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ACCESS TO CLASSIFIED INFORMATION:
CONSTITUTIONAL AND STATUTORY DIMENSIONS

BRUCE E. FEIN*

Preservation of the nation's democracy depends in large measure on public access to information on government practices or policies. Enlightened public debate and intelligent voting require the same access. As James Madison observed, "[a] popular [g]overnment, without popular information, or the means of acquiring it, is but a [p]rologue to a [f]arce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: [a]nd a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹ The Supreme Court relied in part on Madison's views of the Bill of Rights in holding that the first amendment requires that the public has a right of access to criminal trials.²

Madison, however, also recognized that, in limited circumstances, secrecy could be justified to attain ends superior to a completely informed public. As a delegate to the Constitutional Convention, Madison supported making its deliberations confidential,³ and thereafter, reportedly maintained that publicity would have scuttled the effort to achieve a consensus for adopting the Constitution.⁴ In fact, two United States Constitution provisions clearly endorse government secrecy. The first directs the publication of a journal of each house of Congress, except "such parts as may in [the Congress'] [j]udgment require [s]ecrecy."⁵ The second provides that "a regular [s]tatement and [a]ccount of the [r]eceipts and [e]xpenditures of all public [m]oney shall be published from

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1. 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (Letter to W.T. Barry, August 4, 1822).

2. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980).

3. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 15-17 (M. Farrand ed. 1937).

4. See *supra* note 3 at 478-79 (Journal of Jared Sparks, April 19, 1830).

5. U.S. CONST. art. I, § 5, cl. 3.

time to time."⁶ The United States Court of Appeals for the District of Columbia Circuit has determined that the phrase "from time to time" was intended to authorize secret expenditures for sensitive military or foreign policy endeavors.⁷

Although the Constitution recognizes a limited need for congressional secrecy, confidentiality may be equally vital to ensure that the executive branch can perform its duties. Safeguarding the nation's survival or supporting urgent foreign policy or national security goals may require the President to withhold classified information from the public or Congress. This executive branch secrecy is not inherently at war with the ethos of the Constitution. The constitutional preamble gives national defense equal status with "the blessings of liberty."⁸ Justice Jackson recognized this when he warned against interpreting the Constitution as a suicide pact.⁹ Chief Justice Hughes stated the principle even more explicitly: "Self-preservation is the first law of national life and the Constitution itself provides the necessary powers in order to defend and preserve the Constitution."¹⁰

To hold national security interests invariably subservient to the first amendment's devotion to publicity of government affairs is senseless. As President Lincoln asked in addressing his unilateral suspension of the habeas corpus writ during the Civil War,

are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?¹¹

Lincoln answered his rhetorical questions with a resounding "no" when he ignored Chief Justice Roger B. Taney's federal circuit court decree which held the suspension of habeas corpus to be un-

6. U.S. CONST. art. I, § 9, cl. 7.

7. See *Halperin v. CIA*, 629 F.2d 144, 154-60 (D.C. Cir. 1980).

8. U.S. CONST. preamble.

9. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also *Haig v. Agee*, 453 U.S. 280 (1981); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

10. 42 ABA REPORTS 232 (1917).

11. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (R. Basler ed. 1953) (message to Congress in special session, July 4, 1861) (emphasis in original).

constitutional.¹² Lincoln anticipated Chief Justice Hughes' recognition a half-century later that our nation is endowed with a fighting Constitution.¹³

This Article explores the President's constitutional and statutory powers to prevent the disclosure of classified information to the public, to litigants, and to Congress, notwithstanding countervailing values of the first amendment and other constitutional provisions. The Article examines judicial and nonjudicial checks that prevent the Chief Executive from abusing his authority to classify or withhold information. It determines that federal statutes and case law generally display proper deference to the President's broad classification and secrecy powers. Contrary to a court of appeals decision, however, the Article concludes that disputes between Congress and the President over access to classified information should be held nonjusticiable political questions.

I. THE CURRENT SCHEME OF CLASSIFICATION

Several statutes and executive orders provide the procedure for executive branch classification of government information. By executive order, President Reagan established a comprehensive scheme for classifying and withholding national security information.¹⁴ The Order defines "national security" as the national defense or foreign relations of the United States,¹⁵ and provides three levels of classification for information. The Classification Order defines "top secret" information as information, "the unauthorized disclosure of which reasonably could be expected to cause *exceptionally grave damage* to the national security."¹⁶ "Secret" information describes information "the unauthorized disclosure of which reasonably could be expected to cause *serious damage* to the national security".¹⁷ Finally, the order defines "confidential" information as information "the unauthorized disclosure of which reasonably could be expected to cause *damage* to the national secur-

12. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

13. See ABA REPORTS, *supra* note 10, at 248.

14. Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

15. *Id.* at 178 (§ 6.1(e)).

16. *Id.* at 167 (§ 1.1(a)(1)) (emphasis added).

17. *Id.* (§ 1.1(a)(2)) (emphasis added).

ity.”¹⁸ In exercising their authority to classify material, the order instructs designated officials to consider several categories of information as candidates for classification:

military plans, weapons, or operations; the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; foreign government information; intelligence activities . . . , or intelligence sources or methods; foreign relations or foreign activities of the United States; scientific, technological or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; cryptology; a confidential source; and other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President.¹⁹

The Order sets out affirmative guidelines for selecting information to be classified. The Order enumerates improper purposes and subjects of classification to prevent government officials from employing their authority “in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.”²⁰ In addition, “[b]asic scientific research information not clearly related to the national security may not be classified.”²¹ Moreover, under the executive order guidelines, officials must declassify information as soon as national security considerations permit.²²

The Order also addresses disclosure of classified information. Generally, classified information may be disclosed only to executive branch officials whose trustworthiness has been determined by an agency head or designated official and whose access is essential to furthering a legitimate government purpose.²³ Classified information may be disseminated outside the executive branch only

18. *Id.* (§ 1.1(a)(3)) (emphasis added).

19. *Id.* at 163-69 (§ 1.3(a)(1)-(10)) (subsection designations omitted).

20. *Id.* at 170 (§ 1.6(a)).

21. *Id.* (§ 1.6(b)). That injunction has proved to be exceptionally vexing as applied to cryptology and nuclear research.

22. *Id.* at 171 (§ 3.1(a)).

23. *Id.* at 174 (§ 4.1(a)).

under conditions that ensure the same degree of confidentiality protection as that afforded within the executive branch.²⁴

Finally, the Order sets out sanctions for violations of its provisions. Sanctions may be imposed on officers or employees of the United States, federal contractors, licensees, or grantees, for intentional violations or, in one case, for negligent violations of any provision of the classification order.²⁵ The Order specifically singles out for sanctions intentional misclassifications of information and intentional or negligent disclosure of classified information to unauthorized persons.²⁶

The Atomic Energy Act of 1954²⁷ complements the President's classification scheme. Its fundamental provision instructs the executive branch to protect the secrecy of "Restricted Data" unless disclosure does not create an unreasonable risk to the common defense and security of the United States.²⁸ Restricted Data includes all data concerning "(1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy" ²⁹ The Act prohibits an individual who has "reason to believe [restricted] data will be utilized to injure the United States or to secure an advantage to any foreign nation" from communicating, transmitting, or disclosing such data to any person.³⁰

The Department of Defense Authorization Act, 1984³¹ also supplements the President's Classification Order and, thus, promotes national security objectives. Section 1217 of this Act empowers the Secretary of Defense to withhold from the public any Department of Defense technical data with military or space application that may not be exported lawfully outside the United States without an approval, authorization, or license under the Export Administration Act of 1979, or the Arms Export Control Act.³²

24. *Id.* (§ 4.1(c)).

25. *Id.* at 177 (§ 5.4(b)).

26. *Id.* (§ 5.4(b)(1)-(2)).

27. 42 U.S.C. §§ 2011-2296 (1982).

28. *Id.* § 2161.

29. *Id.* § 2014(y).

30. *Id.* § 2274.

31. Pub. L. No. 98-94, 97 Stat. 614 (1983) (codified as amended in scattered sections of 5 U.S.C., 10 U.S.C., 22 U.S.C. and 42 U.S.C.).

32. *Id.* § 1217, 97 Stat. 690 (1983).

