J., concurring).

standing that congressional approval would be sought as soon as possible. Recently, however, it has become fashionable to claim that the exercise of inherent presidential powers is immune to congressional or judicial interference. The executive branch is likely to insist, therefore, that the Constitution prohibits Congress from legislating a classification system that includes mandatory disclosure requirements; and that it prohibits the courts, with or without congressional approval, from reviewing executive secrecy decisions.

Certainly the Constitution itself does not support these assertions. The enumerated presidential powers respecting national security are these:<sup>47</sup>

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

He shall have power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors. . . .

[H]e shall receive ambassadors and other public ministers.

Congress, meanwhile was expressly granted the following powers:<sup>48</sup>

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

These provisions, taken together, necessarily imply independent but concurrent efforts by the respective branches on behalf of national security interests. In case of disagreement, leaders in each branch can and will attempt to marshal public support for their respective views. They may also claim that their opponents are not only mistaken as to policy, but are usurping a function that is not theirs to perform.

### 1. *The Role of Congress*

Although Congress since 1793 has steadfastly asserted its right to publish the confidential information it obtains, the executive branch continues to dis-

47. U.S. CONST. art. II, §§ 2, 3.

48. *Id.* art. I, § 8.

pute that principle. The right of Congress to compel production of information by the executive branch has also been periodically contested, again without definitive result. As Madison pointedly observed in connection with the Jay Treaty dispute, neither Congress nor the President can unilaterally decide constitutional questions for the government and the nation as a whole.<sup>49</sup>

Today the Supreme Court does possess this power.<sup>50</sup> However, it has decided very few cases relating to the allocation of national security powers among the branches, and even fewer relating to control of government information. Such questions are seldom presented directly in litigation between private parties or between a private party and the government as a whole. In these contexts, executive acts are usually claimed to have been authorized or ratified by Congress, and the Court has preferred not to scrutinize too closely this image of cooperative decision-making. Thus the Court has held that congressional approval may properly be given in very general terms, may be implicit rather than direct, and may take place after the fact. These decisions have legitimized the historical accretion of national security powers to the presidency—a development the Court surely has not been in a position to contain.

Since the Civil War the Commander in Chief clause<sup>51</sup> has emerged as an important source of presidential power, and it is now conceded that he may, even without specific congressional authority, employ military force, at least when United States territory or forces are under attack; create executive offices necessary to prosecute a war; issue regulations affecting industry and labor in wartime; requisition property in a theatre of war; establish procedures for military government in occupied territory, and end hostilities by armistice.<sup>52</sup>

At the same time, the Senate's failure to establish for itself an active role in diplomacy has left the President as the sole organ for negotiating with foreign governments. In this capacity he can grant recognition to foreign governments; appoint personal agents (including secret agents) to gather information; negotiate, interpret and terminate treaties; and negotiate executive agreements.<sup>53</sup>

The rationale for these implied powers has been that unity and rapid decision was necessary for the effective conduct of war and diplomacy. While the Court and the nation have agreed that Presidents need not wait for congress-

---

49. 5 ANNALS OF CONG. 772 (1976).

50. *United States v. Nixon*, 418 U.S. 683, 703 (1974), *reaffirming* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

51. U.S. CONST. art. II, § 2.

52. *See generally* E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 227-62 (4th ed. 1957).

53. *See generally id.* at 170-226.

sional action before taking emergency measures, it does not follow, and the Court has never held, that an emergency justifies action that is flagrantly illegal, or that is kept secret once the immediate crisis is past.

