

## Secrecy in the Conduct of United States Foreign Relations: Recent Policy and Practice

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## SECRECY IN THE CONDUCT OF UNITED STATES FOREIGN RELATIONS: RECENT POLICY AND PRACTICE

Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time.<sup>1</sup>

—President Richard Nixon, March 8, 1972

The practice of secrecy in the conduct of United States foreign relations by the different branches of the Government raises several important Constitutional issues and practical problems for the administration of a unified and consistent foreign policy. Three of the more important of these issues and problems will be considered in this note:

(1) the extent to which the practice of secrecy in the conduct of foreign relations by the executive branch of the Government is authorized by the Constitution;<sup>2</sup>

(2) the manner in which the practice of secrecy in the conduct of foreign relations by the executive branch of the Government is to be supervised by the other branches of the government;<sup>3</sup> and

(3) the extent to which the inherent Constitutional powers of the executive branch must yield to the legislative powers of the Congress in the conduct of foreign relations.<sup>4</sup>

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1. Statement by President Nixon, 8 WEEKLY COMP. PRES. DOCS. 542, 543 (March 13, 1972).

2. A scholarly and in-depth analysis of the executive and legislative roles in United States foreign policy-making may be found in SENATE COMM. ON FOREIGN RELATIONS, THE FORMULATION AND ADMINISTRATION OF UNITED STATES FOREIGN POLICY, S. DOC. NO. 24, 87th Cong., 1st Sess. 791-989 (1961).

3. See Smith, *Democracy, Secrecy, and National Security: Are They in Conflict?*, 21 VITAL ISSUES 1 (1972). See also Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 121 U. PA. L. REV. 271 (1971) and Schlesinger, *The Secrecy Dilemma*, N.Y. Times, Feb. 6, 1972, § 6 (Magazine), at 12.

4. The practical aspects of this problem are summarized in a statement by Joseph Bishop of the Yale Law School, reported in *Hearings on U.S. Government Information Policies and Practices—The Pentagon Papers Before a Subcommittee of the House Committee on Government Operations*, 92nd Cong., 1st Sess., pt. 1, at 32 (1971) [hereinafter cited as *Hearings on the Pentagon Papers*]. Other important issues raised by the practice of secrecy in United States foreign relations include: whether secrecy in government in any form is consistent with the spirit of the Founding Fathers; whether the Constitutional system of checks and balances is desirable in the field of foreign affairs; whether the doctrine of executive privilege is implicit in the concept of separation of powers; and whether, and to what extent, the executive branch may invoke the aid of

The resolution of these issues is important because abuse of the practice of secrecy in the conduct of foreign relations may seriously erode the public's confidence in the Government.<sup>5</sup> Additionally, the unsuccessful resolution of these issues may result in hostility and ill will between the executive and legislative branches of the Government which may carry over into the sphere of domestic policy-making.

The processes of United States foreign relations are conducted primarily by the executive branch, with the necessary cooperation of the Congress, and with the occasional guidance of the federal courts. Within the executive branch of the Government, the Executive Office of the President and the Departments of State and Defense exercise the principal foreign affairs powers;<sup>6</sup> but the Congress, with its many specialized foreign affairs committees and subcommittees,<sup>7</sup> also exercises important foreign affairs responsibilities. The conduct of United States foreign relations may include the declaration and prosecution of war, the negotiation and ratification of treaties, the provision for and administration of economic and military assistance, the regulation of foreign commerce, and the conclusion of other non-treaty agreements touching on political, economic, and cultural interests.<sup>8</sup>

Given the basic institutions and processes of United States foreign policy-making,<sup>9</sup> it is apparent that secrecy in matters of foreign relations

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the judicial branch to protect government secrets. For a brief introduction to many of these issues, see the statement of the Hon. Arthur J. Goldberg, *id.*, at 9.

5. A lengthy overview of the American public's access to government information is contained in Forkosh, *Freedom of Information in the United States*, 20 DEPAUL L. REV. 1 (1970). See also Lake, *Lying Around Washington*, 1 FOREIGN POLICY 91 (1971).

6. See OFFICE OF THE FEDERAL REGISTER, U.S. GOVERNMENT ORGANIZATION MANUAL 1971/72, at 57, 80, 119 (1971).

7. The Senate and the House each have four committees which concentrate on problems in the foreign affairs area.

8. The foregoing aspects of United States foreign relations are a mixture of presidential and congressional powers and responsibilities. Other aspects of United States foreign policy-making include such routine processes as exchanges of diplomatic messages, exchanges of statistical information, and regulation of tourism and international commercial transactions.

9. The institutions and processes of United States foreign policy-making are in fact exceedingly complex. See THE FORMULATION AND ADMINISTRATION OF UNITED STATES FOREIGN POLICY, *supra* note 2. It is important to note, however, that the actual formulation and administration of United States foreign policy is a very fluid process, varying in institutional form and substance with different administrations, and a process in many ways reflective of the personal views of the President and his chief foreign policy advisors. Hence, a true understanding of the current administration of United States foreign policy requires an insight into the intimate working relationships of the nation's foreign policy leaders. See Leacacos, *The Nixon NSC*, 2 FOREIGN POLICY 2 (1971); Destler, *State and Presidential Leadership*, 48 FOREIGN SERVICE J. 30 (1971); Beloff, *Professor Bismarck goes to Washington: Kissinger on the Job*, 224 THE ATLANTIC 77 (1969); and Barnett, *The National Security Managers and the National Interest*, 1 POL. & Soc'y 257 (1971).

may be practiced on three levels: secrecy practiced between agencies within a single branch of the Government; secrecy practiced between the different branches of the Government; and secrecy practiced between a branch of the Government and the public. In any given case, however, the primary manifestation of the practice of secrecy is the invocation of the doctrine of executive privilege<sup>10</sup> and the classification of documents.<sup>11</sup>

One obvious reason for the maintenance of secrecy in the conduct of foreign relations is that, at least in some areas, secrecy is vital to our national defense and foreign policy. It is well argued that the need for "such secrecy with respect to highly sensitive decisions of this sort [where lives of American soldiers or the security of the nation is at stake]

10. The doctrine of executive privilege may be defined as the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government. This doctrine is implicit in the separation of powers established by the Constitution.

Statement of the Hon. William H. Rehnquist, *Hearings on the Pentagon Papers*, *supra* note 4, at 359. Not entirely in accord with Mr. Rehnquist's definition is the historical analysis of Senator J.W. Fulbright:

A review of past usage, and precedent shows that "executive privilege" is not a legal or constitutional principle but simply a custom, a survival of the royalist principle that "the King can do no wrong." Legal scholars regard the claim to an absolute executive discretion in matters of providing or withholding information as an anachronistic survival of monarchical privilege, an extension from King to President of the doctrine of sovereign immunity.

Fulbright, *The High Cost of Secrecy*, in *Hearings on Security Classification Problems Involving Subsection b(1) of the Freedom of Information Act*, 92nd Cong., 2nd Sess., pt. 7, at 2912, 2914-15 (1972) [hereinafter cited as *Hearings on Security Classification Problems*]. Both Mr. Rehnquist and Senator Fulbright would agree that the doctrine of executive privilege is the authority or absolute discretion of the President to withhold information from Congress, the courts, and the public. Constitutional authority for the doctrine of executive privilege is considered in more detail in section II. A. *infra*. An excellent analysis of the evolution of the doctrine of executive privilege is found in Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044 (1965).

11. The expression "classification of documents," unless specifically qualified, refers to both original and derivative classification. Original classification of documents occurs when

officials designated to have original classification authority exercise independent judgement to classify information based solely on the consideration of whether its unauthorized disclosure would inflict prejudicial or, or [sic] a greater degree of damage to the national defense interest.

Derivative classification of documents occurs when

any person authorized to receive and disseminate classified information in any form treats that information in the same way as the originator with respect to classification of content and markings.