II. GOVERNMENT INTERESTS FOSTERED BY SECRECY

The comprehensive scheme created by the President's executive order and by statutory provisions demonstrates governmental recognition that important national interests may be served and advanced when the executive branch withholds certain information from the public. These national interests concern, in a fundamental sense, our national survival. First, protecting the confidentiality of properly classified information bolsters the nation's capacity to defeat foreign aggression and, thus, to preserve the Constitution. Disclosure of classified information may aid the military strength of the nation's enemies, or may undermine the fighting capability of our armed forces. Revealing blueprints for constructing the nation's cruise missiles deployed in Europe or the Trident II submarine missiles, for example, would aid Soviet military power and technological prowess. Ceaseless efforts by the Soviet Union to buy or steal this type of information testify to its military value.³³ Even during peacetime, disclosure of information about the security safeguards of plants manufacturing nuclear weapons would imperil the nation's security. Such information might be exploited by terrorists and used to attack or destroy the plant or its inventory of weapons. The United States, thus, possesses a compelling interest in maintaining the secrecy of weapons information.

The United States, furthermore, has a compelling interest in withholding other types of military information. During war, disclosure of the location or plans of the nation's armed forces would impair chances of military victory. An announcement that experts had successfully deciphered encrypted enemy messages would negate any advantage gained by the discovery, because the enemy would change their plans and code. These examples illustrate the government's need for military secrecy.

The national need for secrecy does not exist only in the areas of weapons, troops, and tactics. To deter military aggression and avoid endangerment of American lives, the President must be em-

33. Since 1980, the Justice Department has prosecuted thirteen cases of espionage on behalf of Soviet or eastern bloc countries. No prosecutions have been dropped because of concerns that national security information might be disclosed. Telephone interview with Thomas E. Marum, Deputy Chief, Internal Security Section, Criminal Division, U.S. Department of Justice (January 10, 1984).

powered to maintain the secrecy of classified information or negotiations concerning foreign relations, treaties, and executive agreements. Express or tacit agreements between the United States and foreign countries would be scuttled or their terms adversely skewed if either the advice given the President or the content of negotiating deliberations between American and foreign officials were publicly disclosed.³⁴ First, publicity would chill candid discussions between the President and his advisors, and between the negotiating parties. The United States Supreme Court recognized this danger when it observed, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”³⁵

Second, disclosure of the negotiating tactics or positions of any party might affect national interests adversely. Publicity revealing the negotiating tactics of the United States would undermine the possibility of an agreement advantageous to the nation. Equally, if the negotiating posture of a foreign government were disclosed, then embarrassment or a loss of domestic political support for that incumbent foreign government might foreclose any agreement with the United States. Disclosure, furthermore, might circumscribe possibilities for compromise by making it politically unacceptable for a government to yield from a publicly known bargaining position. Many of these considerations retain their force even after negotiations have concluded. President Washington explained the reasons for this when he refused the House of Representatives’ request for papers prepared in anticipation of treaty negotiations with England:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate in-

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

35. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

convenience, perhaps danger and mischief, in relation to other powers.³⁶

In fact, the imperative of secrecy supplied a prime reason for granting the President, and not Congress, the authority to negotiate with foreign governments.³⁷

The need for secrecy is not refuted by experience showing that disclosure of classified information has not invariably occasioned immediate foreign policy setbacks or caused imminent military danger. Military or foreign policy developments result from a broad array of forces and events. Publicity of classified information might contribute to a chain of events that several years thereafter endangers the nation's independence or gravely wounds our foreign policy goals. Safeguarding against such eventualities is a paramount government interest under the Constitution.³⁸

III. CONSTITUTIONAL VALUES IMPAIRED BY SECRECY

To preserve the Constitution and, thus, the nation's independence, secrecy of classified information may be an urgent necessity. Such secrecy, however, lessens government accountability to the people by reducing public knowledge of government activities and by impeding informed public appraisal of government officials and must be balanced against other constitutional goals. Justice Black maintained in *New York Times Co. v. United States*,³⁹ that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."⁴⁰ Justice Black further insisted that "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."⁴¹

The first amendment fosters several vital constitutional values

36. 1 J.D. RICHARDSON, A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902, at 194-95 (1905).

37. See THE FEDERALIST No. 64 (J. Jay).

38. See ABA REPORTS, *supra* note 10.

39. 403 U.S. 713, 714 (1971) (Black, J., concurring).

40. *Id.* at 717.

41. *Id.* at 719.

which governmental secrecy may impair. The first amendment supports the protection and encouragement of informed public colloquy "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."⁴² Enlightened public discussion or criticism of government policies enables the electorate to form intelligent opinions whether particular public officials should stay in office or whether particular government practices should continue. When the public is denied access to classified information, however, trenchant appraisal by the electorate of the nation's defense and foreign policies may be hindered.

Arguably, norms of self-government are mocked when classified information about foreign negotiations or weapons potentially decisive in either precipitating or forestalling war is concealed from the public. Voters pay additional taxes and hazard life and limb if war eventuates because of government action. This argument implies that the public should be privy to all government deliberations or information that could be pivotal in matters of war or peace. Additionally, it suggests that public disclosure of classified information may enhance the quality of government decisionmaking. Justice Douglas asserted that "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors."⁴³ For instance, President John F. Kennedy's 1961 ill-starred Bay of Pigs assault against Castro's Cuba may have been a miscalculation that could have been avoided by public disclosure of classified information. Prior to the venture, Kennedy successfully invoked national security concerns to convince *The New York Times* to delete certain information about the invasion in a Tad Szulc story. After the military fiasco, Kennedy told editors of *The Times*: "If you had printed more about the operation, you would have saved us from a colossal mistake."⁴⁴ Arguments and examples such as these may suggest that governmental secrecy can seriously impair important constitutional goals.

These questions raised by executive branch classification and

42. *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

43. *New York Times*, 403 U.S. at 724 (Douglas, J., concurring).

44. Marder, *Bay of Pigs Invasion was no secret to many*, *Wash. Post*, Dec. 23, 1965, at A11, col. 4.

withholding of national security information are answerable. First, the public has no real need for particular items of classified information in order to evaluate government performance. Vast quantities of nonclassified information concerning a President's foreign or defense policies are available to the electorate. Because of the availability of this data, even without access to classified information, a voter can make an intelligent assessment of the President's national security programs. Furthermore, voters are concerned primarily with whether a President's national security policies have been successful; the particular items of classified information employed in achieving success or in suffering defeats are, at best, of secondary interest. The electorate generally knows, without access to classified information, whether the nation is at war, or has strengthened its alliances, or has improved its international posture.

With the information available, the public not only can evaluate foreign policies, but also can make its preferences known. An incumbent President virtually may be ousted from office if the public believes his foreign policies have failed. President Lyndon Johnson's decision in March of 1968 to renounce any re-election aspirations in light of the albatross of the Vietnam War illustrates the formidable power of public opinion in matters of national security. Denying the public access to classified information thus works no meaningful impairment of the people's power to vindicate their own national defense or foreign policy preferences through the electoral process.

Government decisionmaking might, in limited circumstances, be improved by public disclosure of classified information. Such a benefit, however, seems outweighed by the harm publicity would cause to many well-conceived government negotiations or national security endeavors. The Manhattan Project and Ultrasecret, for example, provided substantial national security benefits that depended on secrecy.⁴⁵

In addition, the likelihood that publicity of government deliberations and consequent public input will improve the quality of deci-

45. The Manhattan Project was the secret endeavor of the United States to develop an atomic bomb. Ultrasecret was the Allies' capability, unknown to the Nazis, to decipher encrypted messages during World War II. See F.W. WINTERBOTHAM, *THE ULTRASECRET* (1974).

sions or agreements is insubstantial. Members of the public ordinarily lack the time or comprehensive knowledge needed to make a productive contribution to national security decisionmaking by the government.

Government secrecy, thus, is not inevitably incompatible with constitutional values. Our Constitution was the child of secret deliberations. It has been lauded by Gladstone, nonetheless, as "the most wonderful work ever struck off at a given time by the brain and purpose of man."⁴⁶ The longevity of our Constitution and its influence on the constitutions adopted in other nations further testify to its greatness. Secrecy of government deliberations or negotiations thus is compatible with sound and far-sighted decisionmaking.

IV. ACCESS BY CONGRESS TO CLASSIFIED INFORMATION

Congress possesses a stronger need for access to classified information than does the public. It may need this information to successfully perform its constitutional duties. In addition, Congress has procedural mechanisms that reduce the risk that members of Congress will disclose classified information to the public.