Indeed, the Court has repeatedly made it clear that the President's emergency powers are limited by the concurrent powers of the other branches and by the Bill of Rights. In the last analysis, it remains the province of Congress to make the law and that of the Court to ensure that constitutional limitations are observed.<sup>54</sup>

The claim that Congress may not legislate limits on presidential national security powers is not supported by precedent. A careful review of Supreme Court decisions shows that only the pardon power and the power to fire presidential appointees have been accorded a measure of immunity from legislative interference.<sup>55</sup>

The Court has never held a congressional act to be unconstitutional on the ground that it infringed upon the President's powers as Commander in Chief or as agent of foreign policy. Instead, the Court has repeatedly held that once Congress addresses itself to a particular national security problem, the President is bound by the legislation and is not free to pursue alternative measures that are more to his liking.<sup>56</sup>

The cases most often cited in support of presidential claims to inherent or exclusive national security powers<sup>57</sup> do show that the President may take substantial initiatives on his own where Congress has established no specific restrictions; and that the President and Congress, acting together, have ample powers—always limited by the Bill of Rights—to do what the national security requires. These cases do not discuss, and certainly in no way limit the power of Congress to establish guidelines and procedures for the conduct of the executive branch.

Presidents themselves have recognized the propriety and usefulness of congressional participation in the secrecy system. They have sought and obtained special legislation protecting atomic energy,<sup>58</sup> intelligence,<sup>59</sup> and cyp-

---

54. The applicability of the Bill of Rights to national security powers is confirmed by such cases as *United States v. Robel*, 389 U.S. 258 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Home Bldg. & Loan Ass'n v. Blaisdall*, 290 U.S. 398 (1934); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

55. *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

56. The leading modern case in point is the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (see especially the quite incisive concurring opinion of Mr. Justice Jackson).

57. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *In re Debs*, 158 U.S. 564 (1895).

58. 42 U.S.C. §§ 2271-2282 (1970).

59. 50 U.S.C. §§ 403(d)(3), 403g (1970).



tographic secrets,<sup>60</sup> and more recently have proposed additional legislation protecting classified information in general.<sup>61</sup> If Congress may legislate for secrecy, surely it may legislate for publicity as well.

## 2. *The Roles of the Courts*

In vetoing the 1974 amendments to the Freedom of Information Act, President Ford asserted that the provision for *de novo* judicial review of security classifications is unconstitutional.<sup>62</sup> This assertion was not backed by supporting argument, and Congress did not find it persuasive. Nevertheless, we will undertake a brief survey of the applicable case law, to see what authority can be mustered for the President's view.

It is true that the courts have no explicit constitutional role in making national security policy. That function is assigned to the popularly elected, "political" branches of government. This legal principle is augmented by political realities, for the courts have been aware that they could be permanently damaged by accusations of irresponsible meddling in national security affairs—not to mention charges of deliberate subversion.

Thus the courts have been most reluctant to sit in judgment upon matters of national security policy, or to become involved in disputes between Congress and the President. Moreover, the courts have exercised substantial restraint in reviewing factual determinations by Congress or the President that relate to national security. Corwin has summarized the scope of this principle as follows:<sup>63</sup>

On this principle the Court has subsequently held at one time or another that it must accept as final and binding on itself the determinations of one or other or both of "the political departments," with respect to all such questions as whether a certain newly constituted community was a qualified belligerent at international law; what was the correct boundary of a certain country; what country was the sovereign of a particular region; whether a certain community was entitled to be considered as a "belligerent" or as an independent state; who was the *de jure*, who the *de facto* ruler of a certain country; whether a particular person was a duly accredited diplomatic agent to the United States; how long a military occupation of a certain region should continue in order to fulfill the terms of a treaty; whether a certain treaty was in effect; and so on.

This commitment to self-restraint, however, has never entailed an abdication of what the Court sees as its essential functions. The Court has always reserved the power to balance governmental interests, however urgent, against the fundamental rights of citizens; and the Court has steadfastly refused to relinquish its own control over the conduct of judicial proceedings.

---

60. 18 U.S.C. §§ 793, 952 (1970).

61. Ford statement accompanying Exec. Order No. 11652, *supra* note 5.

62. 10 WEEKLY COMP. OF PRES. DOC. 1318 (Oct. 17, 1974).