Statement of David O. Cooke, *Hearings on the Pentagon Papers*, *supra* note 4, at 393. Thus, the difference between original and derivative classification is that in the case of original classification, the classifying official need not be guided by previous classification determinations. This is not so in the case of derivative classification.

excludes not merely Congress but all but an infinitesimal number of the employees and officials of the executive branch as well."<sup>12</sup>

Another reason for the maintenance of secrecy is the preservation of the integrity of the decision-making process. Committees of Congress meet in secret sessions to "mark up" bills and judges of appellate courts meet secretly to reach their decisions.<sup>13</sup> Why should not decision-makers of the executive branch meet secretly? It would seem important that subordinates in the agencies of the executive branch be permitted to voice their opinions and recommendations without fear of being called before a congressional committee to account for their participation. As one high official in the executive branch has observed:

Now, if you can imagine . . . an ambassador sitting in Moscow or any capital you can name and saying, "This is what I want to say to the President, but if this is going to wind up on the front page of the *Washington Post* or the *New York Times*, I can't possibly say it flatly. I am going to have to say it differently, or it will do great damage, because the damage to be done will outweigh the good I am trying to accomplish."<sup>14</sup>

A third reason for maintaining secrecy in the conduct of foreign relations, illustrated by a White House letter to Mr. Epstein following the *Epstein v. Resor* decision,<sup>15</sup> is that foreign governments must be able to deal with the United States, secure in the knowledge that our government will not be required to disclose information and proposals tendered in confidence.<sup>16</sup>

In light of the issues which have just been raised, it is the purpose of this note to explore the practice of secrecy in foreign relations matters by the executive branch from the perspective of Executive Order 11,652, which concerns the classification of documents, and from the counter-vailing perspective of the Freedom of Information Act, which concerns the release of government documents to members of Congress and the public.<sup>17</sup>

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12. Statement of the Hon. William H. Rhenquist, *Hearings on the Pentagon Papers*, *supra* note 4, at 364. See generally HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF DEFENSE OF THE UNITED STATES: THE STATUS OF EXECUTIVE ORDER 10501, H.R. REP. NO. 2456, 87th Cong., 2nd Sess. (1962).

13. Statement of the Hon. William H. Rhenquist, *Hearings on the Pentagon Papers*, *supra* note 4, at 364-65. See also Statement of Joseph Bishop, *id.* at 35.

14. Statement of the Hon. William B. Macomber, Jr., *id.* at 900.

15. See notes 117-119 *infra*, and accompanying text.

16. Statement of the Hon. William B. Macomber, Jr., *Hearings on the Pentagon Papers*, *supra* note 4, at 900.

17. See Exec. Order No. 11,652, 3 C.F.R. —, 37 Fed. Reg. 5209 (1972), 50 U.S.C.A. § 401, note (Supp. July 1972) (Classification and Declassification of National Security Information and Material); Freedom of Information Act, 5 U.S.C. § 552 (1970).

## I

THE PRACTICE OF SECRECY BY THE EXECUTIVE BRANCH:  
HISTORY, POLICY, AND AUTHORITY

## A. HISTORICAL BACKGROUND

Secrecy in government, especially the doctrine of executive privilege and the classification of documents, is a firmly established feature in the history of American government.<sup>18</sup> In his first administration, President Washington, through his Secretary of War, was asked by the House of Representatives for information concerning the expedition of General St. Clair into the Northwest Territory.<sup>19</sup> The President called a cabinet meeting

because it was the first example and he wished that so far as it should become a precedent, it should be rightly conducted. He could readily conceive that there might be papers of so secret a nature as they ought not to be given up.<sup>20</sup>

The request was granted, however, when the President determined that disclosure would not adversely affect the public interest. In 1796, acting upon an appropriations bill for payments under the Jay Treaty, the House of Representatives requested that the President furnish the instructions given the American ministers who negotiated the Treaty. President Washington declined to provide this information, stating, in a formal message to the House, that to do so

would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.<sup>21</sup>

Subsequent administrations almost without exception have similarly exercised the doctrine of executive privilege or have withheld informa-

18. The authors of the Constitution, influenced by earlier English political philosophers, were very much aware of the uses and abuses of secrecy and its ramifications for the new government. See, e.g., Berger, *supra* note 10, at 1056, for a recounting of English and colonial precedents of legislative inquiry into executive conduct. A principal framer of the Constitution reflected several years after the Convention:

Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.

Letters from James Madison to W.T. Barry, Aug. 4, 1822, cited in *Hearings on the Pentagon Papers*, *supra* note 4, at 815. It is interesting to note that the Convention which met in Philadelphia in 1787 was itself conducted in secret sessions. 1 THE RECORDS OF THE FEDERAL CONVENTION 13 (M. Farrand ed. 1911).

19. For an excellent account of the St. Clair expedition, see T. TAYLOR, *GRAND INQUEST* 17 (1955).

20. 1 THE WRITINGS OF THOMAS JEFFERSON 189-90 (Ford ed. 1892).

21. J.D. RICHARDSON, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194-95 (1898).

tion from Congress or from the public by the classification of documents.<sup>22</sup>

The present system of classification of documents dates from the First World War.<sup>23</sup> A General Order issued by the American Expeditionary Force Headquarters, dated November 21, 1917, provided for three levels of classification—"confidential," "secret," and "for official circulation only." A fourth classification—"restricted"—appeared in 1935, with a notice that information so classified affected the national defense within the meaning of the Espionage Act of 1917.<sup>24</sup>

Executive Order 8381<sup>25</sup>—issued March 22, 1940, by President Roosevelt—recognized the military classification system and defined the material subject to such classification, relying for authority upon the Espionage Act of 1938.<sup>26</sup> Executive Order 8381 was superseded by Executive Order 10,104,<sup>27</sup> issued February 1, 1950, by President Truman. This order introduced the "top secret" classification and gave the President and the

22. See, e.g., Berger, *supra* note 10, at 1093, 1094, 1096. Congress, through its members and committees, has made policy pronouncements on the practice of secrecy by the executive branch in the conduct of foreign relations. As early as 1816, the Senate Committee on Foreign Relations reported: "The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends upon secrecy and dispatch." S. COMM. ON FOREIGN RELATIONS, 8 U.S. SENATE REPORTS 24 (1816), cited in *Hearings on the Pentagon Papers, supra* note 4, at 361. There have been many other remarks by committees and members of Congress which recognize the power of the President to withhold information from Congress in matters of foreign relations. See, e.g., 41 CONG. REC. 97-98 (1906) (remarks of Senator Spooner); statement of the Hon. William H. Rhenquist, *Hearings on the Pentagon Papers, supra* note 4, at 362.

23. Much of the following history of document classification by the executive branch is discussed in: FOREIGN AFFAIRS DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, 92nd Cong., 1st Sess., SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY (Comm. Print 1970) [hereinafter cited as SECURITY CLASSIFICATION AS A PROBLEM].

24. *Id.* at 3.

25. Exec. Order No. 8381, 5 Fed. Reg. 1147 (1940) (Defining Certain Vital Military and Naval Installations and Equipment).

26. Specifically, Exec. Order No. 8381 relied upon the following language of the espionage law:

Whenever, in the interests of national defense, the President shall define certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relating thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military or naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station . . .

Espionage Act of 1938, 18 U.S.C. § 795(a) (1970).

27. Exec. Order No. 10,104, 15 Fed. Reg. 597 (1950) (Defining Certain Vital Military and Naval Installations and Equipment as Requiring Protection Against the General Dissemination of Information Relative Thereto).

Secretaries of Defense, Army, Navy, and Air Force delegable authority to classify designated information. Executive Order 10,290,<sup>28</sup> issued by President Truman on September 24, 1951, broadened the classification system to include classification by non-military agencies and departments and to authorize such classification to safeguard *security* as well as defense information.

Executive Order 10,501,<sup>29</sup> issued by President Eisenhower in 1953 and amended by Presidents Kennedy and Johnson, was the model for the present system of document classification. Executive Order 10,501 adopted three classifications—"top secret," "secret," and "confidential." Under the Order, original classification authority was exercised by "the head of the department, agency, or Governmental unit concerned or by such responsible officers or employees as he, or his representative, may designate for that purpose."<sup>30</sup> Altogether, the heads (or their representatives) of thirty-five executive departments and agencies were authorized to classify documents in the interest of national defense.<sup>31</sup> The heads of twelve additional departments and agencies also exercised non-delegable original classification authority.<sup>32</sup> The Order further laid down guidelines for the actual classification, declassification, downgrading, and upgrading of documents and other materials; rules for accountability and dissemination; procedures for transmission of classified information; methods of disposal and destruction; interpretation of the Order's provisions by the Attorney General; and review of the Order by a presidential staff member, by the National Security Council, and by the concerned departments and agencies.