Article I of the Constitution grants Congress legislative power over a broad spectrum of national security matters.⁴⁷ For example, Congress authorizes the development and production of weapons systems, and determines the size and compensation of the armed forces.⁴⁸ It possesses authority to declare war, to enact laws against international terrorism, and to shape foreign policy through economic or military aid or trade laws.⁴⁹ The Senate addresses additional national security issues in considering whether to ratify treaties, or whether to confirm a President's nomination of an official who previously participated in national security decisionmaking in government.⁵⁰ When Congress exercises its oversight duty to prevent inefficiency or maladministration in the Defense Department, the State Department, the National Security Agency, the Central

46. Gladstone, *Kin Beyond the Sea*, 127 NORTH AMER. REV. 179, 185 (Sept.-Oct. 1878).

47. See generally U.S. CONST. art. I.

48. See *id.* § 8, cl. 13.

49. See generally U.S. CONST. art. I, § 8, cl. 4, 12 and 13.

50. See U.S. CONST. art. II, § 2, cl. 3 and 4.

Intelligence Agency, or other executive agencies, it also may need to examine national security matters.

Congressional access to classified information thus will foster enlightened and efficacious discharge of Congress' constitutional responsibilities over foreign policy or national defense. Furthermore, congressional access can be circumscribed to avoid the risk of further publicity of classified information. Hearings involving classified information can be held in closed executive sessions; classified documents can be made available for examination by members of Congress or their staffs only in executive branch offices; disclosure of classified documents can be made only to select committees or select members; classified documents can be held in secure rooms and safes in congressional offices for perusal there without notetaking; debates on the floor of the House or Senate concerning national security information can be held in secret; or classified information may be transmitted to congressional committees only with pledges of secrecy.⁵¹

In summary, congressional endeavors to extract classified information from the executive branch in furtherance of legislative duties are justified constitutionally. The justification strengthens if Congress accedes to procedural restrictions on access to classified information that curtail the hazards of public disclosure.

Several factors, however, render congressional need for classified information on national security imperative. Enlightened congres-

51. For a discussion of measures Congress may take to retain secrecy, see generally *United States v. AT&T*, 551 F.2d 384, 386-87 (D.C. Cir. 1976) (involving the ability of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce to maintain the confidentiality of FBI wiretaps for asserted national security purposes). See also *supra* note 5 (regarding the constitutional basis for allowing portions of the journals of each House of Congress to be kept secret); Senate Rule XXVI(5)(b); House of Representatives Rule XI(5)(2) (executive sessions); Senate Rule XXVI(10)(a); House Rule XI(2)(e)(2) (committee records to be kept only in committee offices); Senate Rule XXI; House Rule XXIX (secret sessions).

A secrecy agreement between the executive branch and Congress, however, would probably be constitutionally unenforceable if a member of Congress decided to break the agreement through disclosure of classified information on the floor of Congress or during a session of a congressional committee. See *Gravel v. United States*, 408 U.S. 606, 615-16 (1972) (finding that a legislator's reading of classified material into the public record is protected by the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1); see also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (holding that the Senate Subcommittee on Internal Security's issuance of a subpoena duces tecum falls within the protection of the speech or debate clause and is therefore immune from judicial interference).

sional decisions about national security legislation or about executive maladministration can ordinarily be made without access to classified information. As the United States Court of Appeals for the District of Columbia Circuit explained in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, congressional judgments normally "depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events."⁵²

The executive branch, moreover, is entrusted with independent responsibility for the formulation and execution of national security policy. Disclosure of classified information to Congress may obstruct achievement of these executive duties for two reasons. First, experience teaches that initial disclosures to Congress, despite procedural safeguards, frequently result in public dissemination of classified materials through knowing or unwitting "leaks."⁵³ Disclosure to Congress, even without subsequent leaks, may chill full and candid discussions of national security matters within the executive branch, or may inhibit negotiations or exchanges of information with foreign officials. These consequences flow from a reluctance to display intellectual boldness or imagination if even tentative or exploratory views are to be revealed to a separate branch of government frequently at odds with the executive,⁵⁴ and a recognition by executive and foreign officials that disclosure to Congress carries an appreciable risk of further disclosure to the public.⁵⁵

In conclusion, an examination of the respective constitutional

52. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (comparing the tasks of Congress and a grand jury).

53. A Senate staff official associated with the Senate Intelligence Committee observed that classified information leaked into the public domain during the confirmation process of Richard Burt, nominated by President Reagan to Assistant Secretary of State, and during debate over CIA involvement in mining of Nicaraguan harbors. Interview with anonymous staff official, Senate Intelligence Committee (December 1984). Herb Romerstein, a former professional staff member of the House Intelligence Committee, remarked that when sharp political divisions over the nation's policies in Central America emerged in recent years, the number of leaks of classified information concerning that region multiplied. Interview with Herb Romerstein (December 1984). See also I. CRABB & P. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY* 152 (1980).

54. Cf. *Nixon*, 418 U.S. at 705; *New York Times*, 403 U.S. at 727-30 (Stewart, J., concurring).

55. See *supra* note 52.

powers and interests of Congress and the Executive yields no categorical answer to whether the Congress should be constitutionally entitled to obtain classified information from the Executive.

V. NONJUDICIAL SAFEGUARDS AGAINST ABUSE OF CLASSIFICATION AUTHORITY

A President could misuse his classification powers and withhold information from Congress or from the public when disclosure would not damage the national security. Several nonjudicial safeguards, however, militate against such misuse. These safeguards help to preserve the constitutional values fostered by access to information and allow the benefits obtained from the ability to properly classify information to continue.

Experience demonstrates a substantial probability exists that "leaks" from the executive branch would reveal patterns of improper classification of information.⁵⁶ First, Congress may informally investigate such misclassification. Following such revelations, Congress could retaliate against the President by refusing to enact legislation or to appropriate funds he has requested for national security or for other purposes, by refusing to confirm nominees for national security positions in the executive branch, by refusing to ratify treaties, or, in extreme circumstances, by initiating impeachment proceedings. Congress could pursue these retaliatory measures, moreover, upon mere suspicion of executive abuse of classification authority, without confirmatory executive branch leaks. One commentator observed:

It is obvious that in a large majority of cases it is greatly to the advantage of the executive to cooperate with Congress, and in a large majority of cases it does so. Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation.⁵⁷

56. The Reagan Administration's consternation over the frequency of leaks may yield new legislation to stiffen penalties for government officials who disclose secrets to the press. Wash. Post, Dec. 2, 1984, at A3, col. 1.

57. *Nixon v. Sirica*, 487 F.2d 700, 778 (D.C. Cir. 1973) (quoting Bishop, *The Executive's Right to Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 486 n.3 (1957)).

Second, the public may limit improper misclassification of information. Unwarranted secrecy may impair chances for vindication of the President's initiatives or for reelection. Third, the President's successor could inform Congress or the public of a predecessor's unjustified classification of information. Finally, the Presidential Records Act of 1978 requires the maintenance, preservation, and public disclosure of a broad array of presidential records.⁵⁸ A President's abuse of the power to classify probably would be revealed under the Act after that President left office.⁵⁹

VI. APPRAISAL OF STATUTES AND CASE LAW

The foregoing national security and constitutional considerations provide the background for appraising the prevailing legal norms governing access to or publicity of classified information. Analysis of these norms is sharpened by separating the legal rules into five categories: rights of the public or the press, rights of criminal defendants, rights of civil litigants, rights of former government employees, and rights of Congress. Examination of these areas shows that federal statutes and case law generally have recognized the President's need for secrecy.

A. *Rights of the Public or the Press*

Generally, neither the public nor the media enjoy any constitutional right of access to information or records generated or controlled by the government, whether classified or not. This principle may be seen in *Houchins v. KQED, Inc.*,⁶⁰ a case involving non-classified government information. In *Houchins*, a broadcaster de-

58. 44 U.S.C. §§ 2201-2207 (1982).

