The Separation of Powers Under Carter

Peter E. Quint*

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* Professor of Law, University of Maryland School of Law. A.B. 1961, LL.B. 1964, Harvard University; Dipl. in Law 1965, Oxford University.

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I. Introduction

In 1966, during the Vietnam War and long before the Watergate affair, Arthur Schlesinger, Jr., remarked that "while nearly every increase in presidential power has produced a reaction in favor of the limitation of that power . . . the reaction has never quite cut the power back to its earlier levels." This prophetic remark foreshadowed the development of presidential power under Jimmy Carter. President Carter took office after the courts and Congress had rejected several of President Nixon's extensive claims of executive authority. After President Ford's brief interregnum, President Carter's election seemed to portend an era of cooperation between the executive and legislative branches and to presage a degree of presidential modesty and reticence. In some instances this promise was fulfilled; the rhetoric of presidential power was muted under President Carter, and the Administration accommodated the institutional requirements of Congress in several instances. In other cases, however, President Carter advanced claims of executive power that were hardly more modest than notable claims advanced by the Nixon administration. These assertions were perhaps less striking because they lacked the flamboyant and obsessive quality of President Nixon's executive claims and did not push executive power to the point of illegality. Yet they are particularly interesting for what they suggest about the structural and institutional limits of voluntary executive restraint.

This Article outlines and discusses some of the positions taken by the Carter administration on questions of presidential power. This rel-

2. For example, the new Administration pledged close cooperation with Congress in foreign affairs. See Atwood, Downtown Perspective: Lessons on Liaison with Congress, in THE TETHERED PRESIDENCY 220-21 (1981); see also J. CARTER, KEEPING FAITH 18 (1982) (desire to reduce the imperial status of the presidency); id. at 27 (desire for open government); id. at 66 (desire to cooperate with Congress).
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Atively brief period produced a rich variety of separation of powers disputes, and a review of some of these issues may assist in an understanding of continuing problems. In several cases the discussion extends into the Reagan administration, especially when later developments illuminate the implications or fate of policies initiated by President Carter. The analysis generally observes the framework of an earlier article on the separation of powers under the Nixon administration and embodies the general conceptual view advanced in that article.

According to this view, two types of separation of powers questions must be distinguished. The first type of question focuses on whether the President or Congress is authorized to make decisions of general policy in a particular area. This question is raised whenever the President or Congress seeks to make a policy decision that the other branch claims to be within its purview, and it requires judgments about the comparative institutional competence of the branches. Functionally, these questions raise such doctrinal issues as the respective abilities of Congress and the President to reflect the popular will, and the extent to which other values such as executive “secrecy” and “dispatch” should affect the allocation of authority.

The second type of separation of powers question arises when the Executive acts without explicit congressional authorization in a manner that threatens the constitutional rights of individuals. When the Executive threatens constitutional rights without explicit statutory authority, there is an increased risk of discriminatory executive action and a serious danger that the Executive may unduly favor the government interest and undervalue the countervailing constitutional interests. In these cases, legislative action can protect individual rights in addition to effecting the majority will. When the Executive threatens constitutional rights, therefore, this Article advocates a strict requirement of prior legislative authorization.

In accordance with this distinction, the separation of powers problems of the Carter administration are discussed in the following order. Part II discusses assertions of general policymaking authority by the Carter administration in both domestic and foreign affairs. President Carter’s position in these cases is analyzed, and a general principle that may be helpful in resolving these issues is examined. Part III dis-

4. For a detailed discussion of these two central issues in the context of the Nixon administration, see id. at 35-70.
Discusses cases in which the Carter administration threatened individual constitutional rights without clear congressional authorization. In some ways these were among the Carter administration's most far-reaching assertions, but the courts upheld the Administration's actions almost without exception. This Part urges that courts should impose a requirement of strict statutory authorization. Part IV discusses special executive privileges and immunities asserted by the Carter administration, including the presidential privilege of confidentiality and the Executive's immunity from tort liability. Several of these assertions arose from events of the Nixon era, and the Carter administration was called upon to take positions on these issues. This Part argues that these privileges and immunities often are ancillary to the central separation of powers issues discussed in Parts II and III, and they are accordingly analyzed in light of those central concerns.

Although the principal focus of this Article is an analysis of specific cases and doctrines, it indicates that in several instances the Carter administration asserted extensive claims of executive policymaking authority, even in circumstances in which individual constitutional rights were at stake. In a brief conclusion, this Article reflects upon certain structural pressures in the American constitutional system that may encourage executive officials to assert strong positions of executive policymaking authority despite their abstract desire for accommodation with Congress.

II. Allocation of General Policymaking Authority

Although the Constitution confers the federal legislative power on Congress, Presidents frequently have undertaken executive measures that reflected independent decisions of policy. The most common issue in separation of powers conflicts between the President and Congress has been the manner in which general policymaking authority should be allocated between the two branches, and these questions continued to be of great significance during the Carter administration. Issues of this sort commonly arise when the President asserts general policymaking authority in an area ordinarily thought to be within the congressional preserve, or in which the allocation of competence is unsettled. Each assertion of policymaking power by the Executive poses the basic questions of whether the President or Congress is better able to reflect the wishes and interests of the populace and whether particular virtues

5. U.S. Const. art. I.
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of executive action may override other considerations in some instances.

The "legislative power" of Congress is the power to formulate basic policy, based on the presumed superiority of the legislature in divining and effecting the majority will.6 The President's power to "take care that the Laws be faithfully executed"7 also may confer policymaking authority, but it is basically a policy of implementation. Much executive policymaking authority is delegated authority, and Congress can confer more or less policymaking authority on the Executive by legislating at a high level of generality or by enacting detailed legislation that leaves very little discretion to the Executive.8 In contrast, when the Constitution directly grants the President some independent policymaking authority, it is probably not because the President is thought to possess greater representative capacities in the area concerned. Rather, the Executive's ability to act with secrecy and dispatch9 may override the legislative values of representation and deliberation in these areas.

The activities of the Carter administration presented several important instances of executive policymaking in both domestic and foreign affairs. In adjudicating these cases, however, the courts tended to adopt an unsatisfying formalism that ignored the basic principle at issue. Decisions in separation of powers cases should reflect a functional understanding of the executive and congressional roles. When individual constitutional rights are not involved, the judicial choice is often between the legislative power to make fundamental policy decisions and the executive power to implement those decisions. The values of representative democracy, moreover, imply that as the likelihood of a significant social impact from the policy increases, the argument that the choice should be made by the legislature gains strength. When a measure has an important effect on the general populace, there is a

6. Commentators often rest the case for a basic congressional role in policymaking on an assumption of Congress' ability to reflect the popular will. See, e.g., Gewirtz, The Courts, Congress, and Executive Policymaking: Notes on Three Doctrines, 40 Law & Contemp. Probs. 46 (1976); see also R. Dahl, Congress and Foreign Policy (Yale University Institute of International Studies Memorandum No. 30, 1949). For a review of some of the factors favoring this view, see Quint, supra note 3, at 35-37. See also G. Wills, Explaining America: The Federalist 127-29 (1981) (noting that the Framers assumed congressional predominance in the Constitution). But see Quint, supra note 3, at 37 n.169 (discussing arguments for the representative nature of the presidency).
7. U.S. Const. art. II, § 3.
8. Congress cannot legislate so narrowly, however, that penalties are placed on named individuals or groups. See United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
9. See The Federalist No. 64, at 403 (J. Jay) (H. Lodge ed. 1888).
more pressing need for the support of legislative representation and deliberation. Like many constitutional principles, this principle is so general in form that it may be insufficient to decide certain difficult cases;\textsuperscript{10} moreover, it may be subject to modification when secrecy and dispatch are required. Nonetheless, it is a useful starting point for solving problems that otherwise may be intractable. This Part will trace the role of this principle in the disputes of the Carter era.

A second functional point that must be considered in separation of powers cases is the requisite vigor of judicial review.\textsuperscript{11} In individual liberty cases, the courts act to protect the rights of individuals and minorities against the will of the majority;\textsuperscript{12} in these cases, vigorous judicial review is warranted. Judicial review need not be so stringent, however, in allocating power between Congress and the Executive when individual liberties are not at issue. In deciding between majoritarian branches, greater deference can be accorded to the majoritarian political process; moreover, such adjudication may require complex factual inquiries and assessments of social and economic policy that may not be subject to principled resolution. Even here, however, the issues sometimes may be presented clearly enough for judicial decision. This is most likely to be true when Congress has legislated a resolution to a disputed issue. Indeed, the limitations of judicial authority suggest that substantial weight should be accorded to congressional allocations of legislative and executive authority under the necessary and proper clause.\textsuperscript{13}

A. Executive Power in Domestic Affairs—The Control of Inflation

Some of the most important domestic separation of powers disputes since World War II have centered on the problem of inflation. Inflation has been a particularly tenacious domestic issue and was one of President Carter’s most intractable domestic problems.\textsuperscript{14} Perhaps because of the difficulty of the problem and its high political costs, several presidents have sought to control inflation with programs not au-

\textsuperscript{10} See C. Black, Decision According to Law (1981) (emphasizing the generality of constitutional principles).

\textsuperscript{11} See Linde, Judges, Critics and the Realist Tradition, 82 Yale L.J. 227, 227-29 (1972); Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1212-13 (1978) (distinguishing between the underlying constitutional norm and the extent to which the courts enforce that norm).

\textsuperscript{12} See J. Choper, Judicial Review and the National Political Process 64-70, 79-128 (1980).

\textsuperscript{13} U.S. Const. art. I, § 8, cl. 18.

In these instances, assertions of executive policymaking authority took the form of a claim that the circumstances triggered direct constitutional authority, enabling the President to act without statutory authorization. In some cases, therefore, the executive branch has urged the alternative claim that an executive policy decision is authorized by a statute that does not grant explicit authority, but nonetheless should be interpreted to confer the power to act. In some instances, the Executive has used this form of argument to claim extensive authority under extremely remote or tenuously related statutes. In these cases, questions of presidential power and the correlative issues of presidential or congressional representation are recast as issues of statutory interpretation. The question of statutory interpretation, however, must in turn be influenced by underlying constitutional judgments.

Such a case was presented by President Carter's most significant assertion of domestic policymaking authority—his claim of authority to combat inflation by denying procurement contracts to certain companies that refused to follow presidentially issued guidelines. In November 1978, President Carter issued an executive order that set forth "voluntary" guidelines for wage and price increases for all business enterprises. The Administration also announced that it would ordinarily deny federal contracts in excess of $5 million to companies that

15. For example, President Truman seized control of the steel mills in 1952 because he wished to maintain steel production without a strike or a price increase that would have aggravated wartime inflation. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 676 (1952) (Vinson, C.J., dissenting) (quoting Message from President Truman to Congress (Apr. 9, 1952), reprinted in PUB. PAPERS: HARRY S. TRUMAN 250-51 (1952-1953)). Similarly, President Nixon impounded funds allocated by Congress in order to control inflation by decreasing government expenditures. See Quint, supra note 3, at 14-17.

16. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (evaluating a Presidential claim of authority to seize steel mills). During the impoundment controversy, the Nixon administration advanced both constitutional and statutory arguments. See Quint, supra note 3, at 16 & n.67.


18. See, e.g., Quint, supra note 3, at 27 (discussing the Nixon administration's claim that a statute authorizing the use of the Army for riot control also authorized a secret domestic surveillance program).


failed to comply with the guidelines. Although the issuance of voluntary guidelines probably was authorized by the Council on Wage and Price Stability Act of 1974 (COWPSA), no explicit statutory authority existed for using the denial of government contracts as a means of enforcing the guidelines.

The President's program was challenged in *AFL-CIO v. Kahn*. In defending its policy, the Administration generally avoided assertions of "inherent" executive powers over government procurement or the control of inflation. Rather, the Administration argued that the contract policy was authorized by section 205(a) of the Federal Property and Administrative Services Act of 1949 (FPASA). The general objective of the FPASA is to implement procurement policy "advantageous to the Government in terms of economy, efficiency, or service." Section 205(a) authorizes the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act."

The decision in *Kahn* turned on the interpretation of this language. The provision easily could be read as authorizing the President to do little more than issue relatively modest housekeeping regulations relating to procurement practice. The government argued, however, that this section authorized the denial of government contracts to companies exceeding the wage-price guidelines, a program that could impose wide-ranging anti-inflation controls on most large domestic


25. See id. at 787. The executive order, however, invoked President Carter's constitutional power "as President and as Commander in Chief of the Armed Forces," in addition to statutory authority. Further, the government suggested in its brief that the question of inherent presidential power remained open. Brief for Appellants at 19 n.10, AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979).


27. Id. § 481(a).

28. Id. § 486(a).

corporations. According to the government, the program would effectuate a procurement policy “advantageous to the Government in terms of economy” because it would ultimately result in lower costs for goods purchased by the government.

The District of Columbia Circuit agreed with the government and held that the program was authorized by section 205(a). Although the court conceded that the grant of presidential authority was “imprecise,” it concluded that there was “a sufficiently close nexus” between the wage and price guidelines and the statutory goals of “economy” and “efficiency” in government procurement. According to the court, the guidelines probably would yield not only short term procurement benefits in the form of lower prices charged by complying companies, but also long term benefits in the form of lower costs to the government resulting from a general decline in inflation.