## B. PRESENT UNITED STATES POLICY

### 1. Executive Order 11,652—A Summary

Well supported by historical precedent, the practice of secrecy in foreign relations by the executive branch is now regulated by Executive

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28. Exec. Order No. 10,290, 16 Fed. Reg. 9795 (1951) (Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Departments and Agencies of the Executive Branch of Official Information Which Requires Safeguarding in the Interests of the Security of the United States).

29. Exec. Order No. 10,501, 18 Fed. Reg. 7049 (1953) (Safeguarding Official Information in the Interests of Defense of the United States).

30. Exec. Order No. 10,501, 3 C.F.R. 306, 307, § 2(a) (1972).

31. *Id.*

32. *Id.* § 2(b).



Order 11,652,<sup>33</sup> issued by President Nixon in March 1972, and made effective June 1, 1972.

Three major changes were effected by Executive Order 11,652: (1) reduction in the number of personnel in the executive branch with original classification authority, (2) provision for speedier declassification of documents as per a pre-defined schedule, and (3) creation of an Interagency Classification Review Committee to insure compliance with the Order.<sup>34</sup>

Specifically, the system of document classification under the Order retains the three terms and definitions of "top secret," "secret," and "confidential."<sup>35</sup> Authority to classify is limited to the heads and senior principal deputies of thirteen departments and agencies.<sup>36</sup> The heads and senior principal deputies of thirteen additional departments and agencies are authorized to classify at the "secret" or "confidential"

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33. Exec. Order No. 11,652, 3 C.F.R. —, 37 Fed. Reg. 5209 (1972), 50 U.S.C.A. § 401, note (Supp. July 1972) (Classification and Declassification of National Security Information and Material).

34. The White House, Office of the White House Press Secretary, Fact Sheet on Executive Order No. 11,652, August 3, 1972 [hereinafter cited as Fact Sheet on Executive Order No. 11,652].

35. Exec. Order No. 11,652, 3 C.F.R. —, 37 Fed. Reg. 5209 (1972), 50 U.S.C.A. § 401, note (Supp. July 1972). The classifications are defined as follows:

(A) "Top Secret." "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments relating to national security. This classification shall be used with the utmost restraint.

(B) "Secret." "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) "Confidential." "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

*Id.* § 1.

36. *Id.* § 2(a).

levels only.<sup>37</sup> The Order further specifies procedures for classification;<sup>38</sup> downgrading and declassification (including precise schedules therefor);<sup>39</sup> and access, marking, safekeeping, accountability, transmission, disposition, and destruction of information and material.<sup>40</sup> The Order provides for the establishment of the Interagency Classification Review Committee,<sup>41</sup> which has the general responsibility of insuring compliance with the Order, and, more specifically, the responsibility to receive and consider suggestions and complaints regarding the Order and to recommend corrective action.<sup>42</sup> Information and material covered by the Atomic Energy Act (1954) is expressly excluded by the Order.<sup>43</sup> Of particular note is the inclusion in the Order of administrative and judicial sanctions to be invoked against those who over-classify and those who under-classify.<sup>44</sup> Such is the formal policy of the executive branch today.

All of the departments and agencies of the executive branch affected by Executive Order 11,652 have, pursuant to a National Security Council directive<sup>45</sup> governing implementation of the Order, issued their own policy guidelines reiterating and implementing the policy and procedures of Executive Order 11,652.<sup>46</sup>

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37. *Id.* § 2(b).

38. *Id.* § 4.

39. *Id.* § 5.

40. *Id.* § 6.

41. Members of the Committee include the General Counsels of the Departments of State, Defense, and Justice; the General Counsel of the Central Intelligence Agency; and representatives from the Atomic Energy Commission and the National Security Council Staff. President Nixon selected John S.D. Eisenhower, former U.S. Ambassador to Belgium, to serve as the first chairman of the Committee. Fact Sheet on Executive Order 11,652, *supra* note 34, at 1.

42. Exec. Order No. 11,652 at § 7, 3 C.F.R. —, 37 Fed. Reg. 5209 (1972), 50 U.S.C.A. § 401 note (Supp. July 1972).

43. *Id.* § 8.

44. *Id.* § 13(A) provides:

*Administrative and Judicial Action.* Any officer or employee of the United States who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

45. National Security Council Directive Concerning the Classification, Downgrading, Declassification and Safeguarding of National Security Information, 37 Fed. Reg. 10,053 (1972).

46. The rules and regulations of the more important agencies and departments

## 2. Executive Order 11,652 and Executive Privilege

The policy and procedure by which executive privilege is presently exercised is to a large extent the same as that of Presidents Kennedy and Johnson,<sup>47</sup> as is evidenced by a memorandum, dated March 24, 1969, from the President to concerned department and agency heads.<sup>48</sup> This memorandum provides the procedure by which requests for information are submitted to the President for approval where the department or agency head is unsure of the need for secrecy. The claim of executive privilege is thus made only with the express personal approval of the President.

President Nixon's March 24th Memorandum further provides that a request for classified information, particularly when made by a committee or member of Congress, be held in abeyance and that attempts be made to satisfy the request by alternative means.<sup>49</sup> Thus, this informal policy of "negotiation and accommodation" serves to limit the frequent exercise of the executive privilege.<sup>50</sup>

The President's March 24th Memorandum also included the following statement: "[T]he Executive branch has the responsibility of withholding certain information, the disclosure of which would be incom-

which have implemented Executive Order No. 11,652 may be found in 10 C.F.R. pt. 9, App. A (1972) (Atomic Energy Commission), 22 C.F.R. pt. 9 (1972) (Dep't of State), 28 C.F.R. pt. 17 (1972) (Dep't of Justice), 32 C.F.R. pt. 159 (1972) (Dep't of Defense), and 32 C.F.R. pt. 1900 (1972) (Central Intelligence Agency).

47. Letter from President Richard Nixon to the Hon. John E. Moss, April 7, 1969, in *Hearings on the Pentagon Papers*, *supra* note 4, at 6. See also statement of the Hon. William H. Rehnquist, *id.* at 358.

48. Richard Nixon, Memorandum for the Heads of Executive Departments and Agencies, March 24, 1969, *id.* at 7.

49. *Id.* The Memorandum continues: "Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege." *Id.*

50. The practical consequences of the policy of "negotiation and accommodation" well illustrate the relationship of document classification to executive privilege:

When a Member or committee of Congress attempts to obtain a specific piece of classified information and is denied it, the problem merges with that of executive privilege. For though the information sought may be classified, withholding it from Congress apparently is more likely to be based on executive privilege than on the basis of classification. To deny it on the grounds of classification might imply either that the Member of Congress seeking it did not have a need to know or that he was not trustworthy.

SECURITY CLASSIFICATION AS A PROBLEM, *supra* note 23, at 28.

The President's policy of "negotiation and accommodation" was recently reaffirmed. Claiming well-established precedent, and citing that the privilege was invoked only three times in his first administration in response to congressional requests, the President declared that the scope of the executive privilege extended to *former*, as well as to present, Presidential staff members. N.Y. Times, March 13, 1973, at 16, col. 3.

patible with the public interest . . . ."<sup>51</sup> The policy of the executive branch therefore, is to maintain secrecy in those areas of the conduct of foreign relations encompassing not only information classified for defense and security reasons, but also such information classified for the reason of incompatibility with the *public interest*.

