

National Security and the Amended Freedom of Information Act

[I]t is clear to me that it is the Constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.¹

But by the 1960s and 1970s the religion of secrecy had become an all-purpose means by which the American Presidency sought to dissemble its purposes, bury its mistakes, manipulate its citizens and maximize its power.²

On November 21, 1974, Congress amended the Freedom of Information Act (FOIA) over the veto of President Ford.³ The provisions of the Amendments altering the status of national security information generated the greatest controversy⁴ and were a major cause of the Ford veto.⁵ The provisions require courts for the first time systematically to determine the substantive adequacy of executive classifications.

This Note attempts to resolve some of the ambiguities of § 552 (b) (1),⁶ the national security exemption of the amended FOIA. It then examines present classification standards to assess whether courts will in fact be able to exercise effective review of classification decisions. Finally, it evaluates the strengths and liabilities of the basic FOIA strategy of using the judiciary to review executive classifications.

I. The (b)(1) Exemption of the Amended FOIA

The Freedom of Information Act was originally enacted in 1966⁷ to replace § 3 of the Administrative Procedure Act.⁸ Section 3 per-

1. *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring).

2. A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 345 (1973).

3. 5 U.S.C. § 552 (Supp. IV 1974). The Amendments became effective on February 19, 1975. For a general discussion of the FOIA, 5 U.S.C. § 552 (1970), see Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1022-163 (1975), and sources cited in *id.* at 1023-24 n.323, 1026 n.333; for a general discussion of the Amendments, see Clark, *Holding Government Accountable: The Amended Freedom of Information Act: An Article in Honor of Fred Rodell*, 84 YALE L.J. 741 (1975); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951 (1975).

4. Clark, *supra* note 3, at 758.

5. 10 WEEKLY COMP. PRES. DOC. 1318 (1974); Clark, *supra* note 3, at 754.

6. 5 U.S.C. § 552(b)(1) (Supp. IV 1974).

7. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383.

8. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

mitted the executive to withhold information to protect "any function of the United States requiring secrecy in the public interest."⁹ The (b)(1) exemption of the original FOIA was drafted to limit the areas in which information could be withheld and to force the executive to be more specific in its reasons for withholding information.¹⁰ Unlike § 3, the FOIA permitted information to be withheld only if "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."¹¹

The Supreme Court in *EPA v. Mink*¹² interpreted this exception to mean that if documents had in fact been classified by an executive agency in a procedurally appropriate manner, the substantive adequacy of the classifications would not be subject to judicial review.¹³ The Court held that the Freedom of Information Act did not authorize or permit *in camera* inspections of contested documents to enable courts to separate the secret from the nonsecret and order disclosure of the latter.¹⁴

The provisions affecting national security information in the Freedom of Information Act Amendments were written specifically to overrule *Mink*.¹⁵ They were designed to empower courts to exercise "effective judicial review of executive branch classification decisions" in order to rectify the "widespread overclassification abuses in the use of classification stamps."¹⁶ The Amendments gave the courts discretion to examine documents *in camera* for a de novo determination of their classification,¹⁷ placed the burden of proof on the executive to sustain the classification,¹⁸ and authorized courts to separate "any reasonably

9. *Id.* The APA also permitted "matters of official record" to be withheld "for good cause found." *Id.* § 3(c).

10. S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965):

Exemption No. 1 is for matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. The change of standard from "in the public interest" is made both to delimit more narrowly the exception and to give it a more precise definition.

See H.R. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966).

11. Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54.

12. 410 U.S. 73 (1973). For a discussion of the background of the case, see Mink, *The Cannikin Papers: A Case Study in Freedom of Information*, in *SECRECY AND FOREIGN POLICY* 114 (T. Franck & E. Weisband eds. 1974).

13. 410 U.S. at 84. *Accord*, *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). See *Schaffer v. Kissinger*, 505 F.2d 389, 390-91 (D.C. Cir. 1974); *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Nixon v. Sampson*, 389 F. Supp. 107, 122 (D.D.C. 1975); *Kruh v. General Servs. Admin.*, 64 F.R.D. 1 (E.D.N.Y. 1974).

14. 410 U.S. at 84.

15. H.R. REP. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. REP. No. 93-1200, 93d Cong., 2d Sess. 12 (1974).

16. 120 CONG. REC. S9316 (daily ed. May 30, 1974) (remarks of Sen. Kennedy).

17. 5 U.S.C. § 552(a)(4)(B) (Supp. IV 1974).

18. *Id.*

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segregated portion of a record . . . after deletion of the portions which are exempt under this subsection.”¹⁹ Most importantly, the Amendments altered the nature of the (b)(1) exemption itself. Henceforth documents can be withheld only if they are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”²⁰

The Conference Report on the Amendments makes evident that courts will be expected to review both the procedural and substantive adequacy of executive classifications.²¹ Unfortunately, the language of the statute does not make clear the extent to which the phrase “in the interest of national defense or foreign policy” is meant to circumscribe executive classification standards. Two interpretations present themselves. The phrase can be read to apply to the executive order authorizing classification procedures, in which case it would define the scope of an executive order which could be used as a defense to actions for disclosure under the FOIA. Interpreted in this manner, the phrase would prevent the executive from developing

19. *Id.* § 552(b). This power is particularly important because a frequent source of classification abuse has been the inclusion of admittedly nonsensitive material in classified documents. HOUSE COMM. ON GOVERNMENT OPERATIONS, EXECUTIVE CLASSIFICATION OF INFORMATION—SECURITY CLASSIFICATION PROBLEMS INVOLVING EXEMPTION (b)(1) OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 93-221, 93d Cong., 1st Sess. 48-49 (1973) [hereinafter cited as HOUSE REPORT]; Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438, 1471 (1975). Section 4(A) of Executive Order No. 11,652, 3 C.F.R. 339, 343 (1974), 50 U.S.C. § 401, at 3679 (Supp. IV 1974), presently requires that each classified document shall

to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use.

20. 5 U.S.C. § 552(b)(1) (Supp. IV 1974). The language of the exemption was the result of a compromise between the original House and Senate bills. H.R. REP. NO. 93-1380, *supra* note 15, at 11-12; S. REP. NO. 93-1200, *supra* note 15, at 11-12. The House bill (H.R. 12471, 93d Cong., 2d Sess. (1974)) had allowed documents to be withheld if they were “authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy.” H.R. REP. NO. 93-876, 93d Cong., 2d Sess. 7 (1974). The Senate bill (S. 2543, 93d Cong., 2d Sess. (1974)) had permitted documents to be withheld if they were “specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute.”

Although deleted by an amendment introduced by Senator Muskie on the Senate floor, S. 2543 originally contained a provision which stated:

[U]nder the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

120 CONG. REC. S9311 (daily ed. May 30, 1974). Even though not explicitly incorporated in the Amendments, this standard of “reasonableness” may be adopted implicitly by courts reviewing executive classifications, *see* pp. 414, 418 & note 68 *infra*.

21. H.R. REP. NO. 93-1380, *supra* note 15, at 11-12; S. REP. NO. 93-1200, *supra* note 15, at 11-12.

classification criteria for information clearly outside the area of national defense or foreign policy. On the other hand, the phrase can be read to apply directly to particular information the executive desires withheld. Under this interpretation, courts would be required to examine the information withheld to determine whether it was both in the interest of national defense or foreign policy and in fact properly classified pursuant to the criteria of an appropriate executive order.