The Kahn court found congressional authorization of sweeping presidential power in general language designed to achieve less expansive goals. Although Kahn did not by its terms find “inherent” execu-

30. According to the district court, 50%-70% of “government procurement dollars” would be influenced by the program. AFL-CIO v. Kahn, 472 F. Supp. 88, 92 (D.D.C. 1979); see also Note, Presidential Power over Federal Contracts Under The Federal Property and Administrative Services Act: The Close Nexus Test of AFL-CIO v. Kahn, 1980 DUKE L.J. 205, 212 (noting that the competitive effects of procurement regulations were expected to spread throughout the economy). But see Adequacy of the Administration’s Anti-Inflation Program (Part I): Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 7-10 (1979) (testimony of Jerome H. Stolarow) (asserting that the procurement guidelines would be ineffectual) [hereinafter referred to as Anti-Inflation Hearings].

31. See Kahn, 618 F.2d at 792-93.

32. See id. at 793. The circuit court reversed the district court, which found the program to be unauthorized in light of the history of the FPASA and Congress’ evident intention to “occup[y] the field of wage and price controls.” Kahn, 472 F. Supp. 88, 98 (D.D.C.), rev’d, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979). The district court also found that the program was a “mandatory economic [control]” prohibited by § 3 of COWPSA. Id. at 99-102.

33. 618 F.2d at 792.

34. Id. at 792.

35. Id. at 792-93. The court also found that there was an executive practice of using the procurement process to achieve substantive policy goals. According to the court, “[T]he President’s view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is ‘entitled to great respect.’” Id. at 790. Moreover, the court found that the guidelines were not “mandatory” controls prohibited by COWPSA because they did not possess the requisite “elements of coercion and enforceable legal duty.” Id. at 794. Finally, the court noted that Congress had increased funding for the council created under COWPSA with knowledge that the council was carrying out the President’s program. Id. at 795-96.

In a vigorous dissent, Judge MacKinnon argued that the contract program was not authorized by § 205(a) of FPASA and was inconsistent with other provisions of the statute. Id. at 799-803 (MacKinnon, J., dissenting). Judge MacKinnon argued that the guidelines might not result in short term savings in government procurement costs and that the long term nexus—the relationship between reduced inflation and future procurement costs—was “exceedingly attenuated.” Id. at 804-05. Judge MacKinnon also argued that if § 205(a) authorized the guidelines, the statute would be unconstitutional as an excessive delegation of legislative power. Id. at 811-14.
tive power, decisions like Kahn greatly decrease the necessity of arguments for inherent presidential authority. The proliferation of federal legislative control over large segments of American life often will enable courts to find tenuous statutory language to support an extensive assertion of executive authority, if the court is willing to concur with the executive in a strained construction of a remote statute.

The Kahn decision lacked an appropriate sensitivity to the relationship between the functional reasons for conferring legislative power on Congress—representation and deliberation—and the interpretation of a statute that conceivably could be read to confer sweeping policymaking power on the President. By imposing a broad wage and price control program under the FPASA, the President made a significant decision of economic policy. The framers of the FPASA, however, were concerned primarily with housekeeping provisions for procurement and did not specifically contemplate the use of the procurement statute as an enforcement mechanism for wage and price controls. Therefore, the necessity and desirability of these controls were decided upon solely by the President and other executive officials. The policy was made without the opportunity to consider the views of many varying constituencies that is normally present in congressional decisionmaking and without the deliberation afforded by debate in a bicameral legislature. These legislative values counsel, however, that as the importance of a policy decision increases, the more that decision requires legislative approval with its concomitant opportunities for popular representation and deliberation. This underlying functional principle should be recognized in statutory construction.

Instead of recognizing this principle, the Kahn decision appeared to grant the President a degree of latitude under the “necessary to effectuate” language of section 205(a) similar to the discretion ordinarily extended to Congress under the necessary and proper clause. The court allowed the President to use the procurement process in any manner that he might reasonably believe could achieve the “end” of economy, regardless of the independent social importance of the “means.”

36. See G. Calabresi, A Common Law for the Age of Statutes (1982) (noting the proliferation of statutory law at both the state and federal levels).
37. Indeed, the General Accounting Office argued that Congress specifically considered and rejected the use of procurement as a means of price control when it enacted the FPASA. See Anti-Inflation Hearings, supra note 30, at 4, 52-56 (statement of Milton J. Socolar, General Counsel of the GAO).
38. See, e.g., Gewirtz, supra note 6, at 65-80; see also A. Bickel, The Least Dangerous Branch 161 (1962).
Although the court found a "sufficiently close nexus" between the guidelines and savings in procurement, the nexus was based on speculative data and economic analysis; the court effectively deferred to the judgment of the President in the same manner that it ordinarily defers to the judgment of Congress.

This deference is unwarranted. By imposing broad wage and price controls to achieve efficiency in government procurement, the President chose an executive "means" that seemed substantially more significant as a goal in itself than as a method for achieving the statutory "end." When Congress acts similarly, by choosing significant means to achieve arguably less significant ends, it is ordinarily not subject to judicial scrutiny because its basic policymaking authority includes the power to assess the relative weight of means and ends. If the President acts in this manner, however, his lesser capacity for representation and deliberation inhibits democratic interchange on the choice of means. When the President's choice of means overshadows the statutory ends, it is doubtful that Congress has authorized those means. This doubt should influence statutory construction to the extent that other materials such as legislative history or context do not yield a different result. In sum, the social importance of the Executive's choice of policy should be taken into account in determining whether executive action is authorized under a broad or general statute. The District of Columbia Circuit's failure to recognize this principle in Kahn provided President Carter with a significant opening wedge into the realm of discretionary executive policymaking.

In contrast, this principle may have played a greater role in another case in which President Carter sought broad policymaking power under tenuous statutory authority. In 1980, President Carter imposed a fee on all retail gasoline sales in order to curb domestic consumption of imported oil. The Administration sought to justify the proposed fee

40. 618 F.2d at 792-93.
41. See, e.g., United States v. Darby, 312 U.S. 100 (1941) (upholding the regulation of wages and hours in local production as a means of regulating the flow of goods in interstate commerce).
43. The importance of the means chosen by the executive is only one factor in statutory interpretation and should be viewed together with legislative history and other relevant considerations. See, e.g., H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in BENCHMARKS 196 (1967) (discussing the use of related legislation as an aid in statutory interpretation). The argument made in this Article would not affect those administrative programs in which other indicia leave little doubt of Congress' intention to grant the Executive or an agency the authority to make basic policy decisions.
44. See Proclamation No. 4751, 45 Fed. Reg. 27,905; Proclamation No. 4748, id. at 26,371; Proclamation No. 4744, id. at 22,864. Although the President initially imposed a fee on imported oil, other provisions of the program ensured that the cost ultimately would be borne by all consumers of both imported and domestic oil: "[T]he effect [was] to impose a $.10 per gallon conser-
under a statute that authorized the President to “take such action . . . as he deems necessary to adjust the imports of” a foreign product whose importation “threaten[s] to impair the national security.” This provision, like the statute at issue in Kahn, appeared to grant broad authority to the President to choose the means necessary to achieve a specified end—curbing potentially harmful imports of foreign oil. Moreover, the Supreme Court had held that the “action” authorized by the statute was not limited to import quotas, but also permitted license fees on foreign oil in order to increase its price and thus to reduce its importation.46

President Carter tried to extend this authority by raising the retail prices on all gasoline, whether domestic or imported, in order to reduce total national consumption and thereby ultimately to reduce oil imports.47 This action was challenged in Independent Gasoline Marketers Council v. Duncan.48 In Gasoline Marketers, the Carter administration argued that the eventual reduction of imports justified the fees.49 To the federal district court, however, the independent economic burdens of the price increase apparently outweighed its value as a means of reducing oil imports, the end sanctioned by Congress. Accordingly, the court noted that “the program imposes broad controls on domestic goods to achieve [a] slight impact” on oil import levels.50 For this reason, among others, the court held that the fee was unauthorized.51 The court concluded that “[e]xisting statutes cannot be used for purposes never contemplated by Congress and in ways contrary to congressional intent.”52

Gasoline Marketers and Kahn are difficult to reconcile. In both cases, the President tried to justify important economic measures with general statutory language and argued that the measures were “means”

47. See supra note 44.
49. Id. at 617.
50. Id. at 618.
51. See id. The court also argued that the increase was invalid as an “indirect” rather than a “direct” means of reducing imports. Id. Moreover, the court found indications of specific congressional intent to withhold authority for the President’s action. See id. at 620-21.
52. Id. at 620. The court in Gasoline Marketers also rejected the government’s extraordinary assertion that the President possessed independent constitutional power to impose the program because the importation of oil affects national security. See id. at 619-20. For a discussion of this and similar cases of executive policymaking, see Bruff, supra note 39; Quint, supra note 3, at 38 & n.173 (similar cases in the Nixon administration).
to a statutory end. In both cases, the independent social and economic impact of the means seemed to outweigh their value in achieving the end toward which they were ostensibly directed. President Carter succeeded in *Kahn* and failed in *Gasoline Marketers*; yet the President’s case in *Kahn* seems the weaker of the two. In *Gasoline Marketers*, the statute at least was intended to grant the President some authority over certain oil prices, but the statute in *Kahn* was virtually unrelated to inflation. In striking down the provision in *Gasoline Marketers*, the district judge possessed a clearer appreciation of the underlying functional principle than did the court of appeals in *Kahn.*

In retrospect, President Carter’s imposition of economic measures that rested on tenuous statutory authority may have reflected the political pressures often faced by incumbent presidents. Whether ration-

53. American Fed’n of Gov’t Employees v. Carmen, 669 F.2d 815 (D.C. Cir. 1981), presented a contrasting factual situation. In that case, President Carter ordered federal employees to pay fees commensurate with commercial parking fees for the use of parking spaces on federal property. *Id.* at 817-18, 820 n.27. The court rejected a claim that this action was unauthorized, and held that the order fell within the President’s authority under § 205(a) of the FPASA to implement “an economical and efficient system for the . . . utilization of available [federal] property.” *Id.* at 821. Like the statutes in *Kahn* and *Gasoline Marketers*, this provision was very general and said nothing specific about the type of program ordered by the President. In finding authority, however, the court may have been influenced by the fact that imposing commercially reasonable parking fees for the use of federal parking spaces by federal employees does not involve a major choice of social policy—a factor that distinguishes this case from *Kahn* and *Gasoline Marketers*.

54. President Carter also took other, less formal anti-inflationary steps that were challenged as impermissible attempts to impose executive policies without statutory authorization. In several instances, executive officials sought to persuade regulatory agencies to modify proposed environmental and health regulations that the Administration believed would prove unduly expensive and inflationary. *See* Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944-46 (1980) (discussing cotton dust, ozone, and strip mining regulations). These *ex parte* contacts might be seen as attempts to replace congressional policy decisions by executive policymaking, because under applicable statutes “general inflationary considerations are not legally relevant in most cases.” *Morrison, Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 889 (1982). Dean Verkuil, however, has argued that, within certain limits, this intervention represents a permissible form of policy coordination by the President. *See* Verkuil, *infra*, at 956-58. Moreover, Congress may have manifested “an intent to countenance” *ex parte* contacts in informal rulemaking. *See* Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193, 229 (1981). Nonetheless, attempts by the Executive to introduce broad policy considerations into administrative rulemaking raise serious problems when the policy advocated by the Executive has substantial social and economic ramifications and falls outside the scope of the statute. In one case, however, *ex parte* contacts by President Carter and his advisors were held to be lawful. *See* Sierra Club v. Costle, 657 F.2d 298, 387-408 (D.C. Cir. 1981).

ally or irrationally, public opinion tends to hold the President responsible for the success or failure of the economy.\textsuperscript{55} In fact, President Carter believed that his political future depended upon controlling inflation, and that it was the paramount political issue of his Administration.\textsuperscript{56} When such pressures become extreme, the President may stretch or exceed statutory authority to achieve greater control over decisions he believes are crucial to his political future. These pressures may continue to evoke executive policymaking in domestic affairs in times of political crisis.

\subsection*{B. Allocation of General Policymaking Authority in Foreign Affairs}

In foreign affairs, independent presidential power has been asserted with considerable vigor and success in the postwar period. In practical as well as constitutional terms, President Carter considered his authority in foreign affairs to be more sweeping than his domestic powers.\textsuperscript{57} Although President Carter was willing to accommodate Congress on certain foreign policy issues, it is in this area that the Administration's most far-reaching assertions of executive authority are to be found. During the same period, however, Congress was seeking to reassert its authority over a broad range of foreign policy issues.\textsuperscript{58} In the aftermath of Vietnam and Watergate, therefore, the actions of the Carter administration tested the continued efficacy of postwar claims that the President possessed unchallenged primacy in foreign affairs.