#### C. AUTHORITY FOR EXECUTIVE ORDER 11,652 AND EXECUTIVE PRIVILEGE

Not surprisingly, concern over the executive branch's policy of secrecy in government affairs, especially concern over the policy of secrecy in foreign affairs, has led to investigations of, and challenges to the President's Constitutional and statutory authority to classify documents and to invoke the executive privilege. In 1970, the Senate Committee on Foreign Relations requested from the Department of State an explanation of the legal basis for Executive Order 10,501, the predecessor of Executive Order 11,652.<sup>52</sup> The Legal Adviser of the State Department, with the approval of the Justice Department, referred the Committee on Foreign Relations to the Report of the Commission on Government Security which appeared in 1957.<sup>53</sup> With respect to the President's Constitutional authority for the issuance of Executive Order 10,501, the Commission Report observed:

Pertinent sections of the Constitution appear to contain no express authority for the issuance of an order such as Executive Order 10501. However, the requisite implied authority would seem to lie within article II which says in section 1: "The executive power shall be vested in a President of the United States of America"; and in section 2: "The President shall be Commander-in-Chief of the Army and Navy of the United States"; and in section 3: "[H]e shall take care that the laws be faithfully executed."

When these provisions are considered in light of the existing Presidential authority to appoint and remove executive officers directly responsible to him, there is demonstrated the broad Presidential supervisory and regulatory authority over the internal operations of the executive branch. By issuing the proper Executive or administrative order he exercises this power of direction

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51. Richard Nixon, Memorandum for the Heads of Executive Departments and Agencies, March 24, 1969, *Hearings on the Pentagon Papers*, *supra* note 4, at 1.

52. Letter from Senator Fulbright to John R. Stevenson, in *Hearings on U.S. Security Commitments Abroad Before the Senate Committee on Foreign Relations*, 91st Cong., 1st Sess., pt. 9, at 2010 (1971) [hereinafter cited as *Hearings on U.S. Security Commitments Abroad*].

53. REPORT OF THE COMMISSION ON GOVERNMENT SECURITY OF 1957, 84TH CONG., 1ST Sess. (1957) [hereinafter cited as WRIGHT COMMISSION REPORT]. The Commission on Government Security was established by Congress in 1955. Chairman of the Commission was Loyd Wright, a prominent California attorney; other members of the Commission included Congressmen, educators, scientists, newspapermen, and representatives of labor and management.

and supervision over his subordinates in the discharge of their duties. He thus "takes care" that the laws are being faithfully executed by those acting in his behalf; and in the instant case the pertinent laws would involve espionage, sabotage, and related statutes, should such Presidential authority not be predicated upon statutory authority or direction.<sup>54</sup>

With respect to the President's statutory authority for the issuance of Executive Order 10,501, the Commission Report continued:

While there is no specific statutory authority for . . . Executive Order 10501, various statutes do afford a basis upon which to justify the issuance of the order.<sup>55</sup>

The Commission Report specifically cited the "Housekeeping" Act (1789),<sup>56</sup> the espionage laws,<sup>57</sup> the National Security Act (1947),<sup>58</sup> and the Internal Security Act (1950).<sup>59</sup> Supplementing the Commission Report, the State Department in response to the Senate committee's request, made additional references to provisions of the Atomic Energy Act,<sup>60</sup> the Freedom of Information Act,<sup>61</sup> the Foreign Assistance Act of 1961,<sup>62</sup> the Mutual Security Act of 1954,<sup>63</sup> and the Arms Control and Disarmament Act<sup>64</sup>—all examples of statutory support for the classification of documents under Executive Order 10,501.<sup>65</sup> Nevertheless, that specific statutory authority for Executive Order 10,501 ever existed remains at least open to doubt.<sup>66</sup>

54. *Id.* at 158.

55. *Id.*

56. 5 U.S.C. § 301 (1970) (originally enacted as Act of Sept. 2, 1789, 1 Stat. 65). Prior to 1958 this Act was proffered as the authority for withholding government information, however the Act was amended by Act of Aug. 12, 1958, 72 Stat. 547, to include the following provision: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

57. 18 U.S.C. § 795(a) (1970) (originally enacted as Act of Jan. 12, 1938, 52 Stat. 3). See note 26 *supra*. See also 18 U.S.C. § 798(a) (1970).

58. Act of July 26, 1947, ch. 343, 61 Stat. 495.

59. Act of Sept. 23, 1950, ch. 1024, 64 Stat. 987.

60. Atomic Energy Act of 1954, 42 U.S.C. § 2162 (1970).

61. Freedom of Information Act, 5 U.S.C. § 552 (1970). Subsection (c) provides that "[t]his section is not authority to withhold information from Congress."

62. Foreign Assistance Act of 1961, 22 U.S.C. § 2394 (1970).

63. Mutual Security Act of 1954, 22 U.S.C. § 1934 (1970).

64. Arms Control and Disarmament Act, 22 U.S.C. § 2585 (1970).

65. The State Department reply to the Senate committee's inquiry is found in *Hearings on U.S. Security Commitments Abroad*, *supra* note 52, at 2008. For a discussion of the State Department reply, see SECURITY CLASSIFICATION AS A PROBLEM, *supra* note 23, at 5.

66. Although Congress has recognized the classification system in several of its enactments (see notes 56 to 64 *supra*), it has not to date attempted a comprehensive regulation of the classification system. Perhaps this inactivity is tacit recognition of the President's classification powers. On the other hand, Congress has made its intentions explicit on a number of occasions by expressly providing that legislative recognition of the classification system is not to be construed as authority to withhold information from Congress. See Act of May 13, 1950, ch. 185, 64 Stat. 159. See also

The classification of documents is now regulated by Executive Order 11,652. Like Executive Order 10,501, Executive Order 11,652 claims as its authority, by vague reference, the powers vested in the President by article II, sections 1, 2, and 3 of the Constitution. These same vaguely defined Constitutional powers also constitute the claimed authority for exercise of the executive privilege.<sup>67</sup>

While the preamble to Executive Order 11,652 briefly refers to the Freedom of Information Act, legal advisors in the executive branch concede that there is no express statutory authority for the issuance of Executive Order 11,652.<sup>68</sup> This uncertainty which surrounds the authority, both Constitutional and statutory, for the invocation of executive privilege and the issuance of Executive Order 11,652, requires some further analysis.

### 1. Constitutional Authority

The President's Constitutional authority to issue Executive Order 11,652, for the classification of documents, and to invoke the executive privilege, derives from article II, sections 1, 2, and 3 of the Constitution.<sup>69</sup> Additional Constitutional authority may perhaps be implied from the Separation of Powers doctrine.<sup>70</sup> The Constitutional powers of the President in the conduct of foreign relations have been developed and consistently upheld by the Supreme Court in numerous cases.<sup>71</sup>

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Freedom of Information Act, 5 U.S.C. § 552(c) (1970). The consequences of such an ambiguous congressional position on the issue are obvious:

Although the doctrine of executive privilege is controversial, as a practical matter when information is in the hands of the executive branch the President is physically or administratively able to withhold it if he deems it advisable.

SECURITY CLASSIFICATION AS A PROBLEM, *supra* note 23, at 28.

67. See the statement of the Hon. William H. Rehnquist, *Hearings on the Pentagon Papers*, *supra* note 4, at 360.

68. Letter from D.O. Cooke to William S. Moorhead, July 26, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 754. Neither the House Committee on Government Operations nor the Senate Committee on Foreign Relations was ever fully satisfied by the conclusions of the WRIGHT COMMISSION REPORT, *supra* note 53. Apparently the executive branch now prefers to base its authority for the issuance of Executive Order No. 11,652 solely upon the President's implied Constitutional powers. See note 54 *supra*, and accompanying text.

69. See note 54 *supra*, and accompanying text.

70. Congressional denial of the executive branch's power to classify defense and security information may violate the Separation of Powers doctrine. For an elaboration of this argument, see the opinion of Chief Judge Bazelon in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

71. For example, in the Prize Cases, 67 U.S. (2 Black) 635 (1863), the Court sustained, in a 5-4 decision, the President's power, as Executive and as Commander-in-Chief of the Army and Navy, to suppress an insurrection against the state governments or the Federal Government by ordering a blockade of certain Southern ports. In an 8-1

In the leading case of *United States v. Curtiss-Wright Export Corp.*,<sup>72</sup> the Court, by Mr. Justice Sutherland, expounded upon the theory of "inherent powers" of the President in the conduct of foreign relations by stating:

The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . .

... In this vast external realm [the conduct of foreign relations], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.<sup>73</sup>

The Court urged, with respect to the conduct of foreign relations, that Congress refrain from limiting the freedom and discretion of the President. On the subject of secrecy, the Court at least implied that the President possessed the power to withhold information concerning foreign affairs, even from Congress.<sup>74</sup>

In *Chicago and Southern Air Lines v. Waterman*,<sup>75</sup> the Court reaffirmed the power of the President, as Commander-in-Chief and as "the Nation's organ for foreign affairs" to withhold "information properly held secret."<sup>76</sup> Again the Court denied the power of the

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decision delivered by Mr. Justice McKenna, the Court in *Mackenzie v. Hare*, 239 U.S. 299 (1915), expounded briefly upon the theory of "inherent powers" of the Government in the conduct of foreign relations:

But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

*Id.* at 311. A unanimous Court in *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918), reaffirmed the Court's reluctance to meddle with the power of the executive and legislative branches in the conduct of foreign relations. The Court stated:

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

*Id.* at 302.

72. 299 U.S. 304 (1936).

73. *Id.* at 318-19.

74. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

*Id.* at 320.

75. 333 U.S. 103 (1948).

76. *Id.* at 111.

judiciary to review executive decisions as to foreign policy because such decisions were "essentially political."<sup>77</sup>

In a 6-3 opinion by Mr. Chief Justice Vinson, the Court in *United States v. Reynolds*<sup>78</sup> upheld a claim of executive privilege on the basis of the executive branch's "inherent powers" and on the basis of a statute.<sup>79</sup> With few exceptions the Court has thus sustained the President's Constitutional authority for withholding information and material bearing on foreign affairs.

## 2. Statutory Authority

Statutory authority for the issuance of Executive Order 11,652 and for the classification of documents is provided by 5 U.S.C. § 552(b)(1):

This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; . . . .<sup>80</sup>

Section 552(b)(1) has been tested in the courts on a number of occasions, and in each of these cases the courts have sustained the power of the executive branch to withhold information in the interest of the national defense or foreign policy. In *Epstein v. Resor*,<sup>81</sup> the first test of section 552(b)(1), the Court of Appeals for the Ninth Circuit

<sup>77</sup> *Id.*

<sup>78</sup> 345 U.S. 1 (1953).

<sup>79</sup> In this case, brought under the Federal Tort Claims Act, the widows of three civilians killed in a military plane crash sought the release of an official report on the crash for use as evidence in their case. The Secretary of the Air Force denied their request, claiming executive privilege in that release would seriously hamper "national security, flying safety, and the development of highly technical and secret military equipment." The Secretary also relied on the predecessor to 5 U.S.C. § 301 (1970):

The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining to it.

The Court, while sustaining the Secretary's position, refused to uphold an absolute executive privilege. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. A 1958 amendment to the predecessor of 5 U.S.C. § 301 added the language: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Act of Aug. 12, 1958, 72 Stat. 547. See note 56 *supra*. See generally MEMORANDUM OF LEGAL STAFF, HOUSE GOVERNMENT OPERATIONS COMMITTEE, 92ND CONG., 1ST SESS., ON THE STATEMENT OF WILLIAM H. REHNQUIST, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, TESTIFYING ON EXECUTIVE PRIVILEGE, June 29, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 788.

<sup>80</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(1) (1970).

<sup>81</sup> 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970). See note 112 *infra*, and accompanying text.



affirmed a summary judgment for the defendant Secretary of the Army in holding that the jurisdiction of the federal courts does not extend to cases involving information falling within the exemptions listed in subsection (b) of section 552.<sup>82</sup> In *Mink v. EPA*,<sup>83</sup> thirty-three members of Congress in both their official and private capacities sought to obtain documents pertaining to the proposed Amchitka nuclear test explosion under the Freedom of Information Act. The district court dismissed the complaint as brought in the plaintiffs' official capacity on the grounds that they had failed to state a justiciable case in view of the Separation of Powers doctrine.<sup>84</sup> The district court denied the relief sought in plaintiffs' private capacity on the ground that the documents fell within the (b)(1) and (b)(5)<sup>85</sup> exemptions. The judgment of the district court was affirmed by the Supreme Court in a decision which failed to reach the Constitutional issues raised in the case. Rather, the Court held that the language of section 552(b)(1) of the Freedom of Information Act precluded the forced disclosure of documents classified pursuant to an executive order, and further held that the courts could not examine the documents *en camara* to determine whether the classification was proper.<sup>86</sup>

In *Moss/Reid/Fisher v. Laird*,<sup>87</sup> two Congressmen and the director of the Freedom of Information Center sought access to the "Pentagon Papers"<sup>88</sup> under the Freedom of Information Act. The court granted summary judgment for the defendant Secretary of Defense on the ground that the documents requested fell under the (b)(1) exemption.

82. In addition to the exemption for national defense and foreign affairs secrets, § 552(b) also exempts information solely related to internal personnel rules of an agency, information specifically exempted from disclosure by statute, privileged trade secrets and financial or commercial information obtained from a person, inter-agency or intra-agency memoranda, personnel and medical files, investigatory files compiled for law enforcement purposes, data pertaining to the regulation or supervision of financial institutions, and geological or geophysical information concerning wells. Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9) (1970).

83. 464 F.2d 742 (D.C. Cir. 1972), *rev'd* 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973).

84. See note 70 *supra*.

85. Subsection (b)(5) exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

86. 41 U.S.L.W. 4201, 4204 (U.S. Jan. 22, 1973). The majority opinion, by Mr. Justice White, derived considerable support from the legislative history of 5 U.S.C. § 552, a legislative history quite different from that reported in the dissenting opinion of Mr. Justice Douglas.

87. Civil Action No. 1254-71 (D.D.C. 1971).

88. DEPARTMENT OF DEFENSE, HISTORY OF U.S. DECISION-MAKING PROCESS ON VIET NAM POLICY (1968). See STAFF OF HOUSE COMM. ON ARMED SERVICES, 92ND CONG., 1ST SESS., UNITED STATES-VIET NAM RELATIONS, 1945-67 (Comm. Print 1971).

Thus, in view of the judicial application of section 552, it seems clear that both the President's classification of documents by executive order and his exercise of executive privilege result in secrecy with respect to Congress and with respect to the public. It also seems clear that section 552(c) is not an effective restraint on the President's powers vis-à-vis Congress.<sup>89</sup>

## II

### THE SCOPE OF EXECUTIVE PRIVILEGE VIS-A-VIS CONGRESS AND THE PUBLIC

#### A. EXECUTIVE PRIVILEGE AND THE CONGRESSIONAL ROLE IN UNITED STATES FOREIGN POLICY

Congress is empowered by the Constitution to exercise an important role in the field of foreign affairs.<sup>90</sup> With respect to the powers of Congress under article I, section 8 of the Constitution, the Court has recognized the existence of certain auxiliary powers, including the "power of inquiry" in matters bearing upon the issue of secrecy.<sup>91</sup>

89. See note 61 *supra*.

90. "Secrecy" is expressly mentioned only once in the Constitution—a reference to the authority of each house to publish a journal of its proceedings, "excepting such Parts as may in their Judgment require Secrecy." U.S. CONST. art. I, § 5. Article I, section 8 of the Constitution grants to Congress power to legislate on matters of national defense, foreign commerce, tariff policy, and naturalization. Section 8 concludes with a grant of Congressional power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. These Congressional powers in the realm of foreign affairs have been recognized by the Supreme Court in numerous cases. In the Prize Cases, 67 U.S. (2 Black) 635 (1863) (see note 71 *supra*, and accompanying text), the Court, while affirming the President's actions, expressed some doubt as to whether, in the absence of de facto ratification by Congress, Congressional "approving [or] legalizing" was not first necessary. The Court said:

Without admitting that such an act [of Congress "approving, legalizing, and making valid all the acts, proclamations, and orders of the President"] was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis rati-habitio retrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect.

*Id.* at 671.

91. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

... [O]ne, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; . . .

We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.