The second alternative provides the courts with great range and flexibility in reviewing executive classification decisions. Courts would not have to decide the validity of an entire executive order, but could apply a standard which would operate independently of executive classification criteria to determine if the pertinent information could be withheld under (b)(1). Consequently the discretion which the executive presently enjoys in the development of classification criteria would be limited; in effect the executive would be forced to revise its criteria to be consistent with congressionally mandated standards.

Although this interpretation of (b)(1) has much to recommend it, the legislative history of the Amendments does not support it. No one on the floor of the House or Senate suggested that the phrase "in the interest of national defense or foreign policy" was meant to imply an independent congressional standard by which the propriety of withholding specific information was to be measured.²² The Senate Report on the bill states explicitly that

22. Discussion of the Amendments occurs at 120 CONG. REC. H1788-803 (daily ed. Mar. 14, 1974), S9310-37 (daily ed. May 30, 1974), S17828-30, S17971-72 (daily ed. Oct. 1, 1974), H10001-09 (daily ed. Oct. 7, 1974). Almost all congressional references to the (b)(1) exemption interpret it to mean simply that the courts would be able to determine if the criteria of the appropriate executive order had in fact been correctly applied to the information in question. Most typical are the comments of Representative Moorhead, chairman of the House subcommittee which produced the House version of the Amendments:

[Mr. HORTON]. This provision is not intended to permit a court free rein to classify information as it wishes, is it?

Mr. MOORHEAD [A] court could only determine whether the information was "properly classified pursuant to (an) Executive order." In other words, the judge would have to decide whether the document met the criteria of the President's order for classification—not whether he himself would have classified the document in accordance with his own ideas of what should be kept secret.

120 CONG. REC. H10007 (daily ed. Oct. 7, 1974). Also illustrative are the remarks of Representative Mink, one of the plaintiffs in *EPA v. Mink*, 410 U.S. 73 (1973), p. 402 *supra*:

The change will empower courts to determine whether the matters meet the criteria established by the Executive order under which they were withheld. In effect courts will be able to rule on whether disclosure actually would bring about damage to the national security or on whatever other test is set forth in the Executive order as justification for the classification.

120 CONG. REC. H1796 (daily ed. Mar. 14, 1974). *But see id.* at H1797 (remarks of Rep. Gude).

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Congress could leave ultimate classification decisions to the courts, under only a general national-defense or foreign-policy standard, but the committee prefers to rely on de novo judicial review under standards set out in Executive orders or statutes.²³

On the House Floor, Representative Erlenborn, ranking minority member of the House subcommittee which reported the bill, took the same position and indicated further that executive classification criteria need only be established in the general area of national defense or foreign policy.²⁴ The legislative history of the new (b)(1) exemption thus indicates that courts are to apply the statutory standard to the executive order itself²⁵ and to require merely that the order cover material which would affect national defense or foreign policy in a general way.²⁶

23. S. REP. NO. 93-854, 93d Cong., 2d Sess. 30 (1974). See H.R. REP. NO. 93-876, *supra* note 20, at 19. The reference to the "standards set out in Executive orders or statutes" tracks the language of S. 2543, *supra* note 20, which permitted information to be withheld if "specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute." The statutes referred to are those which, like 42 U.S.C. § 2162 (1970) (Restricted Data), 18 U.S.C. § 798 (1970) (Communications Information), and 50 U.S.C. § 403(g) (1970) (Intelligence Sources and Methods), require certain kinds of information to be kept secret. The FOIA is not such a statute:

Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information *should* be withheld. S. REP. NO. 93-854, *supra* at 6. Thus the reference to "standards set out in Executive orders or statutes" cannot be read as an acknowledgment of an independent congressional "national defense or foreign policy" standard created by the FOIA.

24. 120 CONG. REC. H1794 (daily ed. Mar. 14, 1974):

The court would only review the [classified] material to see if it conformed with the [executive order classification] criteria. The description "in the interest of national defense or foreign policy" is descriptive of the area that the criteria have been established in but does not give the court the power to review the criteria.

25. Supporting this interpretation is the function which the Supreme Court in *EPA v. Mink*, 410 U.S. 73 (1973), assigned to the phrase "in the interest of the national defense or foreign policy" in the unamended (b)(1) exemption. The Court interpreted the phrase as identifying the appropriate executive order authorizing classifications which would exempt information from disclosure under the FOIA. *Id.* at 82-84. See *Robertson v. Butterfield*, 498 F.2d 1031, 1033 (D.C. Cir. 1974), *rev'd on other grounds*, 422 U.S. 255 (1975).

26. On March 10, 1972, President Nixon issued Executive Order No. 11,652, 3 C.F.R. 339 (1974), 50 U.S.C. § 401, at 3678 (Supp. IV 1974), which authorized the classification of information "in the interest of national defense or foreign relations of the United States (hereinafter collectively termed 'national security') . . ." At the time many in Congress felt that the Order enlarged executive classification prerogatives beyond the limitations of the "national defense or foreign policy" limitations of the FOIA. *E.g.*, *Hearings on United States Government Information Policies and Practices—Security Classification Problems Involving Subsection (b)(1) of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. pt. 7, at 2852-53 (1972) [hereinafter cited as *Hearings*] (analysis of the Order by

If this interpretation of congressional intent is correct, the draftsmanship of the new (b)(1) exemption is inadequate. It contains no requirement that the criteria of an executive order be *in fact* in the interest of national defense or foreign policy²⁷ and thus permits the executive to classify whatever information it wishes, so long as a proper authorization is issued.²⁸ Neither the executive nor Congress

the staff of the Foreign Operations and Government Information Subcommittee, incorporated into the remarks of Representative Moorhead, chairman of the House subcommittee which produced the House version of the 1974 FOIA Amendments). Particularly instructive in this regard is the following colloquy, *id.* at 2485, between Representative Moss, chairman of the House Subcommittee which considered the original 1967 Freedom of Information Act, and Deputy Assistant Secretary of State for Public Affairs, William D. Blair, Jr., who helped draft Executive Order No. 11,652:

[Mr. BLAIR]. [N]ational security or national defense, whichever phrase you prefer, does in the modern world, involve things other than military.

Surely what you had in mind in the relevant clauses of the legislation . . . was to indicate the committee's recognition or the Congress' recognition that our national security today depends on things like balance of payments, economic affairs, foreign assistance, things totally—

Mr. Moss. You are making an excellent case for exactly the reason why we decided not to use national security. . . . We decided to use defense and then go on directly to a specific field, foreign policy, not national security, because we were convinced that national security would be so broadly construed as to be a catchall for everything, that it was like having no qualifications of any kind. We felt that the foreign policy was definable because a country has a policy. It is enunciated from time to time by the President

But policy was used, not relations, because we didn't want to go as broadly. For more of this discussion, see *id.* at 2473-74, 2484-93. For an argument that Executive Order No. 11,652 will not in fact alter the kinds of information actually classified, see Note, *Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11,652*, 59 IOWA L. REV. 110, 120 (1973).

Although Congress initially responded negatively to Executive Order No. 11,652, nowhere in the legislative history of the amended (b)(1) exemption is it suggested that the phrase "in the interest of national defense or foreign policy" is meant to narrow the scope of the Order. On the contrary the phrase seems to have been given a meaning vague enough to encompass the "foreign relations" and "national security" language of the Order. See note 24 *supra*. Indeed, the amended (b)(1) exemption refers more explicitly than the original (b)(1) exemption to an executive order establishing classification criteria, and at the time of the passage of the Amendments this was Executive Order No. 11,652. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367-68 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), interpreted the amended (b)(1) exemption to require the application of classification criteria of Executive Order No. 11,652. Pp. 417-18 *infra*. *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974), interpreted the unamended (b)(1) exemption similarly to require the application of Executive Order No. 11,652. See *EPA v. Mink*, 410 U.S. 73, 81, 84 n.10 (1973).