Historically, claims of presidential primacy in foreign affairs have rested on various constitutional bases, a number of which were asserted by the Carter administration. In some cases, for example, the Administration adopted a well-known interpretation of history that recognized the President's ability to exercise extraconstitutional power in foreign
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affairs. Moreover, the Administration agreed with Hamilton that extensive foreign affairs authority was implicit in the "executive power" conferred on the President by article II of the Constitution. Advocates of presidential primacy also have asserted that the exercise of congressional lawmakers' authority is inappropriate in foreign affairs because it requires prudence, secrecy, and dispatch to respond to the unpredictable actions of foreign nations, which are not constrained by domestic law. Others have emphasized the historical shift of foreign affairs power to the President and have invoked the authority of the "living Constitution."

These arguments, however, recently have encountered skepticism in response to the insights furnished by the Vietnam War and the Watergate affair. Some commentators have noted that when foreign affairs issues affect domestic policies—as they do in an increasing number of instances—there is a heightened interest in legislative representation and deliberation. Moreover, "[t]here is little question that, largely stemming from the change in Congress and its desire for a more assertive role in foreign policy, the dynamics of power between the executive and legislative branches have shifted radically" in recent years. Thus the lessons of the "living Constitution" may change with each decade. The foreign affairs cases of the Carter administration

59. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (stating that full foreign affairs powers descended to the federal government from the British Crown). Although Curtiss-Wright has been subjected to sustained and trenchant criticism, see, e.g., Lofgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 YALE L.J. 1 (1973), it retains considerable vitality, see, e.g., Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir.), vacated, 444 U.S. 996 (1979); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 352 comment a (Tent. Draft No. 1, 1980).


61. See, e.g., Thurow, Presidential Discretion in Foreign Affairs, 7 VAND. J. TRANSNAT'L L. 71 (1973) (citing the views of Locke, Montesquieu, and Hamilton).


63. See, e.g., Berger, The Presidential Monopoly of Foreign Relations, 71 MICH. L. REV. 1 (1972); Casper, Response, 61 VA. L. REV. 777, 778 (1975) (arguing that "[the Framers] chose to grant Congress the dominant role in foreign affairs").


65. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-2, at 161 (1978).


explored the conflict between the arguments for presidential primacy and the revisionist criticism of those arguments.

1. Termination of the Taiwan Mutual Defense Treaty.—President Carter’s most striking assertion of presidential policymaking authority in foreign affairs was his unilateral termination of the Taiwan Mutual Defense Treaty.68 In December 1978, the President declared that after January 1, 1979, the United States would recognize the People’s Republic of China as the “sole legal Government of China.”69 At the same time, President Carter announced that the Mutual Defense Treaty between the United States and the Republic of China (Taiwan) would be terminated on January 1, 1980, in accordance with article X of that treaty, which provided for termination by either party on one year’s notice.70 Although presidents may have occasionally terminated treaties unilaterally in the past, none were as important as the Taiwan Mutual Defense Treaty.71 In seeking a rapprochement with China after the rigors of the Cold War and Vietnam, President Carter acted with a unilateral style reminiscent of those earlier periods.72

The major argument against the termination of the Taiwan treaty was constitutional; it asserted that the President had no power to undo a policy that reflected the popular consensus manifested through a form of legislative action.73 The argument rested upon an analogy between a treaty and a statute. According to the supremacy clause, both treaties and statutes constitute the “law of the land”;74 for the same argument that historically “the so-called normal period [of presidential hegemony in] 1941-1967 was in fact an aberration . . . and the new period of congressional assertiveness was in truth the norm”).

69. Address by President Carter to the Nation, Diplomatic Relations Between the United States and the People’s Republic of China, 2 PUB. PAPERS: JIMMY CARTER 2264 (1978) (quoting from Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People’s Republic of China). For a discussion of the normalization of relations between the two nations, see C. VANCE, HARD CHOICES 75-83, 113-22 (1983).
70. See Taiwan Treaty, supra note 68, at art. X.
72. President Carter’s recognition of the Peking government was also subject to congressional criticism because it had been effected without prior congressional consultation. One former Administration official argued that President Carter’s failure to consult with Congress on this issue was an unfortunate exception to the Administration’s usual practice of consultation. See Atwood, supra note 2, at 224-25. But see FOREIGN POLICY CONSULTATION, supra note 66, at 32 (noting that Congress did not hold the same high opinion of President Carter’s willingness to consult).
74. U.S. CONST. art. VI.
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reason that the President cannot repeal a statute, therefore, the President cannot unilaterally repeal the form of "law" represented by a treaty. According to this argument, the repeal of a treaty requires the advice and consent of two-thirds of the Senate (the method by which the "law" was enacted), or an act of Congress terminating the treaty in accordance with ordinary legislative procedures. Moreover, it is the President's duty under the Constitution to take care that the "laws"—including treaties—are faithfully executed and not to countermand them.

The Carter administration marshalled three primary arguments against this position. First, the Administration sought to distinguish the termination of a treaty from the repeal of a statute by flatly asserting that "[u]nder the Constitution the power to terminate treaties . . . resides in the President and not in the Congress," and by suggesting that this presidential power may be immune from congressional limitation. These arguments rested primarily on claims of extra-constitu-

75. The argument for congressional participation in treaty termination is derived from the general grant of legislative power to Congress in U.S. Const. art. I, § 1. Since a treaty is a "law," abrogation of a treaty is a legislative act, and any legislative act not otherwise specifically provided for can be effected only by Congress through the ordinary lawmaking process. See, e.g., Berger, supra note 73, at 621 ("Once made, a treaty is a 'law' and like other 'laws' can only be repealed by Congress"); see also The Chinese Exclusion Case, 130 U.S. 581, 600 (1889) (finding that Congress may alter the domestic effect of a treaty by ordinary legislation if the "subject" of the treaty lies "within the power of Congress"); Head Money Cases, 112 U.S. 580, 599 (1884) (noting that congressional repeal of a treaty is preferable to repeal by President and Senate, because "all three of the bodies participate"); Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903, 929-30 (1959) (arguing that Congress possesses the power to annul the domestic effect of any treaty under a general congressional foreign affairs power).

76. U.S. Const. art. II, § 3. For an exposition of this argument, see Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.), rev'd, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979). For a critique of this argument, based on the view that the treaty was not "law" because it was not self-executing, see Comment, supra note 62, at 1216-17.


78. The State Department maintained that a statute requiring congressional approval as a prerequisite to the termination of treaties would raise "serious Constitutional questions," and "[a] reservation [in a specific treaty, prohibiting the President from terminating the treaty without Senate or Congressional consent] would . . . raise the same Constitutional questions." Treaty Termination Hearings, supra note 77, at 202, 213 (statement of State Department). Before the District of Columbia Circuit, the government argued that even if a statute purported to continue the Taiwan Mutual Defense Treaty in force, "Congress could not end [the President's unilateral power to terminate the treaty] by passing a law, and the President could not waive it by signing a law." Goldwater v. Carter, 617 F.2d 697, 703 n.13 (D.C. Cir.) (quoting oral argument of John Harmon, counsel for the Administration), vacated, 444 U.S. 996 (1979); see also Treaty Termination Hearings, supra note 77, at 209-12 (statement of State Department) (arguing that congres-
tional power, but the President also argued that the authority to terminate the treaty arose from his powers as Commander in Chief and from the general grant of executive authority in article II. The breadth and tone of these constitutional arguments resembled vigorous assertions of executive power by Administrations of the Cold War era. The government also implied that a stronger popular consensus is necessary for entering into treaties than for dissolving them. The Framers intended that it should be easier to undo "entangling" alliances than to establish them, and therefore the President could terminate the treaty unilaterally.

Second, the government asserted that the President's action was authorized by the treaty itself or by statute. Both the Administration and its opponents sought support from ambiguous legislation enacted two months before termination of the treaty which stated "the sense of Congress" that there should be "prior consultation . . . on any proposed policy changes affecting the continuation in force of" the Taiwan Treaty. Critics in Congress asserted that the required consultation had not taken place, while the Administration argued that the legislative repeal of a treaty affects domestic law only and that the international obligation remains unless the President terminates the treaty).

79. See, e.g., Defendants' Brief, supra note 77, at 4, reprinted in Treaty Termination Hearings at 101 ("[T]ermination of a defense treaty which creates no domestic law obligations falls squarely within the President's authority as Commander in Chief."); Treaty Termination Hearings, supra note 77, at 204-05 (statement of State Department) (arguing that the power to terminate treaties is included in the "executive power" of article II). In upholding the President's action, the District of Columbia Circuit relied in part on this ground. Goldwater v. Carter, 617 F.2d 697, 704-05 (D.C. Cir.), vacated, 444 U.S. 996 (1979).


The Administration also supported its position by citing what it claimed were 12 historical examples of unilateral presidential treaty termination. See Defendants' Brief, supra note 77, at 33-38, reprinted in Treaty Termination Hearings at 130-35. The proper weight to be attributed to these examples was sharply disputed. Compare Treaty Termination Hearings, supra note 77, at 207 (statement of State Department) (claiming that several of the Administration's examples "involved important treaties"), with Goldwater v. Carter, 481 F. Supp. 949, 959-60 (D.D.C.) (finding that the treaties cited by the Administration did not approach the Taiwan Treaty in importance), rev'd, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

81. The government relied on article X of the Treaty, which permitted termination on one year's notice by either "party." See Taiwan Treaty, supra note 68, art. X. According to the government, the word "party" should be read to refer to the President because of his special role in foreign affairs. See Defendants' Brief, supra note 77, at 23-24, 38-39, reprinted in Treaty Termination Hearings at 120-21, 135-36. Moreover, the government invoked the Fornosa Resolution, Pub. L. No. 84-4, 69 Stat. 7 (1955), which was enacted at the same time as the Mutual Defense Treaty and granted the President discretion to deploy or withdraw American forces in Taiwan. The Administration argued that this discretionary power over military assistance to Taiwan implied a similar authority over the Mutual Defense Treaty. Reply Brief for Defendants at 18-19, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.), rev'd, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

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...implies an acknowledgement that the President could issue the Notice of Termination without congressional approval."

The third and strongest argument for the President rested on the special circumstance that the Taiwan Treaty was terminated in connection with the recognition of the People's Republic as the sole legal government of China. In United States v. Pink, the Supreme Court held that the President has unilateral power to recognize foreign governments and a measure of "implied power" to remove obstacles to the effective exercise of that authority. The Carter administration argued that the President was empowered to terminate the Taiwan Treaty in order to remove an obstacle to the exercise of his power to recognize the People's Republic of China. Warren Christopher, a State Department official, asserted that the People's Republic had "made it clear that continuation of the treaty was incompatible with normalization of relations and that without its termination, normalization was impossible." The argument based on Pink, however, was not conclusive. In Pink, the executive agreement had been undertaken without contrary legislative action. In contrast, the termination of the Taiwan Mutual

83. Defendants' Brief, supra note 77, at 3, reprinted in Treaty Termination Hearings at 100. The Administration contended that consultation had taken place. Declaration of Richard Holbrooke at 2, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.), rev'd, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979) (asserting that "suggestions of the members [of Congress] were carefully weighed by the Administration"), reprinted in Treaty Termination Hearings, supra note 77, at 85, 86. But see Javits, Congress and Foreign Relations: The Taiwan Relations Act, 60 FOREIGN AFF. 54 (1981) (asserting that there had been no effective consultation). The Administration also argued that the provision was not intended to be mandatory. Defendants' Brief, supra note 77, at 43-48, reprinted in Treaty Termination Hearings at 140-42.

Additional statutory issues were raised by the Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (codified at 22 U.S.C. §§ 3301-3316 (1982)), which was enacted after the President's recognition of the Peking government. The Act affirmed existing treaties and other agreements with Taiwan, although the Taiwan government—now no longer recognized by the United States—was replaced by an entity called "the governing authorities on Taiwan." Id. § 4(c), 93 Stat. at 16. The statute conceivably could be read as continuing the Mutual Defense Treaty in effect. Even if this were the case, the Administration argued, Congress was powerless to annul the presidential termination of the treaty. See supra note 78 and accompanying text. The government suggested, however, that the Taiwan Relations Act actually ratified the President's termination of the treaty. See Goldwater v. Carter, 481 F. Supp. 949, 954 n.18 (D.D.C.), rev'd, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

84. 315 U.S. 203 (1942).

85. Id. at 229 (upholding presidential authority to settle certain claims in connection with recognition of the Soviet government).

86. See Defendants' Brief, supra note 77, at 39, reprinted in Treaty Termination Hearings at 136.


88. Indeed, the Pink Court noted that "Congress tacitly recognized" the policy embodied in the agreement. 315 U.S. at 227.
Defense Treaty arguably involved a direct presidential repudiation of a legislative act—the advice and consent of the Senate. The termination therefore may fall within the category of actions in which the President’s power is at its weakest. Thus, the argument that the President’s power to recognize foreign regimes implies the power to terminate a related treaty is more problematic than the assertion of power to settle certain claims, which was upheld in Pink.