63. E. CORWIN, *supra* note 51, at 177.

The judicial temper is well illustrated by a recent case in which the government argued that the supervision of national security wiretaps was beyond judicial competence. To this attack on fourth amendment rights the Court responded vigorously: "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance."<sup>64</sup> In one line of cases the Court has considered the extent of its own power, in the absence of statutory guidelines, to compel the executive branch to supply evidence needed in court proceedings.<sup>65</sup>

The Court has treated gingerly the issue of whether the executive resistance to disclosure was based on national security concerns, or simply on a generalized policy of confidentiality for high-level executive deliberations. Despite the Court's respectful language and its careful avoidance of confrontation whenever possible, the Court has maintained the position that executive claims of privilege are not automatically binding. The courts themselves must balance the need for secrecy against the litigating parties' need for the information.

In four cases, the Court drew back from ordering disclosure of national security information; these were the *Totten*, *Waterman*, *Reynolds*, and *Mink* cases. *Totten* concerned Union spying activities during the Civil War. *Waterman*, decided in 1948, involved the licensing of foreign operations for United States air carriers. *Reynolds* dealt with the crash of an airplane carrying secret electronic equipment; while *Mink* involved nuclear weapons testing. In none of these cases did the Court recognize a constitutional limitation on its power to demand the information. In *Reynolds*, the privilege to withhold "state secrets" was expressly stated to rest on judicial discretion.<sup>66</sup> The secrecy involved in *Totten* was at least indirectly authorized by law, in that Congress had long exempted the President's secret service expenditures from the usual budgetary disclosure requirements. Congress has also been especially solicitous to protect the kinds of information involved in *Waterman*, *Reynolds*, and *Mink*.

In fact, the Court said explicitly in both *Waterman* and *Mink* that its holding was simply an interpretation of legislative intent.<sup>67</sup> In *Waterman*, it held that Congress did not intend to authorize judicial review and that this policy was

---

64. *United States v. United States Dist. Court*, 407 U.S. 297, 320 (1972).

65. These cases are: *United States v. Nixon*, 418 U.S. 683 (1974); *EPA v. Mink*, 410 U.S. 73 (1973); *United States v. Reynolds*, 345 U.S. 1 (1953); *Chicago & S. Air-Lines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103 (1948); *Totten v. United States*, 92 U.S. (2 Otto) 105 (1876); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Burr*, 25 F. Cas. 30, 55 (No. 14,692), 187 (No. 14,694) (C.C.D. Va. 1807).

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

67. *EPA v. Mink*, 410 U.S. 73, 74, 80 (1973); *Chicago & S. Air-Lines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103, 104 (1948).

constitutionally permissible. It was clearly implied that Congress could also have made the opposite choice without offending against any constitutional limitation. In *Mink*, the issue was the intent of Congress in passing the 1967 Freedom of Information Act. While holding that judicial review of security classifications had not been contemplated, the Court expressly invited Congress to legislate new disclosure guidelines if it saw fit. The Court certainly did not suggest that any provision for judicial review would be unconstitutional.<sup>68</sup>

It is easy to appreciate the value of a clear congressional mandate and legislated guidelines to assist the delicate function of judicial review of national security matters. The implementation of legislated guidelines is a far more congenial task, both politically and intellectually, than the independent development of judicial standards for balancing secrecy and disclosure values.

Nothing in the case law, therefore, remotely suggests that the Freedom of Information Act is unconstitutional, or that our proposals for further amendment would make it so. When officials oppose reforms that will disrupt established routine, they invariably argue that the government will be paralyzed by the plan. This bureaucratic shibboleth has not yet been elevated by the Court to the status of a constitutional principle.