59. Upon the conclusion of a President's term of office, the Archivist of the United States has an affirmative duty to make presidential records available to the public as quickly as possible. See 44 U.S.C. § 2203(f)(1) (1982). However, an outgoing president may specify that certain documents shall not be made publicly available for a period of up to twelve years. See *id.* § 2204. During this period, incumbent Presidents and either House of Congress are permitted access to records containing information that is needed for the conduct of their business and otherwise is unavailable. See *id.* § 2205(2)(B)-(c). These presidential records also are available via subpoena for any civil or criminal investigation. See *id.* § 2205(2)(A). Thus, members of the public, the Congress in furtherance of its investigative responsibilities, and subsequent Presidents in pursuit of their law enforcement functions would all be in a position to uncover misclassifications. ◦

60. 438 U.S. 1 (1978).

manded access to a county jail to interview inmates and take pictures there as a part of a story on prison conditions.⁶¹ Such access, the broadcaster urged, was essential to enlightened public debate over jail conditions. The first amendment, he maintained, creates a right of access to government-controlled sources of information in order to foster an informed electorate and to safeguard against government wrongdoing or maladministration.⁶²

By a four to three vote, the Supreme Court rejected the broadcaster's first amendment interpretation. Writing for a plurality of three, Chief Justice Burger conceded that conditions in penal institutions are of great public importance, and that "with greater information, the public can more intelligently form opinions about prison conditions."⁶³ The Chief Justice denied, however, that the first amendment commands that government facilities be opened or that government information be disclosed simply because public understanding of government would be incrementally advanced.⁶⁴ The Constitution is not a Freedom of Information Act, the Chief Justice concluded, and it permits legislative bodies or executive officials to fashion public access policies regarding government information according to their respective visions of the public interest.⁶⁵

The Court has recognized only one exception to the "no access" rule of *Houchins*. In *Richmond Newspapers, Inc. v. Virginia*,⁶⁶ a seven-to-one majority held the first amendment to require the public and press be allowed to attend criminal trials, absent an overriding interest in closing the trial, supported by specific findings of the trial court. An Anglo-American history of open criminal trials and the contribution openness makes to public understanding of and confidence in the administration of justice provided the intellectual pillars for the *Richmond Newspapers* decree.⁶⁷ Unlike

61. *Id.* at 3-4.

62. *See id.* at 7-8.

63. *Id.* at 8.

64. *See id.* at 11 (citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972): "The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."; and citing *Pell v. Procunier*, 417 U.S. 817, 834 (1974): "The media has no constitutional right of access to prisons or their inmates beyond that afforded the general public.").

65. *See id.* at 12-16.

66. 448 U.S. 555 (1980).

67. *See generally id.*

criminal trials with a history of openness, classified information invariably has been earmarked by secrecy. Accordingly, the reasoning of *Richmond Newspapers* does not extend to the *Houchins* norm and thus does not create a public or press right of access to classified information.

While the courts generally have held that the public has no constitutional right of access to government controlled information without constitutional compulsion, Congress has established a narrow statutory right of public access to classified information when the decision to classify was improper. Under the Freedom of Information Act,⁶⁸ agency records generally must be disclosed to the public on request. Agency records that are "properly classified pursuant to . . . Executive order"⁶⁹ are exempt from mandatory FOIA disclosure. Pertinent legislative history evinces an intent that courts display substantial deference to the classification decisions of the executive.⁷⁰ Judicial examination of classified information must be *ex parte* and *in camera* when a person seeks CIA records; and the substantive (in contrast to the procedural) propriety of the classification, to the fullest extent practicable, rests on sworn written submissions of the parties.⁷¹ Rarely has the judiciary compelled the government to reveal classified information.⁷²

68. 5 U.S.C. §§ 552-552b (1982).

69. *Id.* § 552(b)(1)(B) (emphasis added).

70. See S. CON. REP. No. 1200, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6290:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insight into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information laws, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

71. See Central Intelligence Agency Information Act, Pub. L. No. 98-477 § 701(f)(1)-(2), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2209.

72. *But see* Peterzell v. Department of State, C.A. 82-2853 (D.D.C. October 16, 1984) (slip op.), appeal docketed, No. 84-5805 (D.C. Cir. November 16, 1984); Fitzgibbon v. CIA, 578 F. Supp. 704 (D.D.C. 1983), appeal docketed, Nos. 84-5611, 84-5632 (D.C. Cir. 1984); Abbots v. Nuclear Regulatory Comm'n, 3 G.D.S. § 83.257 (1984). This paper does not examine whether the federal judiciary should be entrusted with authority to review the substantive correctness of classification decisions. The availability of judicial review may cause disclosure of classified information for two reasons. An agency may decline to submit affidavits explaining why requested records were classified because the explanation would reveal ex-

While the public and press have only limited rights to procure government information, if the press obtains classified information, whether innocently or through wrongdoing, then the first amendment establishes a qualified right to publish. In *New York Times Co. v. United States*,⁷³ the "Pentagon Papers" case, the government sought to enjoin *The New York Times* and *The Washington Post* from publishing a classified study styled "History of U.S. Decision-Making Process on Viet Nam Policy."⁷⁴ The classified documents had been purloined from the government and the newspapers received them with knowledge of the prior wrongdoing.⁷⁵ No statute, however, authorized the injunctive suits. The United States claimed, instead, that the government's power to obtain relief rested on the President's constitutional powers over national security.⁷⁶ By a six-to-three vote, the Supreme Court repudiated the government's injunctive strategy.⁷⁷

All members of the majority authored concurring opinions. Justice Stewart's opinion, joined by Justice White, expounded the pivotal rationale for the decision. The Executive, Stewart asserted, is endowed constitutionally with "enormous power" over national defense and international relations, largely unchecked by the courts or by Congress.⁷⁸ Absent government checks, informed public opinion nurtured by a free press is the only effective restraint on the Executive's national security policies.⁷⁹ Thus, the press must vindicate the basic purpose of the first amendment by informing the public about the national security practices of the Executive.⁸⁰

On the other hand, Justice Stewart acknowledged, secrecy is indispensable to attain foreign policy or national defense goals:

[I]t is elementary that the successful conduct of international

ceptionally important classified information that might inadvertently or otherwise leak from the court files. In addition, agency employees processing FOIA requests may unwittingly release records entitled to classification because of insufficient knowledge. The most expert high level agency officials ordinarily are not assigned to an FOIA assembly line.

73. 403 U.S. 713 (1971).

74. *Id.*

75. *Id.* at 754 (Harlan, J., dissenting).

76. *See generally id.* at 714-63.

77. *Id.* at 714.

78. *Id.* at 727 (Stewart, J., concurring).

79. *Id.* at 728.

80. *See id.*

diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.⁸¹

Justice Stewart extrapolated several conclusions from these observations. First, the executive branch possesses an unshared duty and power to protect the confidentiality necessary to achieve its national security responsibilities.⁸² Second, Congress may assist the Chief Executive by enacting civil or criminal penalties for disclosure of classified materials, and the courts would have the responsibility to decide the applicability and constitutionality of any laws so enacted.⁸³ Justice Stewart concluded that, in the absence of congressional action, the President is entitled to an injunction prohibiting publication of classified information only by proving that disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."⁸⁴ Because that convincing showing of harm was not forthcoming, Justice Stewart voted against the government's request for an injunction.

The *New York Times* ruling left open the question of whether newspapers enjoy a first amendment shield against criminal prosecution, civil damages, or penalties for publishing classified information whose disclosure ineluctably would cause direct, immediate, and irreparable harm to the national security.⁸⁵

In *United States v. Progressive, Inc.*,⁸⁶ the United States District Court for the Western District of Wisconsin properly recognized the narrow scope of the first amendment right of the press to publish classified materials established in *New York Times*. The

81. *Id.*

82. *See id.* at 729.

83. *Id.* at 730.

84. *See id.*

85. *See id.* at 740 (White, J., concurring).

86. 467 F. Supp. 990 (W.D. Wis. 1979).

case stemmed from the successful efforts of a private researcher to collate and synthesize information available in the public domain describing a method of manufacturing and assembling a hydrogen bomb.⁸⁷ Relying on the Atomic Energy Act of 1954,⁸⁸ the United States sought to enjoin publication of the information. The district court granted a preliminary injunction, concluding that publication would precipitate immediate, direct and irreparable harm to the nation.⁸⁹

Disclosure of the hydrogen bomb information, the district court found, could accelerate the time needed by nonnuclear countries to construct nuclear weapons.⁹⁰ Moreover, the court reasoned, public knowledge of the technical details of hydrogen bomb construction is unnecessary to informed debate on the dangers of nuclear proliferation.⁹¹ In addition, the court asserted that publication of the hydrogen bomb information arguably would flout a federal statute.⁹² Section 2274 of the Atomic Energy Act proscribes the disclosure of "restricted data" with reason to believe such data will be exploited to injure the United States or to secure an advantage to a foreign nation.⁹³ The Act defines restricted data to include data concerning the design or manufacture of atomic weapons.⁹⁴ Thus, the court observed, the government's case for an injunction was stronger than in *New York Times* because its request was reinforced by a federal statute.⁹⁵

The *Progressive* court noted that in *Near v. Minnesota*,⁹⁶ the Supreme Court declared that injunctions against publication of troop movements in time of war would not violate the first amendment.⁹⁷ In contemporary times, the court in *Progressive* asserted,

87. *See id.* at 993.