27. 5 U.S.C. § 552(b)(1)(A) (Supp. IV 1974) permits documents to be withheld only if "specifically authorized . . . by an Executive order to be kept secret in the interest of national defense or foreign policy." (Emphasis added.) The requirement of clause (b)(1)(B) that information be in fact properly classified refers only to the "procedural and substantive criteria" of the appropriate executive order, H.R. REP. NO. 93-1380, *supra* note 15, at 11-12, and is not meant to require that the criteria or the information be in fact in the interest of national defense or foreign policy.

28. The only case to interpret the new national security exemption since the Amendments became effective, *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), interpreted the exemption to mean that "any citizen now can compel the production of information actually classified if its classification was not

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has so far offered this literal reading of the exemption, but the danger remains that the latitude of the statutory language may undermine the goal of effective judicial review of executive classification decisions. Although Congress intended to concede to the executive the power to create classification criteria within the general area of national defense and foreign policy, the precise language of the exemption may also concede to the executive the authority to decide when its criteria lie within this area.

II. National Security and the Classification Standards of Executive Order No. 11,652

A. *Executive Order No. 11,652*

The major task facing courts under the amended (b)(1) exemption of the FOIA will be to determine whether withheld information meets classification criteria set out by the appropriate executive order. The standards presently defining classification practices are set forth in Executive Order No. 11,652, *Classification and Declassification of National Security Material*, issued by President Nixon on March 8, 1972.²⁹ If the plaintiff requesting classified information has no security clearance, courts must apply the lowest level of classification, "Confidential."³⁰ According to the Order, documents should be classified "Confidential" if their "unauthorized disclosure could reasonably be expected to cause damage to the national security."³¹

authorized by the Executive Order." *Id.* at 1367. Aside from quoting the exemption itself, the decision makes no mention of any "national defense or foreign policy" standard, and it takes as relevant only the criteria set forth in Executive Order No. 11,652. *See* p. 417 *infra*.

29. 3 C.F.R. 339 (1974), 50 U.S.C. § 401, at 3678 (Supp. IV 1974). For a discussion of the Executive Order, see HOUSE REPORT, *supra* note 19, at 52-83; Project, *supra* note 3, at 973-93; Murphy, *Knowledge is Power: Foreign Policy and Information Interchange Among Congress, the Executive, and the Public*, 49 TUL. L. REV. 505, 515-31 (1975); Note, *supra* note 26; A. SCHLESINGER, *supra* note 2, at 348-50; D. WISE, *THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER* 69-72, 109-10, 112 (1973).

30. Exec. Order No. 11,652, § 6(A), 3 C.F.R. 339, 346 (1974), 50 U.S.C. § 401, at 3680 (Supp. IV 1974); National Security Council Directive of May 17, 1972, § VI(A)(1), 50 U.S.C. § 401, at 3682 (Supp. IV 1974).

31. Exec. Order No. 11,652, § 1(c), 3 C.F.R. 339, 340 (1974), 50 U.S.C. § 401, at 3679 (Supp. IV 1974). The Order creates three grades of classification, "Top Secret," "Secret," and "Confidential." The criterion for a "Secret" classification is that the unauthorized disclosure of the document "could reasonably be expected to cause serious damage to the national security." The Order offers four examples of such serious damage: [D]isruption 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 criterion for the "Top Secret" classification of a document is that unauthorized

It has been argued that this standard is sufficiently precise for purposes of judicial review.³² However "national security" has long been recognized by courts and commentators as a notoriously ambiguous and ill-defined phrase.³³ The Order provides no examples to illuminate the meaning of the "Confidential" standard.³⁴ Although the standard need not be given a precise meaning to enable courts to overturn classifications which are manifestly erroneous,³⁵ closer cases will require the development of judicial criteria to monitor the consistent application of this standard. The first challenge which the judiciary will face in the application of the "damage to the national security" criterion is thus to develop a definition of the phrase "national security."³⁶

disclosure "could reasonably be expected to cause exceptionally grave damage to the national security"; five illustrations of the meaning of this criterion are listed. However, the Order offers no examples of the meaning of the "Confidential" classification criterion.

For a discussion of the relationship between the "damage to the national security" standard of the Order and the "national defense or foreign policy" standard of the amended (b)(1) exemption, see note 26 *supra*.

32. Comment, *supra* note 19, at 1464; Note, *supra* note 3, at 967.

33. See, e.g., *Zweibon v. Mitchell*, 516 F.2d 594, 612 n.39, 613 n.42, 636 n.108, 656 n.203 (D.C. Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3440 (U.S. Jan. 26, 1976) (No. 75-1056); *New York Times Co. v. United States*, 403 U.S. 713, 719 (Black, J., concurring), 742 (Marshall, J., concurring) (1971); *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 206 Misc. 721, 729, 134 N.Y.S.2d 716, 718 (Sup. Ct. Spec. Term, 1954); *United States v. United States Dist. Court*, 407 U.S. 297, 309 n.8 (1972); *Cole v. Young*, 351 U.S. 536, 542-43 (1956); HOUSE REPORT, *supra* note 19, at 64 (quoting statement of Rep. Moss that "national security [is] such an ill-defined phrase, that no one can give you a definition. . . . In 16 years of chairing the committee prior to Mr. Moorhead, I could never find anyone who could give me a definition"); A. Cox, *THE MYTHS OF NATIONAL SECURITY: THE PERIL OF SECRET GOVERNMENT* 5 (1975); Murphy, *supra* note 29, at 523.

34. Note 31 *supra*.

35. *United States v. Marchetti*, 466 F.2d 1309, 1319 (4th Cir.) (Craven, J., concurring), *cert. denied*, 409 U.S. 1063 (1972) (courts should overturn those classifications which are "frivolous and . . . absurd") (dictum).

36. Section 1 of Executive Order No. 11,652 purports to define the term "national security" as "national defense or foreign relations." Note 26 *supra*. This definition is inadequate; the Order itself does not use the term consistently with this definition. For example, the Order applies the classification "Top Secret" to information the unauthorized disclosure of which "could reasonably be expected to cause exceptionally grave damage to the national security." It offers as an instance of "exceptionally grave damage" the "disruption of foreign relations vitally affecting the national security." Substituting "national defense or foreign relations" for "national security," this example reads "disruption of foreign relations vitally affecting the national defense or foreign relations." Since the second use of "foreign relations" is redundant, "national defense" must be equated with "national security" if the original meaning is to be preserved. But this equation contradicts the stipulated definition.

Testimony of Nixon administration officials concerning the meaning of national security in the Order suggests that the term is not meant to refer merely to national defense and foreign relations. See, e.g., the definition of national security offered by J. Fred Buzhardt, then General Counsel to the Department of Defense, p. 411 *infra*; the colloquy between Representative Moss and Deputy Assistant Secretary of State Blair, note 26 *supra*; and the testimony of Assistant Attorney General Ralph Erickson, *Hearings*, *supra* note 26, at 2693, suggesting that national security as used in the Order may also encompass domestic security.