The Taiwan Treaty termination was challenged by certain members of Congress in Goldwater v. Carter. At the outset, the government argued that the case should be dismissed as a political question because the judiciary is ill-equipped to determine the difficult issues of policy and fact raised by the termination. The Administration also argued that the plaintiffs were not “injured in fact” by the termination of the treaty, and therefore the complaint should be dismissed for lack of standing. Ultimately, considerations of justiciability proved dispositive in the Supreme Court. Four Justices concluded that the case must “be controlled by political standards.” A fifth Justice found that the case was not ripe for decision because Congress had not offi-

89. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). But see S. REP. No. 7, 96th Cong., 1st Sess. 19 (1979) (arguing that the termination did not fall in that category).

90. On the other hand, the Administration suggested that the termination of the Taiwan Mutual Defense Treaty was less intrusive than the action in Pink, because termination of the treaty did not affect private commercial rights. See Defendants’ Brief, supra note 77, at 18, 41-42, reprinted in Treaty Termination Hearings at 115, 138-39; cf. Tribe, A Constitutional Red Herring, Goldwater v. Carter, NEW REPUBLIC, Mar. 17, 1979, at 15, 16 (asserting that the case for congressional participation is stronger in termination of a commercial treaty involving private rights than in a mutual defense treaty which “ordinarily leaves private rights intact”).


92. According to the Administration, “[The President’s decision involved considerations of global strategy of the most profound character and implications.” Defendants’ Brief, supra note 77, at 11, reprinted in Treaty Termination Hearings at 108. Standards are lacking “when a court attempts to evaluate the fruits of complex diplomatic negotiations.” Id. at 12, reprinted in Treaty Termination Hearings at 109. The Administration also maintained that foreign states would be entitled to accept the President’s notice of termination, even though “for domestic law purposes the Court’s decree would govern.” Id. at 13, reprinted in Treaty Termination Hearings at 110. Consequently, the “possibility of such contrary results in domestic and international law provides a cogent example of ‘the potentiality of embarrassment from multifarious pronouncements by various departments on one question,’ ” one element of the political question doctrine. Id. (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).


95. Id. at 1003. Writing for a plurality, Justice Rehnquist noted that no specific constitutional provision governs treaty termination and that “different termination procedures may be appropriate for different treaties.” Id. Consequently, no judicial standard exists. Justice Rehnquist also observed that the case was not commenced by private litigants, but was “a dispute between co-equal branches of our government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.” Id. at 1004.
cially disapproved the President's action.96

The Taiwan Treaty affair ended with the defense agreement terminated as a practical matter, but without a definitive judicial decision on whether the termination was constitutional. Thus, the question of whether the President has the authority to terminate treaties is still unresolved and a principled approach to its resolution should be determined. The legal regime established by a treaty constitutes a form of general policymaking, in which the vote of two-thirds of the Senate replaces the vote of Congress,97 and in which the opportunities for deliberation, public participation, and representation are almost as great as in bicameral legislation. A functional view of the separation of powers counsels that a court should consider seriously the importance of the treaty in deciding whether the President is empowered to terminate or abrogate the treaty unilaterally, or whether, in contrast, a form of legislative representation and deliberation is required. For example, a group of major treaties forms the core of American foreign policy and reflects fundamental decisions of international conduct.98 These documents and their related statutory schemes represent major plans of national governance with substantial implications for domestic as well as foreign affairs.99 To these treaties, the Carter administration added the Panama Canal treaties, a milestone in the relations between the United States and the other nations of this hemisphere.100 In the case of most fundamental treaties, including the Panama Canal treaties, the terms of the agreement were debated vigorously and adopted only after extensive deliberation. Moreover, these treaties are related intimately to questions of war and peace over which Congress has ultimate authority; a number also affect foreign commerce, a field in which congressional authority is also unquestionably supreme.101 If the President could unilaterally repeal an important decision of policy made by this form of consensus, he would have a momentous degree of policymak-

96. Id. at 997 (Powell, J., concurring). Only Justice Brennan was willing to decide the case on its merits; he voted to uphold the President's action because presidential authority to terminate the Taiwan Mutual Defense Treaty was implied by the President's power to recognize the Peking government. Id. at 1006-07 (Brennan, J., dissenting).
97. See A. HAMILTON & J. MADISON, supra note 60, at 60 (Helvidius Letters of Madison).
98. One commentator suggests that the North Atlantic Treaty, the United Nations Charter, and the SALT treaties fall into this category. Comment, supra note 62, at 1210-11. This Comment argues that the importance of the treaty and other substantive factors should be taken into account in determining the President's power to terminate treaties. Id. at 1207-11.
99. See authorities cited supra note 64.
100. For a discussion of the Panama Canal treaties' importance, see Remarks by President Carter at a Question-and-Answer Session with a Group of Editors and News Directors, 1 PUB. PAPERS: JIMMY CARTER 718 (1978); C. VANCE, supra note 69, at 140-57.
101. See Comment, supra note 62, at 1207-09; see also U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations").
ing authority with serious implications for domestic and foreign affairs. Presidential repeal would alter a basic policy decided after legislative deliberation and representation, without the opportunity for public participation present in both the confirmation of a treaty and the repeal of a statute. Therefore, there should be substantial doubt about presidential power to terminate an important treaty without textual authorization in the treaty or in a statute, or without other special circumstances.

In the case of minor treaties, the focus is substantially different. Although unilateral presidential termination of any treaty might seem to contravene a legislative determination, the minor nature of the treaty may itself imply a delegation of power to the President to terminate the agreement. The technique of statutory construction that interprets an act in favor of finding a delegation to the President—a technique recently emphasized in foreign affairs cases—is most justifiable when the delegation affects arrangements that are not of major significance. Thus, the relative importance of the treaty should be considered in determining whether power has been delegated to the President to terminate or abrogate a treaty.

In Goldwater, the District of Columbia Circuit rejected the argument that a court could assess the relative importance of treaties. According to the court, "[t]here is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards." The court overstated the difficulties that exist. Although the importance of some treaties may not be easily assessable, others can be classified unquestionably as fundamental foreign policy decisions.

Moreover, the decision to terminate an important treaty is not necessarily a simple choice to have one less "entangling" alliance. The United States has relations with most nations and dissolution of a treaty is likely to be part of a process in which relations with one nation are replaced by closer relations with that nation's rivals. In a unilateral treaty termination, therefore, the President effectively may be replacing one set of risks and relationships, approved by both the President and two-thirds of the Senate, with a new set of risks and relationships approved only by the President. See Treaty Termination Hearings, supra note 77, at 308 (statement of Prof. Abram Chayes).

102. Moreover, the decision to terminate an important treaty is not necessarily a simple choice to have one less "entangling" alliance. The United States has relations with most nations and dissolution of a treaty is likely to be part of a process in which relations with one nation are replaced by closer relations with that nation's rivals. In a unilateral treaty termination, therefore, the President effectively may be replacing one set of risks and relationships, approved by both the President and two-thirds of the Senate, with a new set of risks and relationships approved only by the President. See Treaty Termination Hearings, supra note 77, at 308 (statement of Prof. Abram Chayes).

103. See infra note 113.
104. See supra text accompanying note 89.
105. See infra text accompanying notes 158-69.
106. 617 F.2d at 707.
107. Id.
108. See, e.g., Treaty Termination Hearings, supra note 77, at 388 (statement of Prof. Michael Reisman) ("It seems to me that when we deal with security agreements we are dealing with agree-
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The Taiwan Treaty itself, for example, could not be otherwise classified, and the Administration did not attempt to do so.109 In cases of real uncertainty about the importance of a particular treaty, however, the President's role in foreign affairs suggests that his judgment may be accorded a measure of deference.

Any such deference, however, must be subject to a significant qualification. If the treaty indicates that congressional action is necessary for termination, that determination should control. In such a case, the "law" itself indicates that it constitutes an important decision of policy which can only be undone through legislative action.110 Moreover, a similar declaration in a statute would reflect a determination by Congress, under the necessary and proper clause, that in an instance of such importance the powers of the treatymaking "department" of government—composed equally of the President and the Senate—can be carried out adequately only by preventing the decision of that "department" from being countermanded by the President alone.

Moreover, related congressional action also should be taken into account. If the treaty is part of an extensive web of legislation, the high level of legislative activity may imply that Congress considers the subject to be an important policy area over which it has retained authority.111 In such cases, the President's role might be characterized as having been "preempted" or precluded in an area of shared competence.112

In this manner, many issues of treaty termination may be handled as questions of statutory interpretation. Although the underlying question will be the importance of the treaty, the judicial focus will shift to the congressional assessment of importance as indicated by the degree and nature of congressional action related to the treaty. If the treaty is very important or very minor, a court may be able to act on its own; it is in the intermediate areas that the search for congressional guidance can avoid the twin dangers of judicial foreign policy judgments and total deference to executive claims. Although this approach may be

109. But see Comment, supra note 62, at 1219-20 (asserting that the Taiwan Treaty had become less "fundamental" in recent years).

110. See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 352 comment a (Tent. Draft No. 1, 1980).

111. See, e.g., Treaty Termination Hearings, supra note 77, at 389-92 (statement of Prof. Michael Reisman) (arguing that the Mutual Defense Act of 1949 and related treaties indicate that the President was not authorized to terminate the Taiwan Treaty).

112. Cf. Gewirtz, supra note 6, at 80-83 (discussing the preemption argument in domestic and foreign affairs).
qualified in narrow areas of direct presidential authority, it provides a general starting point for a serious inquiry into executive treaty termination.

2. The Iranian Hostage Affair.—The Iranian hostage affair presented President Carter with issues considerably different from those raised by the termination of the Taiwan Treaty. While the treaty termination was a considered judgment reached after long reflection, the hostage crisis forced President Carter to make quick decisions in response to rapidly changing circumstances.

After President Carter's decision to admit the deposed Shah of Iran into the United States for medical treatment, militant student groups seized the American Embassy in Tehran and its personnel. The Iranian government failed to secure the release of the Americans, President Carter issued an executive order that blocked exchange transactions with Iran and prevented Iranian assets, valued between six and twelve billion dollars, from being transferred out of the jurisdiction of the United States.

The Carter administration engaged in extensive diplomatic efforts to obtain the release of the American hostages. The Administration also secured a judgment in the International Court of Justice declaring that Embassy personnel were being held in violation of international law. When diplomatic measures reached an impasse, the Administration tried another alternative.

113. For example, the President may have greater authority to terminate a treaty unilaterally if the termination is linked to the recognition of a foreign government. See Goldwater v. Carter, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting). For a discussion of some difficulties with this position, see supra notes 88-90 and accompanying text. For other special circumstances in which presidential authority may be recognized, see, e.g., Charlton v. Kelly, 229 U.S. 447 (1913) (suggesting that the President may terminate a treaty if it is breached by the other party).


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(a) The attempted rescue of the hostages.—On April 24, 1980, President Carter ordered helicopters and transport planes to fly to a remote portion of the Iranian desert in the first step of a plan to rescue the hostages. The dispatch of war planes to an unfriendly country raised two related questions: first, whether the President had exceeded his constitutional authority, and second, whether his failure to consult with Congress before the mission violated the 1973 War Powers Resolution.

On the constitutional issue, the President argued that the attempted rescue fell within his powers as Chief Executive and Commander in Chief of the armed forces. Similarly, the President’s counsel concluded that “[t]he President’s constitutional power to use the armed forces to rescue Americans illegally detained abroad is clearly established.” The Administration also argued, without a clear textual basis, that the President has an “inherent power” of rescue that is derived from international law. According to these views, a rescue mission falls into the category of presidential actions that require secrecy and dispatch and therefore cannot be subject to congressional publicity or deliberation. Under some circumstances, however, rescue efforts raise fundamental questions of policy; an armed rescue in a hostile country could lead to war, the declaration of which is the responsibility of Congress. Consequently, there is a strong argument for a congressional role.

The functional approach advocated in this Article suggests that, in

116. The attempt was abandoned because of equipment failure. Several American servicemen were killed in a collision that occurred during the evacuation. See generally Brzezinski, The Failed Mission, N.Y. Times, Apr. 18, 1982, § 6 (Magazine), at 28 (describing the rescue attempt). Secretary of State Vance opposed the mission and resigned after its tragic conclusion. See C. Vance, supra note 69, at 409-13.

117. J. CARTER, USE OF U.S. ARMED FORCES IN ATTEMPTED RESCUE OF HOSTAGES IN IRAN: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 96-303, 96th Cong., 2d Sess. 2 (1980) [hereinafter cited as COMMUNICATION FROM THE PRESIDENT]. President Carter also stated that in the case of physical punishment or execution of the hostages, he was “prepared to make a direct military attack on Iran”—action that presumably would have rested on similar constitutional claims. See J. CARTER, supra note 2, at 466.