Indeed, President Ford did not attempt to argue that the courts can play no role whatever in the secrecy system. The executive branch wishes to retain the option of seeking judicial aid in enforcing secrecy; but if the courts are competent to judge the need for secrecy, surely they may judge the need for publicity as well. In fact, President Ford conceded that it would be proper for a court to review a classification decision in order to decide whether it was reasonable. If so, we do not see how the Constitution can be said to prohibit the courts from going on to inquire whether a "reasonable" classification decision was, in fact, correct. That is all the new FOIA provision for *de novo* review accomplishes. While the formula preferred by the President might result in a somewhat smaller number of judicially-ordered disclosures, it would not affect the basic quality of the proceedings. The evidence and the scope of the court's inquiry would be essentially the same; any difference could hardly rise to constitutional significance. Once we recognize the propriety of some judicial participation in the secrecy system, the mode of that participation becomes a political and not a constitutional question.

We may now summarize the key constitutional questions, and our responses, as follows:

First, how much secrecy does the Constitution permit or require? There is no specific constitutional language to help us here. The framers foresaw and

---

68. A similar approach, inviting Congress to provide for judicial review of deportation decisions, was taken in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

accepted the recurring tension between the needs for open communication and broad participation, on the one hand, and for military and diplomatic secrecy on the other. They saw too that the proper balance between these values would depend on shifting circumstance. Thus they shunned a rigid constitutional formula in favor of the principle of responsible discretion.

Second, who is to exercise this discretion: does the Constitution reserve this function to the executive branch alone? The emphatic answer is that each branch has a role to play. While Congress and the courts have usually accepted presidential leadership in national security affairs, they have carefully guarded their respective powers to intervene on their own behalf and on behalf of the public. Neither the text of the Constitution nor the interpretations evolved by the Supreme Court have designated the protection of national security as an exclusive function of the executive. By the same token, safeguarding the democratic political process is not a function committed to the exclusive care of the executive branch. Publicity fosters the right to vote and to participate in political life; these concerns are well within the spheres of congressional and judicial competence.

Third, can Congress legislate a classification system, and provide for judicial review of classification decisions? There is nothing in history or the case law to suggest otherwise. While the founding fathers did not resort to measures like these, they were not confronted with the modern phenomenon of a bureaucratic secrecy system. It is that phenomenon, we have argued, that makes a legislated disclosure system peculiarly appropriate. Such proposals are new, and their constitutionality has not been authoritatively determined. While the Supreme Court has affirmed that presidential discretion in national security affairs is entitled to very great respect, it has also insisted that this discretion is limited by the powers of Congress, the rights of citizens, and the integrity of the judicial process. Nothing in the cases suggests, therefore, that Congress cannot legislate new guidelines for withholding and releasing national security information; nothing in them raises a constitutional obstacle to judicial enforcement, mandated by Congress, of such guidelines.

#### B. Pragmatic Objections: The Proposed System in Operation

There can be little disagreement, we think, with the ultimate aim of our proposals: to enhance the quality of public debate and of the resulting policies, while at the same time providing due protection for legitimate secrets. It remains to be demonstrated that our proposals are well-designed to accomplish this aim—that in practice there would be neither far too much disclosure nor far too little. To show this, we must be more specific about the way our proposed classification system would actually operate. We shall consider in turn each of the three broad categories of classification: mandatory disclosure; presumptive secrecy; and the middle, balancing category.

### 1. *Mandatory Disclosure*

The proposal to require automatic disclosure of certain categories of information is certain to be criticized for its rigidity. In our view, this rigidity is essential. We showed in Part I how secrecy frustrates congressional and public participation in the making of defense and foreign policy. We showed why the executive branch cannot be relied on to release voluntarily the information needed for public debate, and we argued the constitutional case for a more open system.

The mandatory disclosure categories are intended to ensure that certain decisions vitally and directly affecting the general welfare will be made in a constitutionally acceptable manner. Without question, Congress has the right and the responsibility to participate in basic decisions affecting war and peace, to regulate public spending, and to oversee the activities of the executive branch. The attempt to perform these functions through informal and voluntary cooperation may have succeeded in happier times; in our time it has conspicuously failed. History shows that executive secrecy is not adequately controlled by means of internal self-discipline. We think legislation is the only promising alternative.