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B. *Impediments to Judicial Review under Executive Order No. 11,652*

1. *The Meaning of "National Security"*

Although the use of the phrase national security extends back to the early days of the Republic,³⁷ the term as we know it today emerged during the end of World War II and the beginnings of the Cold War.³⁸ Pearl Harbor had jolted the nation from, in the words of Walter Lippmann, her "unearned security,"³⁹ and shocked it into an acute sense of its own vulnerability.⁴⁰ This perception of vulnerability was reinforced by "the tremendously increased scope and tempo of modern warfare,"⁴¹ by the development of offensive air weaponry⁴² and the atomic bomb,⁴³ and by the growing enmity toward the Soviet Union.⁴⁴

National security emerged as the phrase that embodied the nation's strategy to meet these new threats.⁴⁵ The keystone of this strategy was that the nation would be "*potentially* powerful"⁴⁶ enough to forestall the possibility of any attack.⁴⁷ With the global reach of the new

37. Yale undergraduates in the early 1790's debated the question "Does the National Security depend on fostering Domestic Industries?" W. ROSTOW, *HOW IT ALL BEGAN* 191 (1975).

38. See D. Yergin, *The Rise of the National Security State*, Feb. 8, 1974 (unpublished Ph.D. dissertation, Cambridge University) (on file with *Yale Law Journal*); F. EBERSTADT, *UNIFICATION OF THE WAR AND NAVY DEPARTMENTS AND POSTWAR ORGANIZATION FOR NATIONAL SECURITY: REPORT TO HON. JAMES FORRESTAL, SECRETARY OF THE NAVY* (Senate Comm. on Naval Affairs, 79th Cong., 1st Sess., Comm. Print 1945) [hereinafter cited as *UNIFICATION FOR NATIONAL SECURITY*]; A. COX, *supra* note 33, at 1-31; Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 *FOREIGN AFFAIRS* 1, 4 (1973).

39. W. LIPPMANN, *U.S. FOREIGN POLICY: SHIELD OF THE REPUBLIC* 49 (1943). Prior to Pearl Harbor the nation's isolation in the Western Hemisphere had permitted the illusion that "a concern with the foundations of national security, with arms, with strategy, and with diplomacy, was beneath our dignity as idealists." *Id.* See A. WOLFERS, *DISCORD AND COLLABORATION* 151 n.6 (1962).

40. Anderson, *National Security in the Postwar World*, 241 *ANNALS* 1 (1945).

41. *UNIFICATION FOR NATIONAL SECURITY*, *supra* note 38, at 6.

42. *Hearings on S. 84 and S. 1482 Before the Senate Comm. on Military Affairs*, 79th Cong., 1st Sess. 299 (1945) (testimony of Lt. Gen. J. H. Doolittle, Army Air Forces).

43. *UNIFICATION FOR NATIONAL SECURITY*, *supra* note 38, at 6.

44. Katzenbach, *supra* note 38, at 4.

45. E.g., Jacobs, *The Issue Should Be Decided Now*, 241 *ANNALS* 72 (1945).

46. Anderson, *supra* note 40, at 7 (emphasis in original).

47. *UNIFICATION FOR NATIONAL SECURITY*, *supra* note 38, at 6:

The next war will probably break out with little or no warning and will almost immediately achieve its maximum tempo of violence and destruction. . . .

The great need, therefore, is that we be prepared to defend ourselves always and all along the line, not simply to defend ourselves after an attack, but through all available political, military, and economic means to forestall such attack. The knowledge that we are so prepared and alert will in itself be a great influence for world peace.

This concept of security offered a rationale to justify military expenditures in a newly peaceful world. See D. Yergin, *supra* note 38, at 355-56.

military technology, this strategy meant that "defense frontiers" would no longer be "our own coastlines" but instead "the entire world."⁴⁸

The power to forestall any potential attack meant more than military strength. National security implicated the entire resources of the nation—not only its intelligence apparatus, but its scientific, industrial, and economic capabilities.⁴⁹ War was perceived as a continual possibility, and security could be maintained only if the nation were as alert in peace as in war.⁵⁰ Moreover, since the goal of security was freedom from the very possibility of military assault, American policy-makers were led to express "a vital concern in the existence of an ordered world"⁵¹ and to attempt the elimination of political instability and international discord. The most concrete implication of the new strategy of national security was thus the integration of foreign and military policies.⁵² In 1947 Congress created the National Security Council, whose function was "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security."⁵³

The assumptions underlying the meaning of national security have remained intact since the postwar period.⁵⁴ For example, in testimony

48. Nimitz, *Our Sea Power: Ships, Planes, Men and Bases*, 12 VITAL SPEECHES OF THE DAY 39, 41 (1945).

49. See, e.g., 1 BNA GOV'T LOYALTY & SECURITY 15:101 (1962) (definition of national security in sample regulations issued in 1953 by the Department of Justice in conjunction with Executive Order No. 10,450, *Security Requirements for Government Employment*, 3 C.F.R. 57 (1974)); *Hearings on S. 84 and S. 1482 Before the Senate Comm. on Military Affairs*, *supra* note 42, at 108 (testimony of James Forrestal):

[T]he question of national security is not merely a question of the Army and Navy.

We have to take into account our whole potential for war, our mines, industry, manpower, research, and all the activities that go into normal civilian life.

Cf. Hearings on S. 825 on Establishing a Research Board for National Security Before the Senate Comm. on Naval Affairs, 79th Cong., 1st Sess. 15 (1945); Truman, *National Security: Unified Direction of Land, Sea, and Air Forces*, 12 VITAL SPEECHES OF THE DAY 168, 170 (1945).

Concerned with the expansive meaning of national security, the Supreme Court held that in the Act of August 26, 1950, ch. 803, 64 Stat. 476 (later replaced by 5 U.S.C. § 7532 (1970)) (authorizing the heads of certain departments and agencies of the Government to suspend and dismiss civilian employees when deemed necessary "in the interest of the national security"), the term "national security" is used "in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare." *Cole v. Young*, 351 U.S. 536, 543 (1956).

50. Truman, *supra* note 49.

51. Earle, *The Threat to American Security*, 30 YALE REVIEW 454, 476 (1941).

52. Truman, *supra* note 49, at 170. See H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 50-57 (1950). This perception was widely shared by the public. See, e.g., *National Security: Science, "Conscription," Army-Navy Merger—All Such Problems Are Parts of One Whole*, LIFE, Sept. 17, 1945, at 40.

53. National Security Act of 1947, 50 U.S.C. § 402(a) (1970). The members of the Council were, among others, the President, the Secretary of State, the Secretary of Defense, and the Chairman of the National Security Resources Board.

54. See, e.g., Taylor, *The Legitimate Claims of National Security*, 52 FOREIGN AFFAIRS 577, 592-94 (1974) (former chairman of the Joint Chiefs of Staff calls for the creation

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before Congress J. Fred Buzhardt, then General Counsel for the Department of Defense, offered the following definition of national security in Executive Order No. 11,652:

“[N]ational security” is a generic concept of broad connotations referring to the Military Establishment and the related activities of national preparedness including those diplomatic and international political activities which are related to the discussion, avoidance or peaceful resolution of potential or existing international differences which could otherwise generate a military threat to the United States or its mutual security arrangements.⁵⁵

The contemporary conception of national security, rooted in postwar attitudes and events, thus depends both on a calculation of future contingencies and on an assessment of the priorities of the nation in foreign affairs. These characteristics raise serious impediments to effective judicial review of information withheld under Executive Order No. 11,652.