119. Situation Hearing, supra note 115, at 40, 42 (testimony of Warren Christopher, Acting Secretary of State).

120. See, e.g., Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 2d Sess. 51 (1976) (statement of Gerhard Casper) (stating that rescue operations may pose the same questions as war) [hereinafter cited as 1976 International Agreements Hearings].
analyzing this issue, substantial consideration should be given to the potential impact of the President's action. If the operation does not threaten serious consequences, the need for congressional authorization is lessened. If a major conflict may result, however, procuring legislative approval is more important because the Constitution grants Congress the basic power to decide questions of war and peace. Nonetheless, in the case of a rescue, two factors ordinarily militate against a judicial resolution. First, it may be difficult to draw a line between rescue operations that do or do not threaten serious consequences; a court may not be able to decide such complex issues of fact in the short period of time that is available. Second, prevailing doctrines of standing and mootness may render a case nonjusticiable. These factors, however, do not necessarily indicate that deference is owed to the President in all cases. Rather, they support the need for the exercise of congressional authority under the necessary and proper clause to assure that Congress' own power to participate in decisions that may lead to a state of war is effectively preserved.

Accordingly, a prior consultation provision may be viewed as a congressional attempt to accommodate executive and legislative interests without undertaking the difficult task of allocating authority in advance. The consultation provision of the War Powers Resolution, for example, is an attempt to reproduce, within the confines of a particular crisis, the deliberation that the issue of war would receive in Congress. Although the provision does not require that Congress' views prevail, its purpose is to open the closed circle of presidential advisors to the opinions of responsible sources with divergent points of view.

Although some Senators expressed skepticism about the President's constitutional power during committee hearings on the Iranian rescue mission, the debate focused on the impact of the War Powers Resolution. The President's counsel noted that the Resolution was not "intended to alter the constitutional authority of the Congress or of


123. "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ." 50 U.S.C. § 1542 (1976).


125. See, e.g., Situation Hearing, supra note 115, at 46 (statement of Senator Javits).
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the President'" and argued that the Resolution was therefore not intended to affect the President's constitutional power to undertake rescues. The most sharply debated issue under the War Powers Resolution, however, was the scope of the consultation clause.

The Carter administration argued that, because the rescue plan was suspended in its "initial phase" while the aircraft were still at a remote desert location, no "imminent involvement in hostilities" was "clearly indicated" and that as a result the consultation provision of the Resolution was inapplicable. The President claimed that he would have consulted with Congress before undertaking the "second phase" of the plan—an attack on the occupied embassy to free the hostages. The Administration also contended that the language of section 1542, which calls for prior consultations "in every possible instance," confers on the President the authority to determine whether considerations of safety and secrecy permit consultations in any particular case. The Administration argued, therefore, that the President was able to decide that prior consultation raised an unacceptable risk of disclosure.

The hostage rescue attempt illustrated the weakness of the consultation provisions of the War Powers Resolution. The requirement is


127. See *supra* notes 117-19 and accompanying text. An Administration spokesman also argued that the rescue attempt was authorized by another section of the Resolution, which recognizes presidential power to commit forces in the event of an "attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c) (1976):

I think the seizure of the Embassy by the militants and the latter [sic] ratification of that action by the Government of Iran clearly could be characterized as an attack upon the United States because it was an attack upon the United States Embassy or its armed forces, because there were Marines and Army men there.

*Situation Hearing, supra* note 115, at 42 (statement of Warren Christopher, Acting Secretary of State).

128. See *Situation Hearing, supra* note 115, at 4; *J. Carter, supra* note 2, at 511. According to former Senator Javits, President Carter's failure to consult with Congress before the rescue mission was the "most notorious transgression of the statute's consultation requirement." *Javits & Wheeler, Book Review, 57 N.Y.U. L. Rev. 848, 854 (1982).

129. See *Situation Hearing, supra* note 115, at 48 (legal opinion of Lloyd Cutler). This argument is unconvincing; ordering helicopters and troop transport planes into a hostile country will increase the likelihood of hostilities, even though it is hoped that the hostile nation will remain ignorant of the incursion. During the mission, although no Iranian warplanes appeared before the American forces withdrew, the American aircraft were observed by Iranian civilians. See *J. Carter, supra* note 2, at 515. President Carter's alternative argument that the Resolution did not apply because of the "humanitarian" nature of the mission was also ill-founded. See *Javits & Wheeler, supra* note 128, at 854 n.41.

130. See *Situation Hearing, supra* note 115, at 4 (statement of Warren Christopher, Acting Secretary of State).

131. See *id. at* 5, 13.

132. The President's counsel also argued that, because the President possessed "inherent constitutional authority" to undertake the rescue operation, an interpretation of the War Powers Resolution that required consultation risked imposing an unconstitutional burden on presidential power. See *Situation Hearing, supra* note 115, at 48 (legal opinion of Lloyd Cutler).
vague: no specific members of Congress are required to be "consulted," and the nature and duration of the required consultations are not specified. Furthermore, in this as in other respects, the War Powers Resolution lacks an explicit enforcement mechanism.\(^{33}\)

In retrospect, the history of the Carter administration's attitude toward the War Powers Resolution is illuminating. Early in Carter's presidency, Administration spokesmen pledged compliance with the Resolution.\(^{34}\) Despite these protestations, however, the actions of President Carter suggest that abstract promises by executive officials are of limited value. When confronted by what he perceives to be an authentic crisis, time pressures and security fears may impel a President to avoid complying with the Resolution, and particularly the consultation provisions.\(^{35}\) Without a reliable enforcement mechanism, the Executive's resistance may take the form of narrow interpretation of the Resolution's requirements.\(^{36}\) The President can rebut claims that the


Another weakness of the War Powers Resolution is its failure to limit paramilitary operations conducted by employees of intelligence agencies rather than by the regular armed services of the United States. Although covert operations may be acts of war with serious policy consequences, they are normally subject only to a reporting requirement, instead of the more stringent limitations of the War Powers Resolution. From 1974 to 1980, the Hughes-Ryan Amendment, 22 U.S.C. § 2422 (1982), required that a "timely" report of the CIA's covert operations be furnished to several congressional committees. In 1980, a new statute provided that the required notice was to be sent only to the two intelligence committees, but also required that prior notice ordinarily should be furnished before the operation is undertaken. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975, 1981 (1980) (codified at 50 U.S.C. § 413 (Supp. V 1981)). See generally Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 327 (1982); infra note 463.

In general, covert operations were not a major issue during the Carter presidency, although the Administration apparently felt unduly constrained by congressional limits on covert aid to forces in Angola. See J. SUNDQUIST, supra note 67, at 298-99. Under President Reagan, however, covert activity has been extended in Central America and actions such as CIA assistance in the mining of Nicaraguan harbors have aroused grave congressional concern. See N.Y. Times, Apr. 16, 1984, at A8, col. 4.

\(^{134}\) See 1977 War Powers Hearings, supra note 118, at 187-91, 206-07 (statements of Herbert Hansell and Douglas Bennett); Vance Nomination: Hearing Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 38 (1977) (statement of Cyrus Vance, Secretary of State designate). The Administration's position was reached "after much internal debate." Atwood, supra note 2, at 221. One of the Resolution's authors, Senator Javits, noted that Congress "had to fight the preceding Administrations" on the war powers issue and that the Carter administration's pledge was the "first compact" between Congress and the President on this issue. 1977 War Powers Hearings, supra note 118, at 191, 197.

\(^{135}\) Some Senators also argue that Presidents are reluctant to consult with Congress because they wish to avoid receiving discouraging advice. Subsequent disclosure of the advice may be politically embarrassing if the President's initiative fails. *See Situation Hearing*, supra note 115, at 7 (statement of Senator Church); id. at 38 (statement of Senator Lugar).

\(^{136}\) *See, e.g., id.* at 39 (statement of Senator Lugar) ("[A] President who feels it is absolutely vital will look for ways to find that the War Powers Act is not quite operative in that instance."); Marks, *Legislating and the Conduct of Diplomacy: The Constitution's Inconsistent Functions*, in THE
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Resolution has been misinterpreted by asserting that he is the party entrusted with the power of interpretation.\textsuperscript{137} This argument evokes memories of the prolific use of the political question doctrine by the Nixon administration,\textsuperscript{138} and it implies strong claims of presidential hegemony in foreign affairs.\textsuperscript{139}

The assertive and forceful tone of the Administration's arguments on war powers in 1980 contrasts significantly with the spirit of accommodation evident from the testimony on the Resolution given by Administration officials in 1977. This shift apparently reflects the pressures of office on an Administration that began with an unusual spirit of collaboration with Congress.\textsuperscript{140} The result does not bode well for the War Powers Resolution. If it can be eireumvented easily by an Administration that was in general accord with its purposes, it will be even less constraining on an executive that chooses to mount an all-out attack on its constitutionality. In the War Powers Resolution, Congress sought to establish a framework for collaborative action, but the Resolution has been difficult to enforce when a crisis overwhelms the structural values reflected in its provisions. The problem of how to maintain the principles of the Resolution against the pressures that arise in individual cases remains unresolved.\textsuperscript{141}

\textsuperscript{137} TETHERED PRESIDENCY 199, 209 (T. Franck ed. 1981) ("Some interpretation can almost always be found that would avoid strict compliance with a statutory command."). Accordingly, Acting Secretary of State Warren Christopher asserted that President Carter's failure to consult with Congress before the attempted rescue did not "represent a departure" from the Administration's cooperative policy proclaimed at the 1977 hearings. See Situation Hearing, supra note 115, at 9. Similarly, President Carter interpreted the Resolution narrowly to avoid filing a report in 1978. See Congressional Oversight of War Powers Compliance; Zaire Airlift: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 95th Cong., 2d Sess. 15-38 (1978) (statement of Herbert Hansell).

\textsuperscript{138} See Quint, supra note 3, at 4.

\textsuperscript{139} It seems to me that, if we accept the administration's interpretation . . . it means the President continues to adhere to the proposition that whatever he decides is the law in this particular matter because it is within his constitutional authority to deny us consultation if he does not think it is possible. We cannot accept that in my opinion. Situation Hearing, supra note 115, at 6 (statement of Senator Javits).

\textsuperscript{140} See supra note 134. Moreover, during the Iranian rescue crisis Congress was as reluctant to defend its authority as it was during most of the Vietnam War. Although members of Congress protested President Carter's violation of the consultation provisions at first, they "[fell] silent when it was evident that the country was fully behind the president." Maynes & Ullman, Ten Years of Foreign Policy, 40 FOREIGN POL'Y 3, 14 (1980). Maynes and Ullman suggest that the provisions of the Resolution will be enforced "only when the military action ordered [by the President] is unpopular, as well as unsuccessful." Id.

\textsuperscript{141} Experience under the Reagan administration also reveals a departure from early statements assenting to the principles of the War Powers Resolution. The Administration's first Secretary of State, Alexander Haig, followed the pattern of Secretary Vance by declaring that he would act in accordance with the Resolution. See STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMM. ON FOREIGN AFFAIRS 247-48 (Comm. Print 1982) (prepared by Dr. John H. Sullivan); Javits & Wheeler, supra
(b) The Iran executive agreement.—Sustained negotiations in the final weeks of the Carter administration produced a settlement between the United States and Iran contained in two "Declarations" of the government of Algeria.142 Signed on the last day of Carter's presidency, the agreements provided for the hostages' release, the return to Iran of a portion of the frozen Iranian assets, the use of some Iranian assets to settle bank claims, and the settlement of most other American claims against Iran by an international tribunal rather than by American courts.143 To implement the Declarations, Presidents Carter and Reagan issued executive orders that nullified attachments of Iranian assets and suspended claims of Americans against Iran in American courts pending adjudication by the claims tribunal.144

The resolution of the Iranian affair presented issues that were in some ways the obverse of those raised in the Taiwan Treaty case. In-
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stead of unilaterally terminating an important treaty, the President entered into a significant international agreement without the advice and consent of the Senate or other explicit congressional authorization. The Iranian agreement took its place in a long line of executive compacts that were not clearly authorized by statute or treaty, and again raised questions about the extent of presidential authority in foreign affairs.145

Two central aspects of the Iranian agreement and the related executive orders were challenged in Dames & Moore v. Regan.146 First, Dames & Moore attacked the provisions that nullified existing attachments of Iranian assets in American courts and transferred the assets to the Federal Reserve Bank for disposition in accordance with the agreement.147 Second, the plaintiff challenged the suspension of American claims against Iran then pending in American courts and the transfer of those claims to the international tribunal.148 Dames & Moore argued that these provisions were without statutory or constitutional basis and deprived American claimants of their property in violation of the fifth amendment.149

The Administration advanced both statutory and constitutional arguments to support its action. First, the government claimed that the International Emergency Economic Powers Act150 (IEEPA) and the Hostage Act151 provided express congressional authorization for the agreements.152 The Administration also argued that the President had the constitutional power to act unilaterally as a result of his authority over foreign affairs.153 The government invoked a comprehensive "claims settlement authority derive[d] directly from the Constitution, as a necessary incident to the Executive's plenary authority to conduct the

147. Part of the released Iranian property was to be used to settle claims, and the rest was returned to Iran. See Declaration of the Government of Algeria §§ 4-9, reprinted in Emergency Economic Powers Hearing, supra note 142, at 35-36.
149. See 453 U.S. at 667.
152. See 453 U.S. at 675.