*Id.* at 173-74. See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

The legislative power of Congress in article I, section 1,<sup>92</sup> is an additional check upon the foreign affairs power of the President, and was the basis of the holding in the leading case of *Youngstown Sheet & Tube Company v. Sawyer*.<sup>93</sup> Furthermore, judicial reluctance to inquire into matters of congressional powers expressed in earlier decisions<sup>94</sup> may give way to more explicit judicial definition and "separation" of executive and legislative powers in the area of foreign relations. Such a prediction was made by Mr. Justice Brennan in *Baker v. Carr*.<sup>95</sup>

The congressional role in foreign relations is further defined by the 1966 statute<sup>96</sup> enacting Title 5 of the United States Code into positive law:

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.<sup>97</sup>

Despite interpretations by members of Congress to the contrary,<sup>98</sup> however, the executive branch has negated the impact of section 2954 by adopting a singularly narrow interpretation of the statute based upon

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92. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

93. 343 U.S. 579 (1952). Article I, § 1 of the Constitution, by the Separation of Powers doctrine, is a significant check on the President's foreign affairs powers. For the President to deny to Congress, by means of document classification, security information necessary to carry out its exclusive lawmaking responsibilities may be impermissible executive control over the functions of the legislative branch. Compare note 71 *supra*.

94. See notes 71, 72, 75, and 78 *supra*.

95. 369 U.S. 186 (1962). Said the Court on the subject of foreign relations:

There are sweeping statements to the effect that all questions touching foreign relations are political questions [citing *Oetjen*]. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action.

*Id.* at 211.

96. Act of Sept. 6, 1966, 80 Stat. 378.

97. 5 U.S.C. § 2954 (1970).

98. See, e.g., letter from John D. Ehrlichman to the Hon. Henry S. Reuss, June 20, 1970, in *Hearings on the Pentagon Papers*, *supra* note 4, at 787-88; letter from the Hon. John E. Moss to the Hon. Melvin R. Laird, June 18, 1971, *id.* at 9; and letter from the Hon. Ogden Reid and six other members of Congress to the Hon. Melvin R. Laird, June 28, 1971, *id.* at 327-28.

its legislative history.<sup>99</sup> This interpretation has been much criticized by members of Congress.<sup>100</sup>

#### B. EXECUTIVE PRIVILEGE AND THE PUBLIC'S RIGHT TO KNOW

There is no express provision in the Constitution creating or affirming a right in the people to be informed of all the goings-on in the Government. Such a right is perhaps to be implied from the Preamble to the Constitution;<sup>101</sup> or, perhaps the Ninth Amendment<sup>102</sup> may in time provide the basis for the Court's declaring a new "penumbral right" to certain government-held information, similar to other recently discovered penumbral rights.<sup>103</sup>

99. 5 U.S.C. § 2954 (1970) is derived from the Act of May 29, 1928, ch. 901, § 2, 45 Stat. 986. The interpretation of this Act by the Justice Department was aired before the House Government Operations Committee in June 1971:

Section 1 of that act [Act of May 29, 1928] provided for the repeal of 128 statutes requiring the submission of reports to Congress, which either had become obsolete or which served no useful purpose.

Section 2 of the 1928 act, which has now become section 2954 of title 5, United States Code, was designed to enable Congress to obtain, if needed, the information theretofore contained in the discontinued report. And we think that is indicated in the Senate report made to the Congress in the enactment of the 1928 statute, and I will quote from that:

To save any question of the House of Representatives to have furnished to it any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Department or upon the request of any seven members thereof.

This section makes it possible to require any report discontinued by the language of this bill to be re-submitted to either House upon its necessity becoming evident to the membership of either body.

That is the end of the quotation from the Senate report. And it was our conclusion that the legislative history from which the section was derived indicates that its purpose was to serve as a vehicle for obtaining information theretofore embodied in routine annual reports to Congress submitted by the several agencies rather than the extremely broad purpose, which I cheerfully concede is a permissible interpretation of the language itself.

Statement of Hon. William H. Rehnquist, *Hearings on the Pentagon Papers, supra* note 4, at 785.

100. For an interpretation of section 2954 by Rep. Frank Horton and Rep. Paul McCloskey, see *id.* at 785-86.

101. "WE THE PEOPLE of the United States . . . do ordain and establish this CONSTITUTION for the United States of America." U.S. CONSR. preamble. The argument would be that the public, as the collective source of all Constitutional power to withhold government information, has not consented to the exercise of that power against it by its servants.

102. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONSR. amend. IX.

103. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel); *NAACP v. Alabama*, 357 U.S. 449 (1958) (right to associate and privacy in one's associations); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Loving v. Virginia*, 388 U.S. 1 (1967) (rights of marriage and procreation); *Babbitt v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *appeal dismissed*,

The public's "right to know" does, nevertheless, receive indirect support from the Constitutional guarantees of the First Amendment.<sup>104</sup> For example, the virtual Constitutional prohibition of prior restraints on expression,<sup>105</sup> most recently affirmed in the *Pentagon Papers* case,<sup>106</sup> is recognition of the need for an enlightened citizenry. Whatever may be the status of the public's "right to know," it is clearly the *basic purpose* of the First Amendment to preserve this right.<sup>107</sup>

The power of the executive branch to withhold information "specifically required by executive order to be kept secret in the interest of national defense or foreign policy"<sup>108</sup> has been legislatively sanctioned by Congress and judicially upheld by the courts in a number of cases.<sup>109</sup> As Chief Judge Bazelon reasoned in *Soucie v. David*<sup>110</sup>—a suit brought under the Freedom of Information Act—the power of Congress to force disclosure of records to the public is no greater than its power to force disclosure of records to Congress itself. Secrecy as between the executive

400 U.S. 1 (1970), *Roe v. Wade*, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973), and *Doe v. Bolton*, 41 U.S.L.W. 4233 (U.S. Jan. 22, 1973) (mother's right to refuse to carry an unquickened embryo). See also *United States v. Vuitch*, 402 U.S. 62, 74 (1971) (dissenting opinion of Mr. Justice Douglas).

104. "Congress shall make no law . . . abridging the freedom . . . of the press . . ." U.S. Consr. amend. I.

105. For the development of the Court's thinking on the doctrine of "prior restraints," see *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (dissenting opinion of Mr. Justice Holmes); *Near v. Minnesota*, 283 U.S. 697 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

106. *New York Times Co. v. United States*, 403 U.S. 713 (1971). See the opinion of Mr. Justice Douglas (concurring), *id.* at 724, wherein he says: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public issues there should be 'uninhibited, robust, and wide-open' debate."

107. See the opinion of Mr. Justice Stewart (concurring), in the *Pentagon Papers* case, wherein he states:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

*Id.* at 728.

108. 5 U.S.C. § 552(b)(1) (1970).

109. See *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970); *EPA v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973); and *Moss/Reid/Fisher v. Laird*, C.A. No. 1254-71 (D.D.C. 1971). The failure of the Freedom of Information Act to carry out its intended purpose is discussed in Statement of Mr. Mitchell Rogovin, *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act*, 92nd Cong., 2nd Sess., pt. 5, at 1490 (1972) [hereinafter cited as *Hearings on the Freedom of Information Act*].

110. 448 F.2d 1067 (D.C. Cir. 1971).

branch and the public is, then, rather clearly circumscribed by the restrictions contained in section 552(b).<sup>111</sup>

### III

#### THE PRACTICE OF SECRECY BY THE EXECUTIVE BRANCH

The exercise of their respective powers and rights, both Constitutional and statutory, by the executive branch, Congress, and the public concerning government documents and information, has, on a number of occasions, resulted in conflict between the executive branch and Congress, and between the executive branch and the public.