2. *Uncertainties and Intangibles in National Security Determinations*

National security is a prophylactic concept, concerned with potential dangers—with “intangibles, uncertainties and probabilities rather than [with] concrete threats readily foreseeable and easily grasped.”⁵⁶ Hence the “damage to the national security” standard is so intrinsically vague and elastic that courts will have difficulty applying it to executive classification decisions. The question is not, as it is sometimes phrased, whether courts have enough technical expertise to assimilate the factual information necessary to conduct such a review,⁵⁷ but

of an “expanded National Security Council charged with dealing with all forms of security threats, military and nonmilitary”; nonmilitary threats to security include the energy crisis, retarded economic growth, “higher costs of industrial production,” “new deficits in international payments,” “increased inflation,” “the oil weapon,” and the “population explosion”; B. BRODIE, *WAR AND POLITICS* 345-47 (1973).

55. HOUSE REPORT, *supra* note 19, at 65 (quoting testimony before the House Subcommittee on Foreign Operations and Government Information).

56. Schultze, *The Economic Content of National Security Policy*, 51 *FOREIGN AFFAIRS* 522, 530 (1973). See Office of the Legal Advisor, United States Department of State, *The Legality of the United States Participation in the Defense of Vietnam*, 75 *YALE L.J.* 1083, 1101 (1966) (legal justification for the Vietnam War, emphasizing the prophylactic nature of national security); Johnson, *Special Message to the Congress on the State of the Nation's Defenses*, in I *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES*, LYNDON B. JOHNSON, 1965, at 62.

57. *E.g.*, *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); Franck & Weisband, *Dissemination, Secrecy, and Executive Privilege*, in *SECRECY AND FOREIGN POLICY* 430 (T. Franck & E. Weisband eds. 1974); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 *U. PA. L. REV.* 166, 194 (1958);

whether the "damage to the national security" standard is specific enough to permit the use of this expertise even if available to the courts.

3. *Foreign Policy in National Security Determinations*

Although political rhetoric often invokes national security as if it were a "fact" beyond the control of policymakers,⁵⁸ national security is dictated by policy rather than the reverse.⁵⁹ It is not possible to supply national security with a content, military or otherwise, that is distinct from a political determination of foreign policy goals.

In the first place, security is largely subjective;⁶⁰ even in the absence of "objective" threats, a nation is not secure if it is afraid. Hence security is not synonymous with power.⁶¹ Moreover, national security decisions require commitments of national resources which could be placed elsewhere; thus "acceptable" levels of security can only be determined by the balancing of security against other national priorities.⁶² Finally, national security can be achieved by other than purely military means. Switzerland seeks her security through a policy of neutrality, while we seek ours largely through alliances and armaments.⁶³

Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468, 474 (1948); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1225 (1972); Comment, *supra* note 19, at 1469-72. *But cf.* United States v. United States Dist. Court, 407 U.S. 297, 319-20 (1972) (rejecting contention that the judiciary "would have neither the knowledge nor the techniques necessary" to decide whether to issue a warrant authorizing wiretapping in the interest of "national security in its domestic implications").

58. See, e.g., President Johnson's remarks:

The world's most affluent society can surely afford to spend whatever must be spent for its freedom and security. We shall continue to maintain the military forces necessary for our security without regard to arbitrary or predetermined budget ceilings. . . .

. . . .

. . . So long as I am President, we shall spend whatever is necessary for the security of our people.

Johnson, *supra* note 56, at 62, 69.

59. See *Zweibon v. Mitchell*, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3440 (U.S. Jan. 26, 1976) (No. 75-1056); Nixon, *Third Annual Report to the Congress on United States Foreign Policy*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RICHARD M. NIXON, 1972, at 194, 304-08; Moore, *Law and National Security*, 51 FOREIGN AFFAIRS 408, 409 (1973).

60. H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* 61 (1950).

61. A. WOLFERS, *supra* note 39, at 150 n.5: "The fear of attack—security in the subjective sense—is . . . not proportionate to the relative power position of a nation." *Id.* at 151: "[S]ome may find the danger to which they are exposed entirely normal and in line with their modest security expectations while others consider it unbearable to live with these same dangers."

62. See, e.g., Nixon, *supra* note 59, at 304-05 ("we must harmonize our essential strategic objectives, our general defense posture, and our foreign policy requirements with the resources available to meet our security and domestic needs"); H. LASSWELL, *supra* note 52, at 55-56.

63. A. WOLFERS, *supra* note 39, at 152-58.

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Because national security essentially deals with a wide variety of vague, contingent circumstances, security decisions generally are not dictated by urgent military necessity, but instead are made at a time when a whole spectrum of military and diplomatic responses are possible.

The dependence of national security on policy determinations creates difficulties for courts attempting to review executive classifications. Although courts will decide what is in form a factual question—whether disclosure of a particular document would reasonably be expected to damage the national security—that decision will turn on prior policy decisions.

For example, if an FOIA plaintiff sought in 1967 to obtain the disclosure of documents revealing presidential dissimulation in the Gulf of Tonkin incident,⁶⁴ a court would certainly have to accept the executive's factual claim that the release of such information would damage the Vietnam war effort. The real issue in the case would be whether, in light of this information, the court would accept the executive's prior policy determination that the Vietnam war was vital to our national security. If courts do not accept such executive policy judgments, they will have placed themselves in the position of independently evaluating foreign policy planning,⁶⁵ a position they have always been reluctant to assume.⁶⁶ But if courts accept at face value executive foreign policy judgments, they will have eliminated a major

64. A. SCHLESINGER, *supra* note 2, at 179.

65. Professor Henkin has elaborated the difficulties which would be entailed in such an evaluation:

If, on the one hand, the need for military secrecy in time of war seems obvious and paramount; if, on the other hand, as in the *Pentagon Papers Case*, many could not see why the Government should conceal documents several years old relating to an issue that had become of great national moment; who can meaningfully weigh the less obvious, less dramatic consequences of disclosure of any one of millions of documents that are the stuff of governing and of international relations? How does a court weigh the effect on relations with country X, or on international relations generally, of publication of a diplomatic communication to or from another country which the latter does not wish to see public?

Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 279 (1971). The resolution of these "factual" questions rests on clearly political judgments.

66. *E.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) ("the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with"); *Wolfe v. Froehke*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), *aff'd per curiam*, 510 F.2d 654 (D.C. Cir. 1974) ("The realm of foreign relations is as inappropriate for judicial intervention as is the realm of national security"); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir.), *application for injunction in aid of jurisdiction denied*, 404 U.S. 917 (1971); *Dayton v. Dulles*, 254 F.2d 71, 76-77 (D.C. Cir. 1957), *rev'd on other grounds*, 357 U.S. 144 (1958). For a general discussion of judicial reluctance to interfere with executive foreign policy determinations, see Comment, *supra* note 19, at 1451-62; Project, *supra* note 3, at 1008.

element in that impartial review by which the sponsors of the FOIA amendments sought to check executive classification abuses.⁶⁷ This deference would create a heavy presumption in favor of executive definitions of national security interests, although the amended FOIA requires that the burden of proof be placed on the executive to sustain its classifications.⁶⁸

Of course this presumption need not extend to the question whether the disclosure of particular documents will in fact "damage" the national security interests as defined by the executive. But the power to define national security is in large measure the power to define the meaning of "damage." Moreover courts must resolve how "damage" is to be determined. On the one hand, any attempt to weigh the public's right to know against national security interests⁶⁹ cannot be distinguished from the policy determinations which created the initial classification.⁷⁰ On the other hand, if courts refuse to balance⁷¹ and adopt a narrow, literal approach to the meaning of damage, the pro-

67. "Government classifiers must be subject to some impartial review. If courts cannot have full latitude to conduct that review, no one can." 120 CONG. REC. S9319 (daily ed. May 30, 1974) (remarks of Sen. Muskie).