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Nation's foreign relations."154 The Administration did not rely on the constitutional text, but upon historical practice and the need for executive flexibility in resolving international disputes.155 According to the government, the Iranian crisis presented "a particularly compelling occasion" for the exercise of presidential power.156 This claim of constitutional power arising from historical usage mirrored similar assertions of former presidents and reflected a view that was common during the "imperial" postwar period.157

In Dames & Moore, the Supreme Court upheld the challenged provisions. First, the Court found that the nullification of attachments and the transfer of assets were expressly authorized by section 1702 of the IEEPA,158 which empowered the President to prohibit United States citizens from exercising rights in foreign property and to direct the transfer of foreign property in times of national emergency. The Court also found implicit congressional approval for the suspension of legal claims, but here its argument was considerably more complex. First, the Court concluded that although neither the IEEPA nor the Hostage Act explicitly authorized the action, both statutes were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."159 The Court recognized the broad emergency powers granted to the President under both acts.160 Moreover, the Court found that there was a "long-standing practice of settling [inter-
national] claims by executive agreement,"161 and that Congress had implicitly approved this practice by facilitating or implementing specific

154. Id. at 57-58, reprinted in 122 LANDMARK BRIEFS, at 190-91.
155. Id. at 40-50, reprinted in 122 LANDMARK BRIEFS at 173-83.
156. See id. at 45 n.37, reprinted in 122 LANDMARK BRIEFS at 178. The government did not exclude the possibility, however, that Congress may limit the President's power to settle claims if it "speak[s] with a clear voice." Id. at 58, reprinted in 122 LANDMARK BRIEFS at 191.
158. 453 U.S. at 675.
159. Id. at 675-77. The Court concluded that the IEEPA did not explicitly authorize the suspension of claims against Iran because the claims were in personam, while the IEEPA granted presidential authority over interests in specific property only. Id. at 675-76.
160. Id. at 677. The Court's view that the IEEPA did not explicitly authorize the measure, yet supported an inference of authorization, is problematic. In establishing a comprehensive statutory scheme relating to emergency controls over foreign property, Congress' omission of an express authorization could be read as an implied prohibition of the power to suspend claims. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (Jackson, J., concurring) (indicating that the absence of express authorization in comprehensive legislation can be an implied prohibition); Electronic Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran, 508 F. Supp. 1350, 1361 (N.D. Tex.) (finding that the IEEPA limits presidential power), modified, 651 F.2d 1007 (5th Cir. 1981). But see Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 816-18 (1st Cir. 1981) (Breyer, J., concurring) (asserting that the IEEPA authorizes presidential suspension of claims).
161. 453 U.S. at 679.
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executive claims settlements in the past. The Court noted that it had previously recognized some unilateral presidential power to enter into executive agreements, but nonetheless relied primarily upon congressional consent.

The most interesting aspect of Dames & Moore is its almost exclusive reliance upon congressional authorization through acquiescence or tacit approval. Instead of finding inherent executive power, the Court appeared to establish a special technique of statutory interpretation that is applicable in determining presidential authority in foreign affairs cases. This technique is more radical than merely giving a broad interpretation to unclear authorizing language. Rather, the Court in Dames & Moore used statutory grants of power in an analogical manner. It found that grants of power in the IEEPA and the Hostage Act implied analogous grants that were not included in those statutes. This technique of interpretation, which uses a statute as a source of law in the same manner as a common law court uses a prior judicial opinion, is relatively common in civil law systems. Although this technique has been advocated from time to time by American scholars, its infrequent use in common law and constitutional adjudication makes Dames & Moore noteworthy. Similarly, the Court suggested that congressional approval of specific executive agreements in the past impliedly authorized similar agreements in the future. This is also an an-

162. Id. at 680-81. The Court discussed the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1645 (1982), and statutes relating to claims settlements with China, East Germany, and Vietnam. 453 U.S. at 680-81. The Court also alluded to the requirement that the Secretary of State submit executive agreements to Congress. Id. at 682 n.10 (referring to 1 U.S.C. § 112b (1982)). The Court indicated that Congress' failure to enact stricter measures when it considered this statute implied congressional approval of existing executive practice. Id.

163. 453 U.S. at 682.

164. Id. at 686.

The Court also concluded that nullification of the attachments was not a taking in violation of the fifth amendment. Id. at 674 n.6. In contrast, the Court found that the fifth amendment issue raised by the suspension of claims was not ripe for adjudication, presumably because the claims tribunal had not yet acted. Id. at 688-90. The Court did conclude that the issue was substantial enough to require a decision that the Court of Claims would have jurisdiction to hear the question when it became ripe. Id. Justice Stevens, however, considered the possibility of an unconstitutional taking to be so remote that its justiciability in the Court of Claims did not need to be decided. Id. at 690 (Stevens, J., concurring). For a general discussion of the taking issue, see Note, The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment, 68 VA. L. REV. 1537 (1982).


167. See, e.g., Landis, Statutes and the Sources of Law, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934).

168. For a rare prior example, see Moragne v. States Marine Lines, 398 U.S. 375 (1970). See also Note, supra note 166.
alomical approach: present acts are analogized to past acts that Congress has approved. In adopting these techniques of legislative interpretation, the Court declined to endorse the Executive's claims of direct constitutional authority. By carefully searching for congressional consent and avoiding broad endorsements of presidential power, the opinion casts doubt on the existence of a plenary executive power in this area.\textsuperscript{169}

The careful and reserved opinion in \textit{Dames & Moore} contrasts with the Court's expansive opinion in \textit{United States v. Pink},\textsuperscript{170} which upheld a presidential claims settlement agreement entered into in connection with the recognition of the Soviet government.\textsuperscript{171} In \textit{Pink}, the Court found an independent presidential power to remove obstacles to the recognition of foreign regimes, and stated that the President's discretion to determine when outstanding claims constitute obstacles is "final and conclusive in the courts."\textsuperscript{172} In \textit{Dames & Moore}, however, the Court ignored suggestions by the government and some scholars that the reestablishment of amicable relations with an unfriendly government is a kind of recognition, particularly when diplomatic relations with the unfriendly government previously had been severed.\textsuperscript{173} The power to reestablish friendly relations, or to "re-recognize," could imply the power to enter into executive agreements settling claims that might interfere with the reestablishment of those relations. Under \textit{Pink}, the President's determination that the claims settlement was essential to that process would be "final and conclusive in the courts."\textsuperscript{174} The Court in \textit{Dames & Moore} also declined to adopt the proposition, strongly urged by the Administration, that the President has the constitutional authority to settle international claims, whether or not recog-

\textsuperscript{169} See 453 U.S. at 688; Swan, \textit{Reflections on Dames & Moore v. Regan and the Miami Conference}, 13 LAW. AM. i, vii-x (1981). The cautious nature of \textit{Dames & Moore} is in marked contrast to an earlier lower court decision upholding the Iranian accords on the basis of inherent presidential power. Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 812-13 (1st Cir. 1981) (finding that the President has the "authority to remove impediments to the peaceful resolution of international disputes").

\textsuperscript{170} 315 U.S. 203 (1942).

\textsuperscript{171} Id. at 234; supra note 85 and accompanying text; see Swan, supra note 169, at x.

\textsuperscript{172} 315 U.S. at 229-30. The Court concluded that the power to remove obstacles to recognition is "implied" by the President's power to recognize governments. The source of the recognition power, however, is unclear. Some have argued that it can be found in the textual grant of authority to "receive ambassadors," set forth in U.S. CONST. art. II, § 3. See, e.g., A. HAMILTON & J. MADISON, supra note 60, at 12 (Pacificus Letters of Hamilton); L. HENKIN, supra note 80, at 178. In a number of opinions, however, the Supreme Court has discussed the recognition power without relying on any specific constitutional provision. See, e.g., United States v. Pink, 315 U.S. 203 (1942); Kennett v. Chambers, 55 U.S. (14 How.) 38, 50-51 (1852).


\textsuperscript{174} 315 U.S. at 229-30.
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tion of a foreign government is involved. Justice Frankfurter's concurrence in *Pink* adopted this position and could have provided support had the Court chosen to agree with the Administration.

The ease with which the Court might have found "inherent" presidential power to settle claims makes the opinion in *Dames & Moore* particularly interesting. First, it reveals an unwillingness to extend presidential power to its plausible limits. The Court could have found independent executive power, but chose instead to find a form of congressional authority. This choice suggests that although the Court declined to pass on the constitutionality of the Vietnam War, the Justices learned some lessons from that conflict. Had the court found inherent presidential authority, it might have risked an unpredictable expansion of executive power and might have "[spurred] later executive adventurism." Similarly, the opinion suggests that the Court is unwilling to endorse an indefinite extension of the doctrine of "implied" executive powers—a doctrine that was imported from the considerably different context of *McCulloch v. Maryland*. This doctrine raises substantial difficulties when applied to executive rather than legislative authority.

The Court's use of implied consent may also reflect the underlying view that congressional authority ultimately controls important foreign policy decisions. Accordingly, the opinion in *Dames & Moore* invites renewed attention to the techniques of statutory construction that should be applied when Congress has not legislated explicitly on a particular question. The technique of statutory construction employed in *Dames & Moore* rested on analogical reasoning from congressional acts, and therefore was even more permissive than the technique employed in *Kahn*. The *Dames & Moore* opinion suggests that this technique may be justifiable in foreign affairs because of the President's special role in diplomacy and negotiation. Even if this technique is justified in certain foreign affairs cases, however, the Court in *Dames & Moore* failed to discuss the considerations that should guide the drawing of analogies from congressional legislation or acquies-

175. See Brief for Respondents, supra note 153, at 40-50, reprinted in 122 LANDMARK BRIEFS at 173-83.


177. Bruff, supra note 39, at 35.


181. 453 U.S. at 678.
cene. Using statutes or congressional acquiescence as the source of analogical reasoning in foreign affairs cases may be justified in general, but care must be taken to assure that the analogy is justified in the individual case. A prominent factor in the decision should be the significance of the action that the analogical reasoning seeks to justify. For example, the analogical value of a statute is slight if the action at issue is considerably more important than the actions that are ordinarily authorized by the statute. Similarly, the inference to be drawn from approval of past actions is attenuated if the present action is more economically or socially significant than the prior actions from which the analogy is drawn. Accordingly, the great economic and political significance of the Iran agreement, and the concomitant need for deliberation and representation, militate against a finding of implied congressional consent for broad presidential policymaking authority in Dames & Moore.¹⁸²

On the other hand, the countervailing executive virtues of secrecy and dispatch arguably play an important role. The Iranian hostage affair presents an instance in which the weight of these executive virtues may be particularly great.¹⁸³ If congressional acquiescence in past claims settlements implies a degree of continuing congressional authorization, this implied authorization may be particularly strong when Congress has little time for debate.¹⁸⁴ A more candid discussion of the tension between the value of legislative deliberation on important issues and the requirements of presidential secrecy and dispatch would have illuminated the decision in Dames & Moore, and would have made it clear that implied congressional authorization for a measure of

¹⁸². See infra text accompanying notes 195-206. The total amount of claims in the Iranian settlement may be greater than the amounts involved in any prior claims settlement. See Note, supra note 164, at 1537. Further, the presence of fifth amendment issues raised by the claims settlements may also favor requiring more explicit congressional authorization. See supra note 164, infra Part III. On the other hand, however, fifth amendment rights asserted against measures adjusting economic burdens and benefits have generally not been granted the high degree of protection accorded other constitutional guarantees. See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Epstein, Not Deference, But Doctrine: The Eminent Domain Clause, 1982 Sup. Ct. Rev. 351, 352. This lesser degree of general protection for economic rights may suggest a diminished need for a requirement of explicit statutory authorization as a special technique to protect those rights. See, e.g., L. Henkin, supra note 80, at 99. This is particularly true when the Court of Claims is authorized to satisfy the requirements of the fifth amendment by giving “compensation” for any “taking” that has occurred. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974); supra note 164.

¹⁸³. See, e.g., Christopher, Ceasefire Between the Branches: A Compact in Foreign Affairs, 60 FOREIGN AFF. 989, 993-94 (1982) (“In formulating the hostage agreements . . . the negotiating situation and the time constraints seemed to rule out action by the Congress.”).

¹⁸⁴. See Dames & Moore, 453 U.S. at 669 (noting that the case “involv[es] responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail”).
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this importance should be limited to situations in which a serious emergency exists.

The Iranian accords were not the only executive agreements entered into by the Carter administration without explicit congressional approval. For example, the Administration entered into Bermuda II, an executive agreement with the United Kingdom on air routes that replaced a 1946 executive agreement on the same subject.185 The Administration also reaffirmed a 1959 executive agreement with Pakistan that provided for support in case of invasion, instead of submitting the agreement to the Senate as a treaty.186 Moreover, the Administration obtained congressional ratification of an executive agreement designed to assure an adequate oil supply for Israel, and then sought to interpret the legislation to permit related financial assistance that was apparently beyond the scope of the authorization.187

In certain cases, the Carter administration demonstrated a “slight increase in sensitivity to the need for” congressional authorization before entering into international agreements.188 Major compacts like the Panama Canal accords and the SALT II agreement were submitted to the Senate as treaties and were “subject[ed] to intense senatorial scrutiny.”189 In neither instance, however, was the collaboration with-

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186. See Berger, supra note 73, at 628.