The War Powers Act already requires public reporting of United States combat activities.<sup>69</sup> Our proposals constitute a selective extension of that approach, calculated to guarantee that there will be timely public debate on issues of primary importance. The identification of those issues and the initiation of debate cannot safely be left to official discretion. It is appropriate and essential that Congress designate in advance the kinds of information whose release is of great public value, yet not threatening to national security.

Our mandatory disclosure categories are limited to just such kinds of information. We would not recommend extending the approach to cover the entire domain of information that is not presumptively secret, for the costs of such wholesale disclosure would almost surely outweigh the benefits. Yet it is possible that a few additional mandatory disclosure categories could be justified. Our proposals focus on the problem of secret warmaking, brought so sharply to public attention by events of the last decade. Perhaps other, less obvious kinds of issues deserve equal priority. One advantage of the legislative process is the opportunity it affords for careful consideration of aspects of an issue that may have been overlooked at first. That is precisely why we favor a legislated solution.

It remains to evaluate the impact of mandatory disclosure rules on official behavior. We have no doubt that officials by and large would comply with routine disclosure requirements. Periodic reports submitted to Congress or

---

69. 50 U.S.C. § 1543 (Supp. III 1973).

published in the *Federal Register* are an established feature of the scene. Such requirements are always resented at first, but they tend to be rapidly assimilated into the bureaucratic routine.

The more nagging questions relate to the operation of our system in a crisis situation. In moments of grave danger, would our system deprive the nation of the ability to act with "vigor, secrecy and despatch?"<sup>70</sup>

One approach to an answer is to consider the application of our categories to various historical situations. Speculations of this kind are admittedly somewhat artificial; but we think they show that sharp conflicts between our mandatory disclosure categories and essential security interests are unlikely to arise.

## 2. *The World War II Period*

It appears, for example, that our proposals would have had little impact on the course of events in the years prior to World War II. The main reason is that secrecy did not play a critical role in those events. President Roosevelt's freedom of action was constrained at that time by a neutrality policy that Congress had enacted into law. The President had objected to this legislation on the ground that its inflexibility could prove disastrous; nevertheless, he signed the bill into law. To the extent that he later judged it necessary to take steps that departed from the strict letter of neutrality, he took them openly. Although it was consummated without prior congressional authorization, the destroyer deal of 1940 was in no sense a secret.

It may be that Roosevelt was less than candid about his hopes for early United States involvement in the war. This is unfortunate, but we do not propose to legislate the disclosure of thoughts and sentiments. Our proposals apply to actions and formal decisions, and these the President did not conceal.

Insofar as we approve of Roosevelt's far-sighted leadership, we may be assured that our disclosure requirements would not have hindered it. At the same time, his success in openly circumventing the will of Congress serves as a reminder that publicity is not a panacea. Our proposals are designed to stimulate public debate; the rest is left to the workings of the political process.

The conduct of the war itself of course involved a number of important military and diplomatic secrets. Most of this secrecy raised no constitutional difficulties. Indeed, most of the wartime secrets fall squarely within our protected categories. Our proposals are not intended to interfere with the successful prosecution of a constitutionally initiated war and we cannot perceive any danger that they would do so.

---

70. This phrase was often used by the framers in describing the advantages of a strong executive; see I M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 70, 112, 140, 144 (1937).

### 3. *The Post-War Period*

In the post-war period, many things were done in secret that under our proposals would have had to be disclosed. That, of course, is the main point of our proposals. We recognize, however, that in some cases disclosure would have made little difference. This applies especially to the covert interventions in various countries before the Bay of Pigs. Most of these operations could perhaps have been performed openly without major foreign or domestic opposition; in any case we think public debate on the appropriateness of such operations would have been highly beneficial.

With respect to the course of events in Indochina, the impact of full disclosure would probably have been far more significant, because our operations there were more controversial and were extended over longer periods of time. If some of the critical information in the Pentagon Papers had been public from the beginning, our involvement might never have reached the point of actual combat. On the other hand, it is possible that the public would have continued to support administration policy indefinitely if not for the emergence of the "credibility gap." Of two things we are certain, however. First, the disclosures required by our proposals would not have given foreign governments any significant information they did not already have. Second, secrecy was a crucial factor in the loss of trust between the government and the public that developed in this period. That development was far more costly to our society than any damage that public debate could possibly have done.