68. P. 402 *supra*. Congress clearly meant to place the burden of proof on the executive. The Senate defeated a proposal which would have sustained an executive classification unless it was "without a reasonable basis." See note 20 *supra*. It was argued that such a reasonableness standard would "make the independent judicial evaluation meaningless" and in effect shift the burden of proof to the FOIA plaintiff. 120 CONG. REC. S9319 (daily ed. May 30, 1974) (statement of Sen. Muskie). President Ford vetoed the Amendments at least in part because of the lack of a "reasonableness" standard, and offered to sign the Amendments if they could be revised to include the requirement "that where classified documents are requested the courts . . . would have to uphold the classification if there is a reasonable basis to support it." 10 WEEKLY COMP. PRES. DOC. 1318 (1974). Congress refused to budge in its rejection of the reasonableness standard and repassed the Amendments in their original form.

It appears, then, that the criteria set forth in Executive Order No. 11,652 may accomplish what a presidential veto could not. A judicial presumption in favor of executive definitions of national security in effect would deprive the FOIA plaintiff of the benefit of the amended FOIA's allocation of the burden of proof.

69. Murphy, *supra* note 29, at 523, argues that damage should not ipso facto merit classification, but that "[p]otential damage to the defense or foreign relations of the United States should be weighed against the public's 'right to know' and the importance of a meaningful information flow to the democratic process."

70. Classifications entail "a conscious determination that the governmental interest in secrecy outweighs a general policy of disclosure." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1366 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). Although courts may define the public interest in disclosure differently from the executive and hence reach a different outcome for a given classification, they cannot avoid reliance on executive definitions of policy and on executive characterizations of the need for secrecy.

71. It is argued in *Developments in the Law*, *supra* note 57, at 1225-26, that where it is "clear both that the disclosure of classified information could prejudice the nation's defense interests and that there existed a strong public interest in knowing the information," courts should refrain from making what can only be political judgments.

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phylactic quality of the concept of national security will tend to eviscerate the damage criterion altogether.⁷²

4. *Other Impediments to Judicial Review*

The difficulties of effective judicial review of executive classifications are compounded by two additional factors. First, there is the danger of a confrontation between the executive and the judiciary,⁷³ for the executive may claim inherent Article II powers to defy what might be interpreted as unwarranted judicial intrusion into the area of foreign and military affairs.⁷⁴ The danger posed by such a claim is exacerbated under the FOIA. Unlike other actions in which the Government may be forced to choose between production of relevant material and dismissal of its case,⁷⁵ in FOIA actions the production of information is the object of the suit. Courts will be especially cautious to avoid provoking such a direct confrontation.⁷⁶

Second, the common law evidentiary privilege accorded to state secrets⁷⁷ will not aid courts in deciding whether disclosure of in-

72. For example, consider the following news item: "President Ford told a Boston audience today that the domestic criticism of his cabinet shakeup [in which Defense Secretary James Schlesinger was dismissed] could harm the national security." Boston Evening Globe, Nov. 7, 1975, at 1, col. 4. It is certainly plausible that domestic criticism of Schlesinger's dismissal could affect Soviet perceptions of American defense priorities and in that sense "harm" the national security. But this contention relies on a very dilute sense of harm. The "damage to the national security" criterion contains no intrinsic standards measuring the extent of "damage" required for classification. Thus if courts were to use a strict test for damage and accept at face value executive definitions of national security, they would have to withhold documents classified for no other reason than that their release would further exacerbate domestic criticism of Ford's removal of Schlesinger. Balancing the damage to the national security against the public's right to know is one way of raising the threshold of damage which must occur before courts will accept the validity of executive classifications.

73. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763-65 (1967); Project, *supra* note 3, at 1016.

74. The executive, of course, has claimed such powers with respect to Congress. *Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); Brownell, *Memorandum on Separation of Powers*, 14 FED. BAR. J. 73 (1954); Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958); R. BERGER, EXECUTIVE PRIVILEGE (1974).

75. Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 483 (1957); Welch, *Classified Information and the Courts*, 31 FED. BAR J. 360, 368-70 (1972).

76. The executive reportedly came close to such a direct confrontation with the judiciary over production of tape recordings of presidential conversations subpoenaed in *United States v. Nixon*, 418 U.S. 683 (1974). See N.Y. Times, July 25, 1974, at 22, col. 3.

77. The state secrets privilege applies to "writings and information constituting military or diplomatic secrets of state." MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 107, at 230 (E. Cleary ed. 1972); 8 WIGMORE, EVIDENCE §§ 2378-79 (J. McNaughton ed. 1961). In contrast to information protected by the statutory (b)(1) exemption from suits under the FOIA, information protected by the state secrets doctrine is immune from production as evidence before and during trial. Use of the privilege "has been limited in this country." *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Courts determine the

formation would damage the national security. Courts have resolved claims of state secrets privilege by relying on conclusory phrases such as "military secrets," "strategic information," or "intelligence value"—phrases which could not be used to clarify the "damage to the national security" standard.⁷⁸

These two impediments, together with the others considered above, compel the conclusion that courts will be unable to exercise effective review of executive classifications. The intrinsically vague, prophylactic, and policy-oriented nature of the concept of national security, the lack of clear standards of "damage," the delicate constitutional balance between the executive and the judiciary in the field of national security, and the absence of useful common law doctrine, all combine to deprive courts of independent ground from which to challenge executive decisions. Judicial review under the criteria of Executive Order No. 11,652 will in all probability eliminate only those classifications which are manifestly erroneous.

C. *Alfred A. Knopf, Inc. v. Colby*

The decision of the Fourth Circuit in *Alfred A. Knopf, Inc. v. Colby*⁷⁹ is the only judicial interpretation of the (b)(1) exemption since the new FOIA amendments became effective in February, 1975. The opinion illustrates many of the impediments to judicial review under the amended exemption and Executive Order No. 11,652.

Colby was a sequel to *United States v. Marchetti*,⁸⁰ a 1972 case in which Victor Marchetti, a former employee of the CIA, was enjoined from publicly disclosing classified information acquired by him during the course of his employment. In 1973, pursuant to the injunction, Marchetti submitted the manuscript of a proposed book to the CIA for clearance.⁸¹ When the CIA insisted that 168 items be deleted,

application of the state secrets privilege by balancing the public and private interests in disclosure against the public interest in secrecy. Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 877 (1966); McCORMICK, *supra* § 107, at 230. In practice, the state secrets privilege cannot be used to withhold more information than could be withheld under the national security exemptions of the Freedom of Information Act, since any litigant desiring information from the Government for trial purposes can sue to obtain it directly under the Act. *But cf.* Theriault v. United States, 395 F. Supp. 637, 641-42 (C.D. Cal. 1975); Project, *supra* note 3, at 1021-22.