#### A. RECENT PRACTICES, PROBLEMS, AND PROPOSALS

##### 1. The "Operation Keelhaul" File

The case of *Epstein v. Resor*<sup>112</sup> was decided by the Ninth Circuit upon the Army's assertion that the information sought fell within the section 552(b)(1) exemption. The information sought by Professor Epstein pertained to "Operation Keelhaul," the American-British forced repatriation of approximately two million Soviet nationals unwilling to return to their homeland. The "Operation Keelhaul" file is classified "top secret," ostensibly indicating that disclosure of the file would lead to "exceptionally grave damage to the national security"<sup>113</sup> such as a break in diplomatic relations, an armed attack, or a compromise of military or defense plans. Perhaps realizing the absurdity of this classification, the White House, on October 22, 1970 (four months after the Supreme Court denied certiorari in the case), offered the following information:

The U.S. Government has absolutely no objection (based on the contents of the files) to the declassification and release of the Operation Keelhaul files. However, given the joint origin of the documents, British concurrence is necessary before they can be released, and this concurrence has not been received. Thus we have no alternative but to deny your request.<sup>114</sup>

This continued classification of the "Operation Keelhaul" file by the Department of Defense suggests that co-classification with a foreign

111. 5 U.S.C. § 552 (1970). See note 82 *supra*.

112. 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).

113. Exec. Order No. 11,652, 3 C.F.R. —, 37 Fed. Reg. 5209 (1972), 50 U.S.C.A. § 401 *note*, at § 1(A) (Supp. July 1972).

114. Letter from the White House to Mr. Julius Epstein, October 22, 1970, in *Hearings on the Pentagon Papers*, *supra* note 4, at 302.

government is an additional basis, incorporated into section 552(b)(1), for the classification of documents.<sup>115</sup>

The continued classification of the "Operation Keelhaul" file illustrates two additional problems with the present system of security classification. One problem is the lack of provision in Executive Order 11,652 for accelerated declassification of documents in cases where circumstances warrant accelerated release of the information.<sup>116</sup> With respect to the "Operation Keelhaul" file, the White House concedes that information could be released but for the lack of British concurrence in declassification.<sup>117</sup> Yet even with British concurrence, Executive Order 11,652 prescribes no procedure by which classified information such as the "Operation Keelhaul" file could be released sooner than would be called for under the Order's twelve-year declassification step method.

Another weakness in the Freedom of Information Act is raised by the *Epstein v. Resor* illustration. Individual members of the public must absorb the cost of litigation in any suits they raise under the Act to enforce their right to government information. The prospect of costly litigation may be a considerable deterrent to the enforcement of one's rights under the Act. A possible means of dealing with this problem would be an amendment to the Freedom of Information Act; the federal courts could be authorized to provide reasonable attorney's fees and court costs to members of the public who bring a suit under the Act in those cases where the Government's position is not ultimately sustained.<sup>118</sup>

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115. See note 114 *supra*, and accompanying text.

116. Section 5 contains no requirement to depart from the rules of the General Declassification Schedule that spread out Top Secret to declassification over a 10-year period, even when classified information no longer requires protection. STAFF OF SUBCOMM. ON FOREIGN OPERATIONS AND GOVERNMENT INFORMATION OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 92ND CONG., 2ND SESS., SECTION-BY-SECTION COMPARISON AND ANALYSIS OF EXECUTIVE ORDERS 10501 AND 11652, "CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL" [hereinafter cited as SECTION-BY-SECTION COMPARISON AND ANALYSIS], in 118 CONG. REC. E2774, E2778 (daily ed. March 21, 1972). A summary of this report is contained in *Hearings on Security Classification Problems*, *supra* note 10, at 2849.

117. See note 114 *supra*, and accompanying text.

118. For such an amendment, see H.R. 15,172, 92nd Cong., 2nd Sess., at § 2 (1972). No such provision exists in present law and regulations, perhaps accounting for the fact that fewer than 200 suits have been initiated under the Freedom of Information Act since 1967. *Hearings on the Freedom of Information Act*, *supra* note 109, at 1376. Section 2 of the proposed H.R. 15,172 would have the desirable effect of removing financial obstacles hindering public access to government-held information, while at the same time discouraging frivolous or otherwise non-meritorious suits. While an

## 2. Classification of the Garwin Report

In May 1970, seven members of the House Committee on Government Operations, pursuant to 5 U.S.C. § 2954,<sup>119</sup> requested from the Office of Science and Technology (of the Executive Office of the President) a copy of the Garwin Report, written in 1969 and known to be critical of the proposed SST project then being considered in Congress.<sup>120</sup> The request was denied on the ground that the report constituted "an internal governmental memorandum of a confidential nature, which cannot be released."<sup>121</sup> The denial was based, not upon section 552(b)(5) of the Freedom of Information Act, but upon the executive privilege permitted by the narrow interpretation of section 2954 referred to above.<sup>122</sup>

The failure of seven members of the House Committee on Government Operations to obtain a copy of the Garwin Report indicates that the executive branch is unwilling to invoke the exemptions of the Freedom of Information Act against members of Congress acting in their official capacities. Rather, the executive branch continues to rely upon its own interpretation of 5 U.S.C. § 2954,<sup>123</sup> hence permitting the exercise of the executive privilege.

This particular example of information withheld by the executive branch from members of Congress illustrates the problem of classification of information for considerations other than national security.<sup>124</sup> Attaching the label "internal government memorandum" to the Garwin Report was really more an exercise of "political privilege" than executive privilege. To withhold or to release secret government information is to wield considerable political power. In the present case, the with-

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improvement, section 2 may nevertheless have a chilling effect on the public's desire to exercise their rights under the Act.

119. See note 97 *supra*, and accompanying text.

120. Letter from John A. Blatnik, *et al.*, to Dr. Lee A. DuBridge, May 25, 1970, in *Hearings on the Pentagon Papers*, *supra* note 4, at 787.

121. Letter from John D. Ehrlichman to the Hon. Henry S. Reuss, *id.* at 787-88.

122. See notes 85 and 99 *supra*.

123. See note 99 *supra*, and accompanying text.

124. This criticism has been expounded upon by author and political commentator David Wise:

The fact is that the highest officials of the Government, including Presidents, regularly and frequently leak classified documents to the press when it suits their purposes.

Government officials have come to regard information as a policy tool and classified information all the more so, since it is, under normal circumstances, entirely under Government control.

Statement of David Wise, *Hearings on the Pentagon Papers*, *supra* note 4, at 330. See also the statement of Clark R. Mollenhoff, *id.* at 885.



holding of the Garwin Report was a clear attempt by the executive branch to increase the political strength of SST supporters in Congress. It is very doubtful whether the public benefitted in any way from such an arbitrary and political exercise of the executive privilege.

A possible solution to the problem of who should determine why information is or remains classified may be the establishment of some sort of Classification Review Commission.<sup>125</sup> Where a conflict arises over information withheld by the executive branch from the Congress or the public, the dispute could be submitted to the Commission for settlement. The Commission could prescribe regulations for classifying and declassifying information, and perhaps prescribe and enforce penalties for violation of Executive Order 11,652, 5 U.S.C. § 2954, and the Freedom of Information Act.<sup>126</sup>

### 3. Denial of Information Concerning Pakistan and Laos

In March, 1971, when Congress was considering a bill authorizing foreign assistance for Pakistan, the Department of State denied a request for factual accounts of what was happening in East Bengal, stating that it was "not [their] practice to reveal these communications."<sup>127</sup>

Also in March 1971, certain members of Congress requested of the Department of Defense photographs and other information relating to the bombing of villages in northern Laos. The request was denied, in a letter by a Deputy Assistant Secretary of Defense, in the following language:

In sum, I cannot see that the cause of the civilians in Laos will be advanced by our further exchange of photographs. The public record is as complete regarding our efforts to minimize the effect of the war on Laotian civilians as we can make it without disclosing information which the enemy would certainly use further to endanger the lives of our pilots.<sup>128</sup>

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125. For such a proposal see H.R. 15,172, 92nd Cong., 2nd Sess., at § 4(f)(1) (1972).

126. The Commission, if established, would be subject to several possible weaknesses, including the possibility that it might become partisan; that it could become an instrumentality of private interest groups; and that it might generate conflict rather than settlement. On the other hand, the proposed Commission would be endowed with considerable powers, including the power to promulgate regulations for the classification of documents, a power now exercised by the President. A significant feature of the proposed Commission is that two-thirds of the Commission membership would be appointed by Congressional leadership.

127. See Testimony of the Hon. Paul McCloskey, *Hearings on the Freedom of Information Act*, *supra* note 109, at 1460.

128. Letter from Dennis J. Doolon to the Hon. Paul McCloskey, June 11, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 696.