188. Feinrider, supra note 187, at 568.

189. While the Panama Canal Treaties were pending ratification in the Senate, members of the House of Representatives challenged the process and argued that U.S. Const. art. IV, § 3 required full congressional approval for a disposition of United States property. This claim was rejected in Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978). Thereafter, Congress passed legislation implementing the treaties. Panama Canal Act of 1979, Pub. L. No. 96-70, 93 Stat. 452. For general discussions of the Panama Canal Treaty ratification, see Z.
out difficulty. The Canal Treaties, for example, might have been improved if the President had consulted seriously with Congress at an earlier point.\textsuperscript{190} The SALT II treaty also may have lacked adequate consultation.\textsuperscript{191} Moreover, President Carter threatened to adopt the SALT II accord as a presidential executive agreement if the Senate did not ratify it, or if Congress did not pass enabling legislation.\textsuperscript{192} President Carter also evoked a bitter congressional reaction when he sought to extend the SALT I agreement beyond its termination date by “parallel unilateral” statements of intent issued by the United States and the Soviet Union.\textsuperscript{193} This action may have violated a statutory provision that required arms control agreements to be made pursuant to congressional authorization or treaty.\textsuperscript{194}

One of the most important and inconclusive debates in the United States law of foreign relations has centered on the question of presidential authority to enter into executive agreements without authorization by statute or treaty.\textsuperscript{195} It is often argued that when no specific constitutional grant of power to the President exists, the importance of the international obligation should be a significant factor in determining whether the President may enter into an executive agreement without

\textsuperscript{190}Brzezinski, Power and Principle 134-39 (1983); J. Carter, supra note 2, at 152-85; C. Vance, supra note 69, at 140-57.

\textsuperscript{191}“Many of the reservations attached to the Panama Canal Treaty of 1978, and many of the restrictions that appeared in implementing legislation adopted by the House in 1979, might have been avoided had President Carter reached out earlier to include key members of the House and Senate.” L. Fisher, The Politics of Shared Power 9 (1981).

\textsuperscript{192}See Percy, The Partisan Gap, 45 FOREIGN POL’Y 3, 13 (1981). But see T. Franck \& E. Weisband, supra note 66, at 147-48 (noting that congressional “advisers” were added to U.S. SALT delegation).

\textsuperscript{193}T. Franck \& E. Weisband, supra note 66, at 152-53. The Administration eventually sought a joint resolution of Congress approving the agreement’s extension, but the resolution was not voted upon by Congress. See id. at 153-54.

\textsuperscript{194}Arms Control and Disarmament Act, 22 U.S.C. § 2573 (1982). The Senate Foreign Relations Committee concluded, however, that the extension was a “non-binding” declaration of policy that fell within the President’s authority. 1 M. Glennon \& T. Franck, United States Foreign Relations Law: Documents and Sources 35-37 (1980).

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legislative authorization.\textsuperscript{196} Although this position has been questioned by some commentators,\textsuperscript{197} this Article espouses a similar view. Significant agreements with foreign nations require important policy decisions that normally also have implications for domestic affairs.\textsuperscript{198} If the President were allowed to decide these fundamental issues, basic decisions of national policy would be made by an individual without the benefit of representative deliberation and consent.\textsuperscript{199} This argument is even stronger when the President makes an agreement than when he terminates one because of the risk that he will enter into “entangling alliances.”\textsuperscript{200}

In contrast, every minor agreement made with a foreign country need not be adopted by the Senate as a treaty.\textsuperscript{201} Minor agreements that do not conflict with legislation may conceivably be authorized by an independent executive power to enter into minor agreements with foreign countries.\textsuperscript{202} Moreover, the relative importance of an agreement should be considered in determining legislative authorization under the analogical technique approved in \textit{Dames & Moore}. Relatively minor executive agreements consistent with foreign policy established by statute or treaty may be found to have implied legislative

\textsuperscript{196} A “traditional” distinction is said to exist between treaties and executive agreements based on the importance of the agreement. Sparkman, \textit{Checks and Balances in American Foreign Policy}, 52 IND. L.J. 433, 438 (1977); see Dole v. Carter, 444 F. Supp. 1065, 1070 (D. Kan. 1977); \textit{Transmittal of Executive Agreements to Congress: Hearings Before the Senate Comm. on Foreign Relations}, 92d Cong., 1st Sess. 2 (1971) (statement of Senator Fulbright) [hereinafter cited as 1971 \textit{Transmittal Hearings}]; cf. \textit{OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW} 201 (1974) (stating that one factor in determining the form of international agreements should be the “extent to which the agreement involves commitments or risks affecting the nation as a whole”).

\textsuperscript{197} See, e.g., 1976 \textit{International Agreements Hearings}, supra note 120, at 141 (statement of Leonard C. Meeker); Henkin, supra note 62, at 761-62.

\textsuperscript{198} See supra note 64 and accompanying text.

\textsuperscript{199} Cf. T. Franck & E. Weisband, supra note 66, at 142 (“[A]s the Panama Treaty experience amply illustrated, [the treaty process established by the Constitution] does ensure a full, public consideration of just exactly what kind of commitment we are assuming. When the President takes a short-cut, the nation can no longer be sure what obligations are being assumed . . . .”).

\textsuperscript{200} But see supra note 102.

\textsuperscript{201} “[I]t is too late in our constitutional history for a purist insistence upon treaties as the exclusive means of contracting agreements with foreign nations.” Sparkman, supra note 196, at 445.

\textsuperscript{202} Some authors suggest that the Constitution embodies a distinction, originally propounded by the eighteenth century author Vattel, between treaties, which are permanent ongoing public undertakings, and agreements of lesser stature. See E. Vattel, \textit{The Law of Nations} bk. 2, \S\S\ 152-154 (J. Chitty ed. 1854); Riesenfeld, \textit{The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions}, 25 CALIF. L. REV. 643, 671-72 (1937); Weinfeld, \textit{What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?}, 3 U. CHI. L. REV. 453, 460 (1936). Under this view, the treaty clause is not an implied prohibition of minor executive agreements, and authority to enter into those agreements may be found in the general language of article II.
authorization even though not within the specific authorizing language of any enactment.203 This technique is less satisfactory in the case of important agreements because of the increased likelihood that Congress would have required explicit legislative approval. In rare cases in which an agreement must be made quickly, the executive's ability to act with dispatch may furnish a countervailing consideration in determining the scope of legislative authority.204

This general principle may be useful even when article II confers specific authority on the President to enter into executive agreements. The importance of the agreement should be taken into account in determining whether it falls within the constitutional grant. For example, the President's authority as Commander in Chief of the armed forces may include the power to enter into "wartime agreements concerning military matters, such as armistices, force deployments and control of occupied areas."205 Values of representation and deliberation indicate that this grant to the executive probably should be viewed narrowly to exclude fundamental policymaking to the extent possible. If the President is authorized to enter into armistice agreements, these agreements might also contain ancillary provisions setting forth matters of detail. To the extent, however, that the armistice seeks to govern matters of substantial importance beyond the cessation of hostilities (such as the long-range relations among nations), it becomes more likely that the agreement exceeds the constitutional grant even though the matters may be related in some sense to the armistice.206

Because of the difficulty of assessing the importance of international agreements, some deference might be accorded to the President in doubtful cases if neither individual constitutional rights nor express congressional intent is involved. Congress, however, has the authority to allocate this power under the necessary and proper clause, and if it is exercised, courts should abide by the congressional allocation. Even when the President has constitutional authority, most executive agree-

203. See supra notes 180-82 and accompanying text.
204. See supra notes 183-84 and accompanying text.
205. Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 35 (1975) (testimony of Monroe Leigh, Legal Adviser, Department of State) [hereinafter cited as 1975 Executive Agreements Hearings]; see L. Henkin, supra note 80, at 177.
206. If an armistice agreement concludes a declared war, an alternative analysis might explore whether the agreement was authorized by language in the congressional declaration of war proposing certain goals to be achieved by the hostilities, or by other statutes governing the conduct of the war, rather than by any form of direct presidential power. In any event, to the extent that armistice agreements contemplate significant matters such as the proposed adjustment of boundaries or long range plans for the governance of a defeated enemy nation, some legislative authorization by statute or treaty probably would be necessary.
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ments fall within an area of shared presidential and congressional power in which Congress' actions should control.207 For example, international claims settlements related to the recognition of a foreign regime may fall within the President's power to receive ambassadors, but they also fall within Congress' power to regulate foreign commerce. Therefore, legislation about foreign claims, including framework legislation regulating presidential action, should prevail over an inconsistent presidential settlement of claims even if the settlement is undertaken in connection with the recognition of a foreign government.208

Although there have been several congressional attempts to legislate a framework for a more definite allocation of power, none has succeeded.209 The most important general statute that relates to executive agreements requires the Secretary of State to transmit executive agreements to Congress, or if the agreement is secret, to certain congressional committees.210 Although this statute allows Congress to discover what agreements have been made, it places no limit on the Executive's ability to make agreements.211 In contrast to its action on war powers,

207. See 1971 Transmittal Hearings, supra note 196, at 27 (statement of Alexander Bickel) (stating that the "vast bulk of executive agreements" lie within the "zone of twilight" which "may be occupied by Congress at will"); cf. Henkin, supra note 62, at 771 (noting that ordinarily when "the President has acted inconsistently with what Congress has prescribed, the courts have ruled against the President").

208. See, e.g., 1976 International Agreements Hearings, supra note 120, at 131 (statement of Ruhl Bartlett); Note, Self-Executing Executive Agreements: A Separation of Powers Problem, 24 BUFFALO L. REV. 137, 154-55 (1974). Moreover, a court could consider preemption principles when deciding whether Congress has precluded the President from exercising authority in the area. See id. at 155.

209. These attempts have focused particularly on the legislative veto. The most significant attempt was the Morgan-Zablocki Bill, H.R. 4438, 94th Cong., 1st Sess., 121 CONG. REC. 5569 (1975), which would have allowed a concurrent resolution of Congress to annul executive agreements contemplating the introduction, basing, or deployment of United States troops abroad or the provision of military training or equipment to a foreign nation. See 1976 International Agreements Hearings, supra note 120, at 2-3. For other proposals that provided for the nullification of executive agreements by concurrent resolutions, see 1972 International Agreements Hearings, supra note 195, at 7 (discussing S. 4375, 92d Cong., 2d Sess. (1972)); 1975 Executive Agreements Hearings, supra note 205, at 243, 254 (discussing S. 632, 94th Cong., 1st Sess. (1975) and S. 1251, 94th Cong., 1st Sess. (1975)). For a discussion of the apparent demise of the legislative veto see infra subpart II(C).

210. It has also been proposed that Congress enact a provision similar to the State Department procedure that requires consultation with "congressional leaders and committees" on the question of whether a given agreement should be entered into as an executive agreement or as a treaty. See 1975 Executive Agreements Hearings, supra note 205, at 152-53 (statement of Adrian S. Fisler); OFFICE OF THE LEGAL ADVISER, DEP’T OF STATE, supra note 196, at 202. This measure would be analogous to the consultation provision of the War Powers Resolution, 50 U.S.C. § 1542 (1982), and would allow the Executive to determine ultimately whether a particular agreement should be submitted to the Senate as a treaty after the requisite "consultation" with Congress is completed.

211. The history of this Act suggests the perils of half measures. Although Congress considered stronger means of controlling executive agreements, it enacted a reporting requirement only. The Supreme Court cited this history as evidence that Congress has failed to object to executive
therefore, Congress has failed to act comprehensively on problems raised by executive agreements with foreign nations.

In summary, although the President prevailed in the Taiwan Treaty and Iran agreement cases, the Supreme Court did not return to the outer limit of presidential power proclaimed in *Pink*\(^{212}\) and *Curtiss-Wright*.\(^{213}\) The Carter administration invoked these decisions and argued for broad assertions of independent constitutional authority, but the Court declined to endorse those claims. Particularly in *Dames & Moore*, the Court was careful to base the result on inferences of congressional consent.\(^{214}\) The Court neither denied the necessity of legislative authorization nor foreclosed the possibility of authoritative congressional legislation on foreign affairs. Although the Court deferred to the President, what proved to be deference to the Executive in the absence of specific congressional action may become deference to Congress if it chooses to act.

C. Congressional Limitations on Executive Action—The Case of the Legislative Veto

When the Executive seeks to exercise broad policymaking powers in either domestic or foreign affairs, judicial control of executive action is limited by many factors. As the cases discussed above reflect, the principles for allocation of policymaking authority are broad and difficult to apply; in foreign affairs cases especially, the requisite factual determinations may be complex and far-reaching. Accordingly, it is unlikely that the judiciary will be an effective bulwark against extensions of policymaking power. Rather, the history of Vietnam and the Nixon administration suggests that effective limitations on the Executive must come from Congress. Congress began to confront this role late in the Nixon era,\(^{215}\) and the extent of congressional limitations on presidential power was a recurring issue during the Carter administration. As Congress soon discovered, however, the imposition of statutory limitations on the Executive raises its own difficult problems.

When Congress seeks to protect its policymaking role by limiting or regulating executive action, it has a range of options from which to choose. Perhaps the least restrictive method of congressional regula-

\(^{214}\) 453 U.S. at 688.