88. 42 U.S.C. §§ 2011-2296 (1982).

89. 467 F. Supp. at 999-1000. The court concluded that publication of the article would likely violate the Atomic Energy Act of 1954, but went on to state that the case fell within the narrow area, involving national security, in which prior restraint on publication is appropriate. *Id.* at 1000.

90. *See id.* at 994.

91. *Id.* at 996.

92. *See id.* at 994.

93. *See supra* note 30.

94. *See supra* note 29.

95. *See* 467 F. Supp. at 994.

96. 283 U.S. 697 (1931).

97. *Id.* at 716.

the replacement of foot soldiers by machinery and bombs placed the country on a permanent war footing.⁹⁸ A nuclear war can be commenced instantly. Thus, the district court maintained, because the government made a strong showing of direct, immediate, and irreparable harm, and because suppressing technical data showing how to construct a nuclear bomb would not obstruct the defendants' quest to stimulate public knowledge and debate about nuclear armaments, enjoining publication of the technical data was justified under the rationale of *Near v. Minnesota*.⁹⁹

To summarize, case law and the Freedom of Information Act establish several propositions. Neither the public nor the press enjoys a first amendment or statutory right to properly classified information. The public may obtain improperly classified information held as agency records, however, through FOIA litigation, but courts may find impropriety in classification only in narrow circumstances. Further, if the press acquires possession of classified information, an injunction against further disclosure is available only if the United States demonstrates that publication would engender direct, immediate, and irreparable harm to the national security. An injunction could be justified on a lesser showing of harm if publication would violate a federal statute. In addition, the more insignificant the contribution the classified information would make to informed public opinion and dialogue on national security matters, the more readily an injunction will issue.

The Department of Defense recently has initiated unprecedented measures to further the principle "that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces."¹⁰⁰ These measures, designed to enhance public understanding and public availability of information regarding military operations, lessen the public's need for access to classified information to formulate intelligent opinions regarding the nation's military endeavors.

98. See 467 F. Supp. at 996.

99. *Id.*

100. See Statement of the Secretary of Defense releasing the final report of the Chairman of the Joint Chiefs of Staff Media-Military Relations Panel (Sidle Panel), No. 450-84 (August 23, 1984).

B. *Rights of Criminal Defendants*

Federal criminal defendants possess limited rights to examine or to disclose classified information pertinent to establish a defense. These rights, however, create no genuine threats to the government's national security interests because the government can withhold or suppress classified information by terminating a prosecution.¹⁰¹

Statutory provisions generally establish the rights of the defendant and government in this context. Under the Classified Information Procedures Act,¹⁰² the United States may seek a protective order enjoining a criminal defendant from disclosing any classified information revealed to him by the government.¹⁰³ Moreover, the trial court

may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the Information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.¹⁰⁴

A defendant must provide timely notice to the United States whenever he anticipates disclosing classified information in con-

101. See *Alderman v. United States*, 394 U.S. 165 (1969) (holding that recordings from electronic surveillance must be turned over to defendants so that they can determine if any illegally obtained information was used to convict them). The Court stated that if the government did not want to disclose the information it could decide to dismiss the case. *Id.* at 181, 184). See also Classified Information Procedures Act, § 6(f), 18 U.S.C. app. at 549 (1982):

Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. . . . If the United States fails to comply with its obligations under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

Id. at 550-51.

102. 18 U.S.C. app. at 549-54 (1982).

103. *Id.* § 3, at 549.

104. *Id.* § 4.

nection with any pretrial or trial proceeding.¹⁰⁵ The United States is entitled to an in camera hearing to obtain court rulings on the use, relevance, or admissibility of the classified information.¹⁰⁶ If the court authorizes the disclosure of classified information, then the United States may move to substitute either a statement admitting facts that the information would tend to prove, or a summary of the classified information.¹⁰⁷ The court must grant the motion if the requested substitution would not substantially detract from the defendant's ability to mount a defense.¹⁰⁸ If the court denies the motion and the Attorney General files an affidavit explaining how disclosure of the pertinent classified information would cause identifiable damage to the national security, then the court must dismiss the prosecution and enjoin the defendant from disclosing the classified information.¹⁰⁹ In lieu of dismissal, if the interests of justice dictate, the trial court may dismiss only specified counts of the indictment or criminal information, may make findings against the United States on issues relating to the suppressed classified information, or may strike or preclude all or part of the testimony of a witness.¹¹⁰

Another statute, the Foreign Intelligence Surveillance Act,¹¹¹ requires the government, in either criminal or civil proceedings, to inform any target of electronic surveillance initiated for national security purposes that it anticipates that it will use information derived from the surveillance against him.¹¹² The target is entitled to suppression of the information if it was unlawfully acquired or if the surveillance deviated from an order of authorization or approval.¹¹³ The United States may obtain an in camera, ex parte suppression hearing if the Attorney General files an affidavit with an appropriate court certifying that either disclosure of the challenged information or an adversary hearing would harm the na-

105. *Id.* § 5(a).

106. *See id.* § 6(a), at 550.

107. *Id.* § 6(c)(1).

108. *Id.*

109. *Id.* § 6(e)(1)-(2).

110. *Id.* § 6(e)(2).

111. 50 U.S.C. §§ 1801-1811 (1982).

112. *See id.* § 1806(c).

113. *See id.* § 1806(e).

tional security.¹¹⁴ In ruling on a suppression motion, the court may disclose to the target, under appropriate security procedures and protective orders, materials related to the electronic surveillance only when necessary for an accurate determination of its legality.¹¹⁵

In addition to statutory provisions, the Supreme Court has examined a criminal defendant's right of access to classified information. To safeguard constitutional guarantees of privacy, the Supreme Court has ruled, in general, that evidence seized in violation of a criminal defendant's fourth amendment rights, without good faith justification, must be suppressed in criminal proceedings.¹¹⁶ To buttress a claim that evidence is tainted by a fourth amendment violation, a defendant may review materials derived from unjustified unconstitutional conduct, whether or not national security information would be disclosed.¹¹⁷ The trial court, where appropriate, should prohibit the defendant and his counsel from unwarranted disclosure of the materials subject to inspection.¹¹⁸ To avoid disclosure of national security information to the defendant, the government may dismiss the prosecution.¹¹⁹

Criminal defendants, therefore, may insist on limited access to or disclosure of classified information when necessary to marshal a defense. These access and disclosure rights accord with concepts of fairness and do not endanger the government's paramount interest in national security. The government's interest can be protected by dismissal of the prosecution or less drastic concessions by the government in a criminal case. Thus, in the area of criminal prosecutions the defendant's need for information and the government's need for confidentiality have been balanced properly.

C. *Rights of Civil Litigants*

In contrast to criminal defendants, plaintiffs suing the United States enjoy no right of access to classified information pertinent to the litigation. In *United States v. Reynolds*,¹²⁰ a Federal Tort

114. *Id.* § 1806(f).

115. *Id.*

116. *See generally* *United States v. Leon*, 104 S. Ct. 3405 (1984).

117. *Alderman v. United States*, 394 U.S. 165, 181 (1969).

118. *Id.* at 185.

119. *Id.* at 181, 184.

120. 345 U.S. 1 (1953).

Claims Act suit, plaintiffs sought discovery of an Air Force investigation report of an aircraft accident and of statements of crew survivors. The United States resisted discovery on the ground that disclosure would hamper national security seriously.¹²¹ In a unanimous decision, the Supreme Court elaborated on the government privilege for state secrets.

Writing for the Court, Chief Justice Vinson asserted that the Federal Rules of Civil Procedure entitled the United States to withhold disclosure of "privileged" information and that military or state secrets are cloaked with privilege.¹²² To determine whether the government has properly invoked such privilege, Vinson declared, the trial judge must determine from all the circumstances that clearly, revelation of the evidence will expose military matters that, in the interest of national security, should not be divulged.¹²³ The judge should try to make this determination without an in camera examination of the privileged materials.¹²⁴ The Court recognized that the greater the plaintiff's need for the material, the more scrupulous the trial court's scrutiny of the privilege claim should be.¹²⁵ The Court ultimately concluded that if the government establishes its privilege claim, no matter how great the plaintiff's need, then the government may withhold the national security information without suffering any litigation sanction.¹²⁶

In *Totten v. United States*,¹²⁷ the administrator of a decedent's estate sought compensation for clandestine services performed by the decedent under contract during the Civil War.¹²⁸ Denying the claim, the Supreme Court reasoned that both the government and the decedent must have intended to conceal the existence of the contract:

This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our

121. *Id.* at 3-5.