78. Zagel, *supra* note 77, at 882, 884.

79. 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

80. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

81. Marchetti and his co-author, John Marks, were planning to publish *The CIA and the Cult of Intelligence*. The injunction required Marchetti to submit to the CIA, for examination 30 days in advance of release, any manuscript relating to U.S. intelligence activities. *United States v. Marchetti*, Civil No. 179-72 (E.D. Va., May 24, 1972) (Permanent Injunction and Final Order). Marks and the publisher of the book, Alfred A. Knopf, Inc., were co-plaintiffs in *Colby*.

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Marchetti brought suit claiming that the items had not been in fact classified.⁸²

The district court upheld Marchetti's claims with respect to 142 of the deleted items.⁸³ On appeal, the Fourth Circuit reversed the district court on this finding.⁸⁴ However, after oral argument but before the case was decided, Congress enacted the FOIA Amendments. Writing for the court, Judge Haynsworth chose to reach the additional issue whether the deleted items could be withheld under the newly amended (b)(1) exemption.⁸⁵ This issue required the court to decide whether classification of the deleted items was authorized by Executive Order No. 11,652.

The *Colby* opinion did not consider several of the important issues raised by the amended (b)(1) exemption. It did not question whether the "national defense or foreign policy" standard of the statute functioned as an independent test for withholding classified material, or whether the "damage to the national security" criterion met this statutory standard.⁸⁶ The court did not attempt to define the nature of national security interests: the case involved information connected

82. Marchetti also claimed, and the district court found, that he had acquired information relating to some of the items while not in the course of his employment. The court of appeals reversed the district court on this issue and remanded for reconsideration in light of a "substantial presumption" against such a claim. 509 F.2d at 1371.

83. Since the Government could not produce the persons who actually classified the documents containing the deleted information and could not demonstrate that a classification referred to all the contents of a classified document as distinguished from particular segments, the district court concluded that the specific deleted items had not been classified. 509 F.2d at 1365-67.

84. The court held that the documents had been in fact classified because the "presumption of regularity in the performance by a public official of his public duty" left "no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the 'Top Secret' legend on the document." *Id.* at 1368. It remanded to the district court for reconsideration using a burden of proof consistent with this presumption. *Id.* at 1370.

85. Although neither *Colby* nor its predecessor, *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), arose as FOIA actions, Judge Haynsworth in his plurality opinion in *Marchetti* had taken a position similar to that of the Supreme Court in *EPA v. Mink*, 410 U.S. 73 (1973), p. 402 *supra*, that courts should not review the substantive merits of executive classifications. 466 F.2d at 1317-18. (Compare Judge Craven's view, in his concurrence, *id.* at 1318-19, that courts should review the "reasonableness" of classifications.) *Colby* was decided on February 7, 1975, 12 days before the amended (b)(1) became effective. The court evidently felt that it would serve no purpose to force the plaintiffs to sue once again under a standard which would permit judicial review of the substance of the classifications:

[T]he Freedom of Information Act as now amended clearly provides for judicial review of questions of classifiability [T]hese plaintiffs should not be denied the right to publish information which any citizen could compel the CIA to produce

509 F.2d at 1367.

86. See pp. 403-05 & note 26 *supra*.

with CIA intelligence operations which all parties apparently assumed was manifestly related to the national security.

What is striking about the opinion, however, is its failure to consider whether the release of the deleted items in fact "could reasonably be expected to cause damage to the national security."⁸⁷ The court avoided this question by relying on a standard of "classifiability." It concluded that "[i]t is enough . . . that the particular item of information is classifiable and is shown to have been embodied in a classified document."⁸⁸ The court examined "some, but not all"⁸⁹ of the 142 deleted items, and found that "at least some of them" contained information related to intelligence operations and to scientific and technological developments "useful, if not vital" to national security. It determined that these items "would seem clearly to be classifiable" under Executive Order No. 11,652. The court also found that other items were classifiable because they "may relate to intelligence sources or methods."⁹⁰ The case was remanded to the district court for reconsideration in light of "the additional element of classifiability."⁹¹

The "classifiability" standard is curiously hypothetical, implying that information need only be capable of being classified, not that, in the words of the statute, it must be "in fact properly classified."⁹² The standard would appear to authorize the disclosure only of material which in principle could not reasonably be classified. It is therefore possible to argue that the standard is a covert reassertion of the "reasonableness" standard explicitly rejected by Congress.⁹³

87. Exec. Order No. 11,652 § 1(c), 3 C.F.R. 339, 340 (1974), 50 U.S.C. § 401, at 3679 (Supp. IV 1974).

88. 509 F.2d at 1369.

89. Not only did the court fail to examine all the deleted items, but it declined to order an *in camera* de novo review of the contents of the classified documents in which the deleted items appeared. The court defended its inaction by noting that the FOIA Amendments "[provide] the judge only with discretionary authority even to require production of the document for his *in camera* inspection; he may find the information both classified and classifiable on the basis of testimony or affidavits." *Id.* at 1369. The decision can derive support for this position from the Conference Report on the Amendments, which states that since executive agencies would have "unique insights" into the consequences of disclosure of classified material,

the conferees expect that Federal courts in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

H.R. REP. NO. 93-1380, *supra* note 15, at 12; S. REP. NO. 93-1200, *supra* note 15, at 12. However this caveat refers only to situations where de novo review is in fact undertaken, which was not the case in *Colby*, and it refers not to the classifiability of documents, but to the weight courts should give to executive representations of possible damage to the national security.

90. 509 F.2d at 1368.

91. *Id.* at 1370.

92. 5 U.S.C. § 552(b)(1)(B) (Supp. IV 1974).

93. See notes 20 & 68 *supra*.

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The *Colby* opinion appears to recognize the inadequacy of the "classifiability" standard. In an important aside, the court referred the plaintiffs to the Interagency Classification Review Committee, a review board created by § 7 of Executive Order No. 11,652 to supervise classification decisions.

The members of the Review Committee, far more than any judge, have the background for making classification and declassification decisions. If, therefore, any of the items in dispute are thought to be properly declassifiable now, there appears to be an available administrative remedy which is far more effective than any the judiciary may provide, which can function without threat to the national security and which can act within the Executive's traditional sphere of autonomy.⁹⁴

The opinion thus defers the substantive question of the declassification of the deleted items to the Interagency Classification Review Committee.⁹⁵ However Congress amended the (b)(1) exemption precisely to authorize *courts* to determine if withheld documents are properly classified pursuant to both procedural and substantive criteria of an appropriate executive order.⁹⁶ The refusal of the *Colby* court to accept this responsibility is a measure of the reluctance of the judiciary to enter the national security thicket. This refusal is particularly striking when it is recalled that *Colby* was not at all concerned with the political judgments required to define national security, but only with the "factual" determination of the potential damage of information disclosure. The deference to executive judgment in *Colby* is so complete that it creates serious doubts about the usefulness of the amended (b)(1) exemption.

III. Courts and Executive Classification Abuses

The inadequacies of the amended (b)(1) exemption call into question the basic FOIA policy of using judicial review to correct the "widespread overclassification abuses"⁹⁷ which have by common consensus transformed the present classification scheme into an "extrava-

94. 509 F.2d at 1370.

95. Marchetti claimed that many of the classified items were already in the public domain. The court stated that the decision whether "information has been so widely circulated and is so generally believed to be true, that confirmation by one in a position to know would add nothing to its weight" should not be made by the judiciary but by the Interagency Classification Review Committee. "As long as it remains classified, however, there should be no further judicial inquiry." *Id.* at 1370-71.