Without the gift of prophecy, there is no way to prove absolutely that our proposals will never have any adverse effect on the national security. We would point out, however, that the most important restraint on presidential power is one that Congress has already seen fit to impose, in the form of the War Powers Resolution.<sup>71</sup> That measure has already contributed to a somewhat more open style in executive decision-making, without noticeable harm to the national security.<sup>72</sup> In fact, the Mayaguez episode illustrates that the presidency has retained an ample—indeed a dangerous—degree of the "flexibility" that crises are said to demand. We have argued that the reforms of recent years do not go far enough. Our proposals are a measured extension of those reforms, and we do not think that they go too far.

The principle of unrestrained official discretion has been discredited by history. A mandatory disclosure system, limited in scope to information that the public urgently requires, would be administratively workable, consistent with the national security interest, and constitutionally superior.

We are persuaded that it would be a terrible mistake to provide for excep-

---

71. 50 U.S.C. §§ 1541-1548 (Supp. III 1973).

72. See text *supra* at notes 9-11.

tions to the automatic disclosure requirements. We grant that a situation could conceivably someday arise in which compliance would be utterly disastrous. If the President made such a determination in a responsible manner, we are confident the country would understand it. In a sense, every law contains an unwritten exception for such occasions. On the other hand, to provide expressly for exceptions would simply invite wholesale evasion of the disclosure requirements themselves. This has already occurred in the case of the "automatic" declassification procedures of the executive order,<sup>73</sup> as well as the Church amendment's provision for public reporting of executive agreements.<sup>74</sup> It would be far better to shorten the list of disclosure categories than to eviscerate the entire system in this manner.

#### 4. *Presumptive Secrecy*

The proposal that Congress designate certain kinds of information as presumptively secret is scarcely novel. Congress has already legislated special protection for atomic energy information and cryptographic information. We propose to extend this approach to a few other areas in which secrecy is unlikely to prejudice the public interest.

Some controversy is possible respecting one of our categories, namely that of weapons design. As we noted earlier,<sup>75</sup> respected scientists have argued that secrecy in this area actually inhibits the development of our own technology far more than it obstructs the research efforts of other nations. We do not feel equipped to evaluate this argument, but expect that Congress would wish to do so very carefully.

As was true for our automatic disclosure categories, we anticipate that others may propose additions to our list of presumptive secrets. We are open to such suggestions and confident that Congress would have ample opportunity to consider them.

Whatever the list may ultimately contain, the logic of our analysis requires some provision for disclosure of information in the presumptively secret categories. No matter how narrowly the categories are drawn, instances are apt to arise where the case for disclosure is exceptionally compelling. This could occur, for instance, in connection with debate over arms control proposals or with oversight of actions in the intelligence community. If Congress enacts a flat rule of secrecy that could cover such situations, the executive branch will certainly not waive it under these circumstances.

We recognize that this position is in contrast with our unwillingness to provide for similar exceptions to the automatic disclosure categories. The two situations are not symmetrical, because the incentive structure of the executive

---

73. Exec. Order No. 11,652, 3 C.F.R. 339 (1974).

74. Pub. L. No. 92-403, § 1, 86 Stat. 619 (codified at 1 U.S.C. § 1126 (Supp. IV 1974)).

75. See note 22 *supra*.



branch is not symmetrical. In the case of disclosure requirements, any exception would be sure to swallow the rule. No such danger is evident with respect to a rule of presumptive secrecy.