122. *Id.* at 6-7.

123. *Id.* at 10.

124. *See id.*

125. *See id.* at 11.

126. *See id.* at 11-12.

127. 92 U.S. 105 (1875).

128. *Id.* at 105-06.

foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.¹²⁹

Accordingly, the Court explained, the secrecy obligation inherent in the decedent's contract precluded any lawsuit for its performance: "The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery."¹³⁰

The *Totten* and *Reynolds* decisions establish the principle that contract or tort claimants against the United States have no constitutional right to obtain or to disclose military secrets or classified information to prove their claims.

The harshness of the rule was illustrated in *Halkin v. Helms*.¹³¹ In that case, twenty-seven individuals and organizations sued several government agencies and private international record carriers alleging unconstitutional interceptions of their international wire, cable and telephone communications.¹³² The Secretary of Defense submitted an open affidavit stating that admitting or denying the interceptions, in and of itself, would reveal important military and state secrets involving the capabilities of the National Security Agency to collect and analyze foreign intelligence.¹³³ Ex parte affidavits and testimony at in camera hearings reinforced this assertion.¹³⁴ Bowing to the Secretary's expertise, the United States Court of Appeals for the District of Columbia Circuit held that the state secrets privilege entitled the government to refuse any response to the plaintiffs' constitutional claims, even if that refusal resulted in concealment of unconstitutional actions.¹³⁵ Dismissal of the claims, thus, was mandated unless evidence, unprotected by

129. *Id.* at 106.

130. *Id.* at 107.

131. 598 F.2d 1 (D.C. Cir. 1978).

132. *Id.* at 3.

133. *See id.* at 4-5.

134. *See id.* at 5.

135. *See id.* at 9. The court stated that the standard of review for claims of state secrets privilege is a narrow one. "Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military and diplomatic secrets." *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)). "The court need only be satisfied that there is a *reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* (citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

the absolute state secrets privilege, could prove the claims.¹³⁶

The question of whether Congress by statute can compel access to or disclosure of classified information in civil litigation is still open. Under the Inventions Secrecy Act,¹³⁷ the United States may prohibit publication or disclosure of any invention submitted for patenting if necessary to prevent detriment to the national security.¹³⁸ Moreover, if such a determination is made, the grant of a patent must be withheld for such period as the national interest requires.¹³⁹ The inventor, however, may sue the government for just compensation for damages resulting from any secrecy order issued under the Act.¹⁴⁰ If the just compensation litigation would disclose military secrets, then the district court may order dismissal.¹⁴¹ Alternatively, the court may conduct the trial in camera, and order disclosure of otherwise privileged "state secrets," but only if no substantial risk of publicity exists beyond the closed courtroom.¹⁴² Congress has not required open courtrooms in litigation initiated pursuant to the Inventions Secrecy Act.¹⁴³

In litigation between private parties, classified information may be pertinent either to prove a claim or to establish a defense. An assertion of the government's state secrets privilege must be

136. *See id.* at 8-11.

137. 35 U.S.C. §§ 181-183 (1982).

138. *See id.* § 181.

139. *See id.* An order that an invention shall be kept secret and the grant of a patent withheld is effective for up to one year. At the end of this time, the order can be renewed by the Commissioner of Patents and Trademarks if notified by the head of the government agency who requested the initial order that the national interest continues to require the invention to be kept secret. *Id.*

140. *Id.* § 183. In addition to the inventor's ability to bring suit in the United States Court of Claims or in a United States District Court, the statute permits the inventor to apply for damages to the agency or department that caused the invention to be kept secret, and authorizes the head of that agency or department to enter into a settlement agreement with the inventor. *Id.*

141. *See generally* Halpern v. United States, 151 F. Supp. 183 (S.D.N.Y. 1957), *rev'd on other grounds*, 258 F.2d 36 (2d Cir. 1958) (inventor may not sue for compensatory damages during pendency of the Secrecy Order).

142. Clift v. United States, 635 F.2d 826, 829-30 (2d Cir. 1979); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958). In *Halpern*, the court held that a trial in camera in which the United States cannot invoke the state secrets privilege is permissible under the Inventions Secrecy Act if, "in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged." 258 F.2d at 44.

143. 35 U.S.C. § 183 (1982) granting inventors a right to compensation makes no mention of either an open or a closed courtroom.

respected in such circumstances.¹⁴⁴ Assertion of the privilege might cause the court to dismiss the plaintiff's claim or to enter a judgment against the defendant. Furthermore, a claim must be dismissed if proof requires evidentiary probing at the borders of the privileged information and thus threatens its confidentiality.¹⁴⁵

D. Rights of Former Government Employees

Former government employees who, as a part of their government employment, enjoyed access to classified information have no first amendment right to disclose such materials in writing or otherwise. Moreover, the government may require a former employee to submit writings relating to his government employment for prepublication review for the purpose of deleting classified information. The United States may claim profits earned by a former employee from publishing materials in contravention of a prepublication review requirement.

In *Snepp v. United States*,¹⁴⁶ Snepp, a former employee of the Central Intelligence Agency (CIA) published, in contravention of his employment contract, a book concerning CIA involvement in South Vietnam. The contract prohibited Snepp from publishing any information relating to the CIA without its specific prior approval. Under the contract Snepp also agreed not to disclose classified information without proper authorization.¹⁴⁷

The United States brought suit seeking a declaration that Snepp had violated his valid contractual obligations, an injunction requiring that he submit future writings for prepublication review, and the imposition of a constructive trust for the government's benefit on the profits Snepp might earn from publishing in violation of his contractual obligations to the CIA.¹⁴⁸ Denying that the first

144. See *Farnsworth Cannon v. Grimes*, 635 F.2d 268 (4th Cir. 1980). *Grimes* involved a suit against an employee of the Department of Navy for wrongful interference with prospective contractual relations between the plaintiff and United States Navy. The Fourth Circuit, on rehearing *en banc*, affirmed the district court's dismissal of the cause of action and held that any attempt by the plaintiff to establish a *prima facie* case "would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." *Id.* at 281.

145. *Id.* at 281.

146. 444 U.S. 507 (1980).

147. *Id.* at 507-08.

148. *Id.* at 508.

amendment barred any of the claims against Snepp, the Supreme Court sustained every government request.

In a per curiam opinion, the Court declared that “[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”¹⁴⁹ Accordingly, the Court reasoned, even without an express agreement, the CIA can impose prepublication review requirements on former employees without disturbing the first amendment.¹⁵⁰

Trial court findings substantiated that Snepp had frequent access to classified information.¹⁵¹ The trial court also found that flouting a prepublication review agreement could harm vital national interests whether or not a publication reveals classified information.¹⁵² Because the CIA possesses a uniquely broad array of information that enables detection of material that might expose classified information or confidential sources, the Supreme Court reasoned that the absence of prepublication review may occasion unwitting disclosure of national security information by a less informed former employee.¹⁵³ It further reasoned that this hazard could cause foreign intelligence services to cease full cooperation with the CIA.¹⁵⁴ Thus, the Court concluded, Snepp’s violation of his prepublication agreement irreparably harmed the government.¹⁵⁵

To deter similar future injury to national security interests, the Court explained, the government was entitled to an injunction against Snepp and to all profits derived from Snepp’s unlawful publication.¹⁵⁶ It concluded that an award of compensatory or punitive damages in lieu of profits would not establish a strong monetary deterrent to prepublication review violations because of evidentiary difficulties the government might encounter, including its

149. *Id.* at 509 n.3.

150. *Id.*

151. *Id.* at 511.

152. *Id.* at 511-12.

153. *See id.* at 512.

154. *Id.*

155. *Id.* at 513.

156. *Id.* at 514-15.

legitimate reluctance to offer evidence in open court that might endanger national security, yet be pertinent to proof of damages.¹⁵⁷ Tacit in the *Snepp* decision is the conclusion that the first amendment right of persons to receive information¹⁵⁸ is subservient to the government's need to preserve the confidentiality of classified information.