96. H.R. REP. NO. 93-1380, *supra* note 15, at 12; S. REP. NO. 93-1200, *supra* note 15, at 12.

97. 120 CONG. REC. S9316 (daily ed. May 30, 1974) (remarks of Sen. Kennedy).

gant and indefensible system of denial."⁹⁸ Whether Congress can ever make this policy effective depends on the nature of the abuses it seeks to rectify.

Classification abuses can be separated roughly into three categories. The first consists of those classifications which are, in one form or another, clearly erroneous—for example, classifications of nonsensitive information because of its inclusion in otherwise properly classified documents, classifications which have in the course of time become unjustifiable, or classifications which withhold information clearly not related to the area of national defense or foreign policy.⁹⁹ This category of classification abuse can be effectively remedied by the amended FOIA.

A second category of classification abuse is defined not by the absence of a factual relationship between the disclosure of withheld information and potential damage to a policy, but rather by the explicitly political judgment that the secrecy of the protected policy must itself be sacrificed due to competing interests in disclosure. Examples of this kind of abuse are classifications which are intended to conceal covert executive policies (*e.g.*, the secret Cambodia bombings)¹⁰⁰ or to conceal mistakes, embarrassments, or wrongdoing the disclosure of which would clearly damage the national security. Information classified for these reasons would continue to be withheld under present law, since such classifications meet the standards of Executive Order No. 11,652. Moreover, the correction of these forms of classification abuse can only be accomplished by an institution able to interfere deliberately with executive foreign policies. Courts would be most uncomfortable if required to perform this function¹⁰¹ and therefore it

98. A. SCHLESINGER, *supra* note 2, at 341. There is almost unanimous agreement on the existence of classification abuse. President Nixon stated that

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. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

8 WEEKLY COMP. PRES. DOC. 543 (1972). *See, e.g.*, HOUSE COMM. ON GOVERNMENT OPERATIONS, AVAILABILITY OF INFORMATION FROM FEDERAL DEPARTMENTS AND AGENCIES (DEPARTMENT OF DEFENSE), H.R. REP. NO. 1884, 85th Cong., 2d Sess. 97 (1958); *Hearings on United States Government Information Policies and Practices Before the Foreign Operations and Government Information Subcomm. of the House Government Operations Comm.*, 92d Cong., 1st Sess. pt. I, at 97-101 (1971); HOUSE REPORT, *supra* note 19, at 40-49; D. WISE, *supra* note 29, at 55-87; Henkin, *supra* note 65, at 275; Katzenbach, *supra* note 38, at 16; Parks, *Secrecy in the Public Interest in Military Affairs*, 26 GEO. WASH. L. REV. 23, 23-24, 51-55 (1957); Note, *Historical and Structural Limitations on Congressional Abilities to Make Foreign Policy*, 50 B.U.L. REV. 51, 66-67 (Special Issue, Spring 1970).

99. *See* p. 405 *supra*.

100. A. SCHLESINGER, *supra* note 2, at 357, 362.

101. *See* note 66 *supra*.

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would be preferable to have such decisions made by a political branch of government.¹⁰²

Finally, there is a large residual category of abuse consisting of classifications where it is questionable whether disclosure would damage the national security. These classifications may occur because of systematic executive exaggerations of the justifiable scope of national security or of the possible damage to national security of unauthorized disclosure; they may also occur because of executive attempts to cover-up mistakes, embarrassments or wrongdoing which if disclosed would have uncertain effects on the national security. Under present law, the nature of the "damage to the national security" standard will in practice impair the ability of courts to detect and disclose information withheld because of improper classifications of this kind. However Congress could assist courts in identifying and eliminating these abuses by adopting more specific criteria for classifications.¹⁰³

Congress can make classification criteria more specific in two distinct ways. It can define more narrowly the substantive areas in which classifications may occur. For example, the Atomic Energy Act of 1954 creates a statutory scheme of classification for atomic energy information.¹⁰⁴ A comprehensive system of classifications could be limited to the areas of military plans, weapons systems, intelligence, and

102. Two bills introduced in the 93d Congress attempt to correct these forms of classification abuse without resorting to the courts for at least an initial determination. H.R. 12004, 93d Cong., 1st Sess. (1973), introduced by Representative Moorhead, would create a Classification Review Commission (CRC) whose members would be appointed by the President and confirmed by the Senate. The CRC would police the implementation of security classifications, rule on congressional requests for classified information, and investigate charges of improper classification. Decisions of the CRC would be appealable to the Court of Appeals for the District of Columbia. For discussions of H.R. 12004, see Moorhead, *Operation and Reform of the Classification System in the United States*, in *SECRECY AND FOREIGN POLICY* (T. Franck & E. Weisband eds. 1974); *Hearings on H.R. 12004 Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. (1974); Murphy, *supra* note 29, at 531-38. Senators Muskie and Javits introduced S. 3393, 93d Cong., 2d Sess. (1974), which creates a Registrar of National Defense and Foreign Policy Information to supply a special Joint Congressional Committee on Governmental Secrecy with an index of all classified information. Only those documents listed on the index would be exempted from disclosure under the FOIA. The Joint Committee would review and revise the index. See *Hearings on S. 1520, S. 1726, S. 2451, S. 2738, S. 3393, and S. 3399 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. (1974); A. Cox, *supra* note 33, at 160-62.

In the 94th Congress, H.R. 8591, 94th Cong., 1st Sess. (1975), has been introduced by Representative Steelman. H.R. 8591 charges the Comptroller General with the responsibility of monitoring executive classification procedures and with reporting semiannually to the Committees of Government Operations of the House and Senate.

103. *E.P.A. v. Mink*, 410 U.S. 73, 83 (1973) ("Congress could certainly have provided that the Executive Branch adopt new [classification] procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.")

104. 42 U.S.C. § 2162 (1970).

secret diplomacy.¹⁰⁵ The disadvantage of such restrictions is the impossibility of foreseeing all future legitimate needs for secrecy. Moreover, to specify a protected area does not imply any particular standard to govern classifications within that area. For example, the Atomic Energy Act of 1954 authorizes declassification of atomic energy information which "can be published without undue risk to the common defense and security."¹⁰⁶ Even though the protected area is quite specific, the classification standard might be exceedingly vague.

A second method of making classification criteria more specific is to require a closer relationship between the classification standard and the policies to be protected. One way to require this closer relationship would be for Congress to permit classification of information only where necessary to protect a *specific* foreign policy or national defense objective.¹⁰⁷

Whether classification criteria are limited to particular areas or tied more closely to policy objectives, they necessarily depend on the policies they protect. It follows that in the area of national defense and foreign policy this dependence will create a presumption in favor of executive definitions of policy and executive characterizations of the possible harm from unauthorized disclosure. No congressional classification standards can in practice relieve the FOIA plaintiff of the burden of overcoming this presumption.

105. This proposal has been put forward by A. Cox, *supra* note 33, at 63. H.R. 8591, *supra* note 102, provides a more complete scheme of seven substantive areas in which classifications would be authorized.

106. 42 U.S.C. § 2162(a) (1970).

107. Information may satisfy the requirements of Executive Order No. 11,652 without having been classified pursuant to a specific foreign policy or national defense objective. For example, publication of information revealing widespread private corruption among high State Department officials might vitally affect our foreign relations to the extent of damaging our national security, though the concealment of this corruption may not be related to a specific foreign policy or national defense objective.

If Congress were to choose this method of requiring a closer relationship between classification standards and protected policies, the task would remain of defining when a foreign policy or defense objective is specific.