These two incidents show that perhaps the greatest obstacle to the release of government information pursuant to a legitimate request is the invocation of President Nixon's policy of "negotiation and accommodation."<sup>129</sup> The actual "negotiation and accommodation" procedure may extend over many months, thus totally frustrating the original effort to obtain the information sought. Authority for withholding information from members of Congress under the policy of "negotiation and accommodation" is certainly questionable in the absence of an express claim of executive privilege. Often information will be denied to members of Congress by agencies of the executive branch without reliance on the section 552(b) exemptions of the Freedom of Information Act, and with no express claim of executive privilege.<sup>130</sup> Nevertheless, individual members of Congress are unable to compel disclosure of the requested information by the simple fact that the information sought is in the physical possession of an uncooperative agency of the executive branch.<sup>131</sup>

In addition, these separate incidents of March 1971 illustrate the long term consequences of government secrecy—the public's loss of confidence in the Government.<sup>132</sup> The inability of members of Congress, let alone the public, to obtain information concerning events in Pakistan and Laos (after repeated attempts in the case of photos taken over Laos) only serves to widen the so-called "credibility gap" between the executive branch and the public. Congressional recognition and assertion of its full legislative power under the Constitution may go a long way to restore credibility to some areas of United States foreign policy.<sup>133</sup>

#### 4. The "Pentagon Papers"

The *Pentagon Papers* case triggered considerable debate over the use of secrecy by the executive branch in the conduct of foreign rela-

129. See note 49 *supra*, and accompanying text.

130. See *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 92nd Cong., 1st Sess., at 5 (1971).

131. See note 66, *supra*.

132. See *Hearings on the Pentagon Papers*, *supra* note 4, at 60.

133. See the statement of Philip Kurland, *Hearings on the Pentagon Papers*, *supra* note 4, at 801. The magnitude of the danger is underscored by Edward Livingstone:

No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.

Quoted in *Reynolds v. United States*, 192 F.2d 987, 995 (3d Cir. 1951).

tions. While the case was pending before the Supreme Court, a subcommittee of the House Committee on Government Operations<sup>134</sup> commenced hearings on United States Government information policies and practices.<sup>135</sup> During these hearings and while the case was still pending, the President released the 47-volume study on the war, classified "top secret-sensitive," to Congress.<sup>136</sup> However, the President made it clear that this action was not due to requests by members of Congress<sup>137</sup> brought under section 552 or otherwise, but because a situation had been created "in which Congress would necessarily be making judgments . . . on the basis of incomplete data which could give a distorted impression of the reports' contents."<sup>138</sup>

The success of Congress in obtaining access to the "Pentagon Papers" demonstrates the importance of publicity and favorable public opinion in forcing disclosure of government secrets. The fact that the "Pentagon Papers" were classified "top secret-sensitive" illustrates a frequent abuse of the present classification system—the use of unauthorized classification symbols.<sup>139</sup> Finally, the rationale provided by President Nixon for the release of the "Pentagon Papers" to Congress<sup>140</sup> suggests that the "Pentagon Papers" incident is not a likely precedent to be invoked in support of future requests made under 5 U.S.C. § 2954 or the Freedom of Information Act.

The incident of the "Pentagon Papers" suggests three needed reforms in the present classification procedures. First, there should be some provision in Executive Order 11,652 or in some statutory equivalent which would provide for administrative reprimand, suspension, or

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134. This subcommittee was the Foreign Operations and Government Information Subcommittee, chaired by the Hon. William S. Moorhead.

135. *Hearings on the Pentagon Papers*, *supra* note 4; *Hearings on the Freedom of Information Act*, *supra* note 109; *Hearings on Security Classification Problems*, *supra* note 10; and *Hearings on U.S. Government Information Policies and Practices—Problems of Congress in Obtaining Information From the Executive Branch*, 92nd Cong., 2nd Sess., pt. 8 (1972).

136. Statement by Press Secretary Ronald L. Ziegler on the President's decision to make the study available to Congress, June 23, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 35-36.

137. Letter from the Hon. John E. Moss to Melvin R. Laird, June 18, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 9.

138. Statement by Press Secretary Ronald Ziegler on the President's decision to make the study available to Congress, June 23, 1971, in *Hearings on the Pentagon Papers*, *supra* note 4, at 36.

139. For a list of the classification symbols used by the Department of Defense see the statement of David O. Cooke, *Hearings on the Pentagon Papers*, *supra* note 4, at 665, 666.

140. See note 138 *supra*, and accompanying text.

other disciplinary action against any individual who had classified information to conceal incompetence, inefficiency, wrongdoing, or administrative error, to avoid embarrassment to any individual or agency, or to prevent or delay release of official information.<sup>141</sup> It is probably true that many of the "Pentagon Papers" were originally classified for one or more of these tainted reasons.

Also, there should be some requirement, either by executive order or by statute, that all departments and agencies with classification powers maintain a complete list of all their employees exercising classification authority.<sup>142</sup> Such a requirement would tend to discourage over-classification and would facilitate disciplinary proceedings when and if necessary.

Finally, there should be some restrictions on the use of classified government information by former government officials in articles, books, and memoirs. This problem is not presently within the scope of Executive Order 11,652.<sup>143</sup>

#### IV

#### CONCLUSION

Secrecy in the conduct of United States foreign relations dates from the very founding of the nation. Originally conceived to protect detailed military information in time of war, the practice of secrecy in the United States Government has since broadened under Executive Order 11,652. While there exists some Constitutional and statutory

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141. Such a provision has been proposed in H.R. 15,172, 92nd Cong., 2nd Sess., at § 4(d)(5)(C) (1972). See the statement of Walter Pincus, *Hearings on the Pentagon Papers*, *supra* note 4, at 863. Compare the proposed section 4(d)(5)(C) with Executive Order No. 11,652, as quoted in note 44 *supra*.

142. Such a requirement is embodied in H.R. 15,172, 92nd Cong., 2nd Sess., at § 4(d)(3)(A) (1972).

143. Section 11 [of Executive Order No. 11,652] dealing with the declassification of Presidential Papers, is a subject area not previously contained in Executive Order 10501.

The inclusion of items (i), (ii), and (iii) as requirements under which the archivist is severely restricted in his declassification authority leaves little substance to the overall intent of the section. Moreover, the recent incidents of private publication of Presidential memoirs after the conclusion of his service, often including references to previously classified information, makes this section somewhat academic because there is no procedure for declassifying information that has already been published.

SECTION-BY-SECTION COMPARISON AND ANALYSIS, *supra* note 116, at E2786.

See the statement of Jack Anderson, *Hearings on Security Classification Problems*, *supra* note 10, at 2441, for a discussion of former President Lyndon Johnson's memoirs and their relation to national security.

basis for Executive Order 11,652, much doubt persists as to the precise limits of this power and the nature of executive responsibility in the area of government secrecy. The courts, with few exceptions, have been reluctant to deal with the problem. While few would deny the need for some system of document classification the present scheme has fostered a large number of abuses<sup>144</sup> which unnecessarily deprive the public and even members of Congress of valuable information, and which permit bureaucrats to insulate themselves from the consequences of their own possible incompetence and wrongdoing. In light of these criticisms, several alternatives to the present system have been proposed, most of them premised upon initial and positive action by Congress.

Some degree of secrecy in the conduct of foreign relations is vital to the security of the nation. The peculiar structure of the United States Government, specifically the separation of powers, creates some unique problems with respect to the practice of secrecy by the Government and to the regulation of this practice. The Constitutional authority of the executive, the legislative, and the judicial branches of the Government in the conduct of foreign relations is not well defined, nor is it likely to become well defined in the near future. Therefore, the policy and practice of secrecy in United States foreign relations should be established and regulated with active participation by all three branches of the Government, or, in the alternative, by an entity independent of all three branches of the Government; but in either case, with primary responsibility to the American public.

*Peter A. Copeland*

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144. See generally Berger, *supra* note 10; Nader, *Freedom of Information Act: the Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); and Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 ADMIN. L. REV. 217 (1971).