The CIA's prepublication review requirements entitle the government to delete only classified information from any submitted writing or proposed speech. In *United States v. Marchetti*,¹⁵⁹ however, the United States Court of Appeals for the Fourth Circuit held that former CIA employees have no constitutional right to judicial review of the correctness of the secrecy classifications the CIA uses in deleting information from submitted materials.¹⁶⁰ The court explained that classification decisions about one item of information frequently turn on expert knowledge of a broad spectrum of foreign intelligence matters. Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."¹⁶¹ Because courts are novices in foreign intelligence matters, they are ill-suited to review the propriety of classification decisions.¹⁶²

In 1974, after the *Marchetti* decision, Congress amended the Freedom of Information Act to authorize judicial review of classification decisions when agency records are sought.¹⁶³ Thereafter, in a sequel to *Marchetti*, *Alfred A. Knopf v. Colby*,¹⁶⁴ the United States Court of Appeals for the Fourth Circuit held that former CIA employees could obtain judicial review of classification decisions in challenging Agency deletions of materials submitted for

157. *Id.*

158. See generally *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) (holding that recipients of prescription drug price information enjoy a first amendment right to receive that information); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305-06 (1965) (holding that citizens have a first amendment right to receive political publications sent from abroad).

159. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

160. *Id.* at 1317.

161. *Id.* at 1318.

162. *Id.*

163. 5 U.S.C. § 552 (1982) (as amended by Pub. L. No. 93-502, 88 Stat. 1561).

164. 509 F.2d 1362 (4th Cir. 1975).

prepublication review under the deferential FOIA standards.¹⁶⁵

In the most recent of these lower court decisions, *Agee v. CIA*,¹⁶⁶ the United States District Court for the District of Columbia imposed a broad prepublication injunction against a former CIA employee, Philip Agee, for intentional violations of a prepublication review agreement.¹⁶⁷ The injunction prohibited Agee "from disseminating, or causing to be disseminated, any [written or oral] information or material relating to the Central Intelligence Agency, its activities, or intelligence activities generally, without the express written consent [of the Agency]. . . ."¹⁶⁸ The only exception to the prohibition was for "extemporaneous oral remarks that consist solely of personal views, opinions, or judgments on matters of public concern, and that do not contain, or purport to contain, any direct or indirect reference to classified intelligence data or activities. . . ."¹⁶⁹

E. Access by Congress

The maiden effort by the federal judiciary to resolve a dispute between the Executive and Congress over access to classified information confirms that such clashes raise nonjusticiable political questions. In *United States v. AT&T*,¹⁷⁰ the Department of Justice sued AT&T to enjoin it from complying with a subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee issued the subpoena in furtherance of its investigation into warrantless wiretapping in the United States, ostensibly for national security purposes. The Subcommittee suspected abuse of warrantless wiretapping and was concerned with the possible need for remedial legislation.¹⁷¹

The FBI conducted warrantless wiretaps using AT&T facilities. Typically, the Bureau would send a "request letter" to AT&T specifying a target line to be tapped, identified by telephone num-

165. See *id.* at 1367.

166. 500 F. Supp. 506 (D.D.C. 1980).

167. *Id.* at 507-10.

168. *Id.* at 511.

169. *Id.*

170. 551 F.2d 384 (D.C. Cir. 1976).

171. *Id.* at 385.

ber, address, or other numerical designation. The letter would further request a private leased line to transmit the tapped communications to an FBI monitoring station.¹⁷²

The Subcommittee subpoena demanded that AT&T provide copies of all national security request letters. It also sought comparable records maintained prior to the initiation of the request letter practice.¹⁷³ Prior to the lawsuit, Subcommittee Chairman John Moss and executive office officials had negotiated about alternative disclosures that would satisfy the information needs of the Subcommittee. In lieu of the request letters, the Justice Department proposed to provide expurgated copies of backup memoranda the Attorney General used to decide whether to authorize foreign intelligence warrantless wiretapes.¹⁷⁴ Such copies would substitute generic descriptions for information that would identify specific targets of the wiretapes.¹⁷⁵ The Subcommittee agreed to the terms of the proposal, except for the method of verifying the accuracy of the generic descriptions.¹⁷⁶

The proposal's verification procedures provided that for two sample years, 1972 and 1975, the Subcommittee would receive all Attorney General backup memoranda pertinent to domestic national security surveillances, with minor deletions to shield ongoing investigations. The foreign intelligence backup memoranda for those years would be edited to disclose targets only generically.¹⁷⁷ The Subcommittee was to maintain the documents in secrecy as provided by House Rules.¹⁷⁸

To verify the accuracy of the foreign intelligence generic descrip-

172. *See id.*

173. *Id.* at 385-86.

174. *Id.* at 386.

175. *Id.*

176. *Id.*

177. *Id.*

178. Under pertinent House rules, the documents in question could be released only by vote of the Subcommittee on Oversight and Investigations (the "Subcommittee") of the House Committee on Interstate and Foreign Commerce (the "Committee"), chaired by Congressman Moss. The Subcommittee's vote could be overruled by a majority vote of the Committee, which, in turn, could be overruled by a majority of the House. Any member of the House would have been permitted access to the documents in question, but would have been bound by the House Rules not to release such documents without obtaining the requisite vote of the Subcommittee, Committee or House. *See id.* at 386-87 (referring to House of Representatives Rule XI(2)(a), (g) and Rule XI(2)(k)(7)).

tions, White House officials offered Chairman Moss the right to inspect a subsample of unedited backup memoranda,¹⁷⁹ or, alternatively, offered the Subcommittee the right, after proceeding through certain channels, to obtain the personal review and certification of the President.¹⁸⁰ The Subcommittee insisted that staff members cleared for national security trustworthiness have access to a subsample of unedited backup memoranda, and have a right to take notes to the Subcommittee.¹⁸¹

Disagreement over the verification question provoked Chairman Moss, on behalf of the House of Representatives, to intervene as a defendant in the injunction suit against AT&T.¹⁸² The executive branch urged that compliance with the Subcommittee subpoena threatened public disclosure of all foreign intelligence surveillance targets since 1969.¹⁸³ That publicity, the executive branch claimed, would adversely affect diplomatic relations with many countries, and would jeopardize the collection and utility of intelligence and counterintelligence information.¹⁸⁴ The district court issued the requested injunction, Congressman Moss appealed, and the court of appeals remanded to foster a settlement.

The court of appeals recognized that the House's demand that the President provide access to foreign intelligence information might raise a nonjusticiable political question.¹⁸⁵ In balancing the investigatory need of Congress against the national security powers of the executive branch, the court conceded that formulating judicially manageable standards would be problematic. In this case, the court noted that evaluating Congress' need for the "request letters" to execute its investigatory power would be difficult because other information was available from the executive branch.¹⁸⁶ It further noted that to assess the national security interests of the President, a court would need to address the likelihood of leaks from Congress and the effect of a leak on intelligence

179. *Id.* at 387.

180. *Id.*

181. *Id.*

182. *Id.* at 388.

183. *See id.*

184. *See id.* at 390.

185. *Id.* at 391.

186. *Id.*

activities or diplomatic relations.¹⁸⁷

The court declined to decide the political question issue and a host of other thorny legal questions, however, and instead encouraged a settlement satisfactory to the essential needs of both Congress and the Executive.¹⁸⁸ Indeed, the court gratuitously injected a suggestion that the parties employ the judiciary in crafting verification procedures to avoid the procedural disagreement that earlier had scuttled a settlement.¹⁸⁹ The record was remanded to the district court, which was ordered to report on the progress of settlement negotiations.¹⁹⁰

Negotiations failed, and the case returned to the court of appeals.¹⁹¹ After offer and counteroffer, the Subcommittee rejected a final Executive proffer providing that subcommittee staff could inspect all expurgated backup memoranda for two sample years, plus ten unexpurgated memoranda randomly selected by the Subcommittee.¹⁹² Under the plan, the Attorney General could make substitutions for any unexpurgated memoranda if he believed its disclosure would gravely injure national security or would result in physical harm to any person.¹⁹³ The substitutions would be subject to in camera judicial review, as would the accuracy of the generic descriptions in the expurgated memoranda.¹⁹⁴ The Subcommittee objected that the sample size for unexpurgated memoranda was too small, that the Attorney General's right of substitution further undermined the validity of the sample, and that the judiciary was incompetent to review executive decisions over the foreign intelligence matters in dispute.¹⁹⁵

Seeking to conciliate the disputants, the court of appeals denied that abstention under the political question doctrine was required because judicially discoverable or manageable standards were unavailable to assess Congress' and the Executive's claims over access

187. *Id.*

188. *See id.* at 390-92.

189. *Id.* at 394-95.

190. *Id.* at 395.

191. *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977).

192. *Id.* at 125.