5. *The Middle Category: Balancing in Practice*

To justify the existence of a middle category should not require extended discussion. While we have argued at length against the system of unlimited official discretion, we do not believe that such discretion can or should be entirely eliminated. The designation by law of mandatory disclosure and presumptive secrecy categories is an appropriate way of dealing with a few specific kinds of information. Those are cases where the balance between the values of secrecy and disclosure can meaningfully be determined in advance, without reference to particular circumstances. However, the attempt to assign all national security information to one or the other of these categories would be extremely unrealistic and counterproductive. In most cases, a national decision will require a sensitive weighing of the requirements of national security and of public debate in the particular situation. The initial weighing must be left to responsible officials of the executive branch. Yet careful provision for the guidance of those officials is clearly essential.

In the past, the executive branch has not been accustomed to taking responsibility for the interest in public debate. That interest has not been central to the political environment in which the national security bureaucracy operates; nor has it been emphasized by the formal rules that apply to secrecy decisions. The Executive Order on Classification does not instruct officials to balance the need for publicity against the need for secrecy; rather, their task is simply to determine whether secrecy would serve the national security interest. In practice, it appears that public debate has been regarded as inherently prejudicial to the national security, and that documents have consciously been classified, under color of law, for the express purpose of preventing public debate.

It was not so long after Watergate that a staff official of the National Security Council made this reply to a request under the Freedom of Information Act:<sup>76</sup>

In addition, knowledge that the United States had undertaken a study of a particular issue could arouse the interest of special-interest groups in the United States which could mount a lobbying effort in the Congress and elsewhere in an effort to influence the outcome of the study and the decision or its recommendations. This could interfere seriously with the objective, dispa-

---

76. Affidavit of Jeane W. Davis, in *Halperin v. Nat'l Security Council*, Civil No. 75-0675 (D.D.C., filed July 25, 1975). Ms. Davis later added that "[t]he publication of the decision making process of the President in the area of foreign policy would have an adverse effect upon the President's ability to act effectively in the area of foreign policy and is thus prohibited by the preamble of Executive Order 11652 and Section I of the Order." Response to Interrogatories, Oct. 20, 1975.

sionate atmosphere in which these issues are analyzed and presented to the President and could have an inhibiting effect on the candor and completeness of the information and advice essential to the President in carrying out his responsibilities and, indeed, on the President's flexibility in dealing with the issue.

Our proposals would reverse this presumption that public debate is a dangerous and inappropriate process, and would establish a rule that information should be made public unless a convincing case can be made for withholding it from foreign governments. Officials who favor disclosure for reasons of their own will then have stronger legal support than they do today. Yet these formal changes will not by themselves reverse the preponderant incentives for secrecy inside the executive branch. It would be unrealistic to expect that adoption of our proposals will automatically lead to dramatic changes in official conduct.

In the final analysis, the impact of our system would largely depend on the climate in which it was implemented. Official attitudes would change substantially if experience made it clear that unwarranted secrecy would not be tolerated. Adoption of our proposals can have substantial impact, if those outside the executive branch are prepared to fight for release of the information they need.

For Congress, this means persistence in demanding information and willingness to use the power of the purse and other effective sanctions to enforce that demand. Committees must tenaciously preserve their right to release information supplied to them by the executive branch, for otherwise their independence is fatally compromised.

Private citizens, organized interest groups, and the press would each have important roles to play. Informal demands for information can now be pressed, if necessary, through the procedures of the Freedom of Information Act. We are confident that the courts will conduct proceedings under the Freedom of Information Act in an effective and responsible manner, in fulfillment of their congressional mandate.

The attitudes that once made the secrecy system impervious to criticism have changed profoundly in recent years. We are heartened by the new readiness in all quarters to look behind the empty slogans of the Cold War. The trend is toward increasing skepticism about secrecy, increasing respect for the rule of law, and renewed faith in the free marketplace of ideas. In this climate, the kind of system we propose can be adopted and implemented with success.

The struggle will not be easy, but we think the effort is worth making. James Madison put it this way: "A people who mean to be their own Governors must arm themselves with the power which knowledge gives."<sup>77</sup>

---

77. S. PADOVER, *THE COMPLETE MADISON* 337 (1953).