193. *Id.*

194. *See id.* at 124-25.

195. *Id.* at 125.

to foreign intelligence information.¹⁹⁶ In substance, the court held that the abstention doctrine would apply only if the constitutional claims of either Congress or the President were clearly and unequivocally correct:¹⁹⁷ "In our view, neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement."¹⁹⁸

Addressing the case's merits, the court of appeals reasoned that the respective investigatory and national security interests of Congress and the Executive must be balanced.¹⁹⁹ Daunted by the profound and prophetic intellectual undertakings needed to perform such balancing, the court again refrained from decision. In an irregular and unorthodox opinion, the court authored a detailed plan for Subcommittee access to unexpurgated backup memoranda that it hoped would prove satisfactory.²⁰⁰

The court proposed that the Subcommittee staff randomly select ten unedited backup memoranda for 1972 and 1975, and compare these with the corresponding expurgated material.²⁰¹ The staff would be permitted to take notes regarding the accuracy of both the classification of the memoranda as relating to foreign intelligence and the use of generic terms, but their notes would be left under seal at the FBI.²⁰² Staff could report their conclusions orally to the Subcommittee.²⁰³ The Subcommittee could seek *in camera*

196. *Id.* at 126-27.

197. *See id.* That conclusion seems bizarre, because in such circumstances judicial resolution of the constitutional issue would be simple.

The present dispute, in its original stance, raised serious questions as to the competence of a court to resolve it on the merits. . . . Our earlier decision to encourage further negotiation has, we believe, largely obviated this problem by bringing into sharper focus the needs of the parties. . . .

We do not accept the claims of either the executive or the legislative branch that its determination of the propriety of its acts is conclusive on the court. Such claims invite this court to adapt the political question doctrine for the situation where the political branches are in conflict.

Id.

198. *Id.* at 127.

199. *See id.* at 131.

200. *See id.* at 131-33.

201. *Id.* at 131.

202. *Id.* at 131-32.

203. *Id.* at 132.

judicial review of a claim of inaccuracy, that if sustained, would justify some unspecified remedial order by the district court.²⁰⁴ The executive branch could substitute an edited backup memorandum for any unedited backup memorandum randomly selected for Subcommittee staff review by showing in camera both that the edited version was fair and accurate and that the original memorandum contained exceptionally sensitive national security information.²⁰⁵

The court's proposal only addressed the present needs of the Subcommittee. Future needs, the court explained, would turn on what the verification procedures disclosed. If they revealed cheating or deceptiveness by the Executive, the court asserted, "our assessment of the relative needs of the parties will naturally be altered."²⁰⁶

The court sustained the injunction against AT&T compliance with the Subcommittee subpoena, at least until its verification procedures had been employed and had proved inadequate.²⁰⁷ The litigation ultimately was settled largely by acceptance of the court's verification procedures.²⁰⁸

The woolly and temporizing opinion of the court of appeals, nevertheless, confirms that the issue of congressional access to classified executive documents is a nonjusticiable political question. In *Baker v. Carr*,²⁰⁹ the Supreme Court declared that one prime earmark of a political question is the absence of judicially discoverable and manageable standards for resolving the dispute.²¹⁰ Confrontations between Congress and the Executive over access to classified information are nonjusticiable because weighing the legislative needs of Congress and calculating the national security interests of the President confound orthodox principled judicial decisionmaking.

204. *Id.*

205. *Id.*

206. *Id.* at 133.

207. *Id.*

208. Conversation with Richard Willard, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice (December 1984).

209. 369 U.S. 186 (1962).

210. *Id.* at 217. See generally *Baker v. Carr*, 369 U.S. at 217 (discussing other earmarks of political questions).

A realistic hypothetical will further demonstrate that conflicts between Congress and the executive branch over classified information are nonjusticiable political questions. Suppose a fifteen member House congressional committee insists on access to classified information about the development and capabilities of the MX missile. The purpose of the request, the Chairman discloses, is to persuade an eighth Member of the Committee to vote for a bill prohibiting further MX funding by showing the missile's vulnerability to Soviet attack. The classified information is unnecessary, however, to convince seven other Members to support the bill. Absent eight affirmative votes, the anti-MX funding bill will "die" in Committee.

Further suppose that the Senate, in the past six months, has voted to continue MX funding, and that virtually all political prognosticators believe that Senate MX support still exists. Thus, even if the House anti-MX bill is voted out of Committee and approved by the entire House, the likelihood of Senate concurrence is nil. Suppose also that the House Committee Chairman maintains that even if the Senate will defeat an anti-MX House bill, the deliberations and discussion stimulated by committee approval of the bill will be instrumental in his plan to generate future opposition to MX funding both in the general public and in the Senate.

Under these circumstances, how would a judge develop standards to evaluate the Committee's need for classified information? Does the judge insist that Committee Members testify about whether the information would alter their votes on the bill? Would not that testimony be uninformative unless the Members first examined the classified information, and would not that examination render the case moot? Even if the information were disclosed and revealed MX vulnerability to Soviet missiles, many other considerations might affect a Member's vote on MX funding, including, for example, the climate of public opinion or the awarding of MX procurement contracts in the Member's district. Thus, a Member could not know with certainty whether access to the classified information would alter his vote on MX.

In addition, how would a judge know whether debate on MX funding in the House and Senate would create a political climate in the future favorable to funding termination? The judge could only speculate on the content of the debates and on their exact

effects on public or congressional support for MX expenditures. Elections held while litigation is pending might increase the number of MX proponents in the House, and thus might weaken the plaintiffs' contention that access to classified information would eventuate in congressional curtailment of MX funding.

In conclusion, no judicially discoverable or manageable standards are readily apparent which assign a weight to congressional need for classified information. The *AT&T* litigation bears out this conclusion, because the District of Columbia Circuit failed to announce standards by which it might weigh the Subcommittee's need for the identity of foreign intelligence surveillance targets or for national security request letters.

Weighing the Executive's interest in withholding from Congress classified information concerning MX development and capabilities also would defy judicial competence. One pertinent factor a court could consider would be the risk of "leaks" from Congress. But how could a judge make such a risk assessment? Would the court examine the frequency of leaks of confidential information in the past from particular Members, or from particular Subcommittees, or from particular Committees, or from the staffs of Committees of Members, or from the House as a whole? How relevant would these inquiries be if Committee or House membership or staff had changed since the time of the prior leaks?

Even if a risk assessment of congressional leaks could be judicially made, any risk of leaks would damage the national security in a judicially immeasurable amount by inhibiting the exchange of information with foreign countries. As a former Director of the CIA testified in the *Snepp* litigation:

We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us.²¹¹

If a CIA Director cannot ascertain the damage to national security

211. *Snepp*, 444 U.S. at 512-13.

ascribable to the risk of improper disclosure of classified information, how can an uninformed judge make that determination? In *Marchetti*, the Fourth Circuit tacitly recognized that judges are too ill-informed and inexpert to appraise the magnitude of national security harm that could be occasioned by publicizing classified information.²¹² Such a determination, however, is indispensable to the rational adjudication of a clash between Congress and the Executive over access to classified information.

In sum, the judiciary can employ no manageable standards to assign a weight to the Executive's interest in denying congressional access to classified materials. The court of appeals in *AT&T* silently confessed to this fact by failing to delineate standards to make such an assignment.

Additional considerations reinforce the view that congressional-executive battles over access to classified information raise nonjusticiable political questions. No individual rights are at stake in such disputes. Both Congress and the President are armed with institutional powers of self-defense to prevent overreaching by the other branch of government. Congress is endowed with authority to legislate, appropriate monies, and oversee executive action. It may exercise such authority antagonistic to executive wishes if it perceives that the Executive is abusing its power to withhold classified information. The Executive has the power to veto legislation, administer grant programs, issue procurement contracts, and appoint officials to check unwarranted congressional retaliation over abortive quests for classified information. The rarity of litigation over the congressional access issue confirms a healthy equilibrium of power between Congress and the President. Thus, no practical needs seem to exist for the judiciary to resolve questions over congressional access to classified information.

CONCLUSION

In a message to Congress during the agony of the Civil War, President Lincoln asked, "Is there, in all republics, this inherent, and fatal weakness? . . . Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain

212. *Marchetti*, 466 F.2d at 1318.

its own existence?"²¹³ Despite modest infirmities, statutory and constitutional law and experience regarding access to classified information militates against an affirmative answer.

213. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 426 (R. Basler ed. 1953)(message to Congress in Special Session, July 4, 1861)(emphasis in original).