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tion is a requirement that the Executive report a specified type of action to Congress. This device permits Congress to know that a significant event has occurred and affords it an opportunity to react. A slightly more intrusive method is to require consultation with Congress before certain executive actions are undertaken. Consultation provisions may have only a limited effect, however, because a consultation requirement is easily circumvented by executive interpretation. A third type of nonintrusive control requires executive certification that a certain state of affairs exists before a particular action can be taken. Although this appears to be a mandatory device, it is actually hortatory in nature because the Executive’s certification is ordinarily not subject to effective review.

In contrast, the most intrusive forms of congressional limitation are carefully limited delegations of power or specific restrictions delineated by statute. Although these limitations can theoretically restrict the Executive effectively, they raise their own problems. First, because the future cannot be readily predicted, it is difficult to define narrow categories of authorization that will be adequate for unforeseen situations or for the regulation of rapidly changing problems. Second, the need for some executive flexibility does not coexist easily with rigid statutory prohibitions enacted in advance.

216. E.g., 1 U.S.C. § 112b (1982) (requiring that executive agreements be reported to Congress or congressional committees); 50 U.S.C. § 413 (Supp. V 1981) (requiring that intelligence activities be reported to congressional intelligence committees); War Powers Resolution, id. § 1543 (1976) (requiring that the dispatch of troops be reported to Congress in certain cases).

217. Reporting requirements, especially those that require prior reports, can sometimes have important effects. For example, the Reagan administration apparently cancelled a plan for a covert operation aimed at overthrowing the government of Surinam after objections by congressional committees. See N.Y. Times, June 1, 1983, at A1, col. 5.


219. See supra text accompanying notes 135-37.


221. For example, when President Reagan recently certified that significant progress in human rights had been made in El Salvador, many doubted that the certified progress had been made. One member of Congress remarked: “In the El Salvador situation, we were asking the President to certify the uncertifiable knowing that the President would do so.” N.Y. Times, July 5, 1983, at A12, cols. 3-5; see Billet, Book Review, 20 HARV. J. ON LEGIS. 663, 668-69 (1983).


223. Commentators have noted that the time and prescience required for detailed statutory drafting are often unavailable to a contemporary legislature. See Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U. L. REV. 455, 465 (1977); McGowan, Congress, Court, and Control of Delegated Power, 77 COLUM. L. REV. 1119 (1977).

224. Cf. T. FRANCK & E. WEISBAND, supra note 66, at 34-45 (arguing that a statutory prohibition of military aid to Turkey unduly restricted flexibility in foreign policy).
The group of statutory devices referred to as the "legislative veto" represents an intermediate position between the hortatory reporting, consultation, and certification requirements, and inflexible prior statutory limitations. The increased use of this technique in the legislation of the 1970s reflected its value as a device for retaining congressional control over policy without unduly limiting the flexibility of executive action. The legislative veto seeks to restrain executive policymaking without resort to a reluctant judiciary. Instead of relying on adjudication, it represents an attempt to establish effective countervailing political power. The debate over the veto during the Carter administration was of great significance because it questioned an important political technique by which Congress attempted to create an equipoise to executive power across a broad range of government activity.

A legislative veto is a statutory provision that subjects executive or agency action to the acquiescence of one or both houses of Congress or a committee as a condition precedent to its effectiveness. A veto dilutes the natural advantage of the executive branch as the acting branch of government. Ordinarily, if the Executive or an agency acts under a claim of statutory or independent authority and Congress disapproves, Congress must bear the burden of the time, effort, and political compromises required to pass a statute that makes such actions impermissible. By suspending the validity of certain executive actions pending Congressional approval or disapproval, the device mitigates the Executive's advantage, and in some instances reverses the burden of political action.

The magnitude of the interests at stake is reflected in the condem-
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nation of the legislative veto by all recent presidents. President Carter did not vary this pattern; he considered the legislative veto to be both unconstitutional and unwise. According to President Carter, the device often injects the Congress into administration and "infringe[s] on the Executive's constitutional duty to faithfully execute the laws." Moreover, it has "the effect of legislation while denying the President the opportunity to exercise his veto." President Carter threatened to disregard legislative veto provisions because of their asserted unconstitutionality and in at least one instance carried out that threat. Often, however, political exigency required the President to sign bills with legislative vetoes, and administration officials sometimes acquiesced in legislative veto provisions. Moreover, President


229. Id. at 1147, reprinted in Congressional Review Hearings at 375.

230. Id. In sum, the veto "threatens to upset the constitutional balance of responsibilities between the branches of government of the United States. It represents a fundamental departure from the way the government has been administered throughout American history." Id. at 1146, reprinted in Congressional Review Hearings at 375.

231. In 1980, Attorney General Benjamin Civiletti advised the Secretary of Education not to recognize the congressional veto of certain regulations by concurrent resolution, because to do so would neglect the responsibility of the executive branch. See Oversight Hearing on Congressional Disapproval of Education Regulations: Hearing Before a Subcomm. of the House Comm. on Education and Labor, 96th Cong., 2d Sess. 18 (1980) [hereinafter cited as Education Hearing]; Nathanson, Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies, 75 NW. U.L. REV. 1064, 1078 (1981). As a result, the Secretary continued to enforce a regulation that Congress had vetoed. See id. at 1078-79 n.55.

In other instances, President Carter announced that legislative veto provisions would be treated either as "report and wait" requirements or as advisory statements. See, e.g., 2 PUB. PAPERS: JIMMY CARTER 2186-87 (1977) (provision for terminating a presidentially declared "national emergency" by concurrent resolution of Congress); 2 id. at 1696-97 (1978) (committee approval provision in Futures Trading Act of 1978); id. at 1718 (provision for a one-house veto of Amtrak route recommendations); id. at 1721 (provision for a one-house veto relating to the personnel system of the Agency for International Development); id. at 1999-2000 (provision requiring a concurrent resolution of Congress to permit certain exchanges of federal for private lands); 1 id. at 432-33 (1980-1981) (committee veto provision in National Parks and Recreation Act amendments); 2 id. at 1592 (two-house veto provision for marine sanctuary designations); id. at 1668 (provision requiring a concurrent resolution of Congress to permit Defense Department Authorization Act waivers); 3 id. at 2803 (two-house veto provision in National Historical Preservation Act amendments); id. at 2837 (two-house veto provision in Farm Credit Act amendments).

President Carter occasionally vetoed legislation because it contained legislative veto provisions. See, e.g., 2 id. at 1925-26 (1978) (Navajo and Hopi Relocation Bill); 1 id. at 4-5 (1980-1981) (bill providing for a study of the health effects of dioxin). President Carter also called for a swift constitutional test of a two-house veto provision relating to Federal Trade Commission regulations. 2 id. at 982-83.

232. See, e.g., L. FISHER, supra note 190, at 106 (noting that Carter administration officials acquiesced in legislative veto provisions relating to arms sales and war powers); id. at 94-95 (noting that President Carter approved a one-house veto provision in a proposed gasoline rationing plan); STAFF OF HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE
Carter supported a one-house veto in an executive reorganization bill, and Attorney General Bell issued an opinion endorsing its constitutionality.233

In some areas, such as war powers and impoundment, legislative veto provisions have imposed congressional limitations on executive assertions of independent constitutional power.234 More typically, however, Congress has included legislative veto provisions in statutes that delegate broad authority to the Executive or to an administrative agency to act in a particular area.235 The effect of this arrangement is to confer a substantial amount of policymaking authority upon the Executive or agency, but to subject that authority to continuing congressional review.

In these cases, the imposition of the legislative veto can be viewed in at least three different ways. First, because the legislative veto prevents the Executive from taking action that might otherwise fall within a statutory delegation, the veto can be viewed as new legislation withdrawing authority that Congress had previously granted to the Executive. The Carter administration adopted this view, and argued that the device is unconstitutional because it circumvents the requirements for the passage of new legislation set forth in the presentation clause,236 and particularly the provision for a presidential veto.237

233. 43 Op. Att'y Gen. No. 10 (1977). Although Bell viewed legislative veto provisions as "constitutionally suspect," he argued that the proposed executive reorganization statute was distinguishable from other legislation containing congressional vetoes. Because reorganization plans would be proposed by the President and would become effective if neither house objected, "the two Houses of Congress and the President [would possess] the same relative power as under the normal Article I legislative process." Id. President Carter held the same opinion. See Message from President Carter to Congress, supra note 228, at 1146-47, reprinted in Congressional Review Hearings at 375; Providing Reorganization Authority to the President: Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before a Subcomm. of the House Comm. on Government Operations, 95th Cong., 1st Sess. 26-55 (1977) (testimony of various Administration officials) [hereinafter cited as Reorganization Hearings]. As ultimately enacted, the Reorganization Act of 1977 contained a broad delegation of power to the President, coupled with a one-house veto provision. 5 U.S.C. §§ 901-912 (1982). See generally J. CARTER, supra note 2, at 69-71.


237. See, e.g., Congressional Review Hearings, supra note 228, at 448-49 (memorandum of Justice Department); id. at 375 (message of President Carter); Education Hearing, supra note 231, at 15 n.7 (letter from Attorney General Benjamin Civiletti).
Second, a legislative veto can be viewed as a declaration by Congress or a part of Congress that the measure taken by the Executive or an agency exceeds the authority delegated by the underlying statute. 238 Attorney General Civiletti responded to this view by asserting that if it were correct, the veto would be unconstitutional because the interpretation of legislation is ordinarily entrusted to the judiciary or to the Executive in the implementation of legislation, but not to Congress. 239

A third possible view, however, is that a legislative veto does nothing more than set forth a reasonable condition precedent to the effectiveness of legislation or related regulations. 240 If Congress can require the approval of two-thirds of the affected tobacco growers before certain agriculture regulations become effective, 241 Congress should be able to require a vote of one or both of its houses (or their silence) as a condition precedent to the validity of other executive or administrative regulations. 242 According to this argument, Congress possesses power under the necessary and proper clause to assure that action taken under a statute has a substantial measure of democratic support at the time of its implementation. 243 The purpose of the condition precedent is to provide this assurance. Under this view, the legislative veto is a method of maintaining democratic and representative control of government. 244

238. Some statutes expressly limit the legislative veto to instances in which the vetoing body finds that the executive action exceeded statutory authority. See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1386 (1977) (discussing the 1974 General Education Provisions Act amendments); see also Education Hearing, supra note 231, at 2 (statement of Rep. Carl D. Perkins) (“[In exercising legislative vetoes] I feel strongly that we in Congress have a responsibility to see that the laws we write are properly implemented by the executive branch and that the regulations promulgated by the Department do not go beyond the statutes.”).

239. See Education Hearing, supra note 231, at 8 (letter of Attorney General Benjamin Civiletti).

240. See, e.g., Congressional Review Hearings, supra note 228, at 143 (statement of Rep. Mickey Edwards); Abourezk, supra note 235, at 336-37; Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 595 (1953) (offering a summary and critique of this view).


243. See infra note 244.

244. See, e.g., Reorganization Hearings, supra note 233, at 91 (testimony of Laurence Tribe) (“[T]he legislative veto provision, when Congress seeks to use it as a method of more closely policing administrative agencies or the executive branch, may well be a perfectly constitutional device for enhancing constitutional accountability.”). But see Bruff & Gellhorn, supra note 238, at 1417 (arguing that “political accountability is likely to be attenuated in practice”).

Certain forms of the legislative veto raise intricate conceptual issues of representative control. If the veto is effected by one house, for example, a minority arguably is denying the Executive the benefit of a statutory policy on which a consensus has been achieved. On the other hand, a statute that contains a broad delegation may represent a consensus only on a general approach to the problem, and more specific measures contained in regulations subject to the veto arguably should
In 1983, the Supreme Court struck down a legislative veto provision in *INS v. Chadha*. Writing for the majority, Chief Justice Burger adopted the first view of the legislative veto—the view also held by President Carter—and delivered a sweeping opinion that discussed far more than the narrow issue presented to the Court. According to the Chief Justice, when "any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." Consequently, the House's veto of a Justice Department ruling exempting an alien from deportation was "presumptively" a legislative act. Moreover, because the statute permitted the House to alter legal rights and duties and replaced an historical practice of congressional enactment of private immigration bills, the House had acted legislatively. The Court then found the legislative veto provision to be unconstitutional on the ground that under article I legislative action may be taken only by a vote of both houses and presentment to the President for his signature or veto. Although the case was susceptible of a more limited resolution, Chief Justice Burger's opinion seemed to refer to all uses of the be re-endorsed by a majority in order to assure that these measures are also the product of popular support. If neither house disapproves of a regulation, there is evidence of continued popular support. Conversely, the disapproval of one house may indicate a lack of popular consensus. Therefore, a one-house veto may not violate principles of bicameralism. See *Congressional Review Hearings*, supra note 228, at 144 (statement of Rep. Mickey Edwards) ("[T]he principle of bicameralism is not violated by the one-house veto. The principle of bicameralism requires in essence that both houses approve in the cases where the principle applies. If one house disapproves of an administrative rule, then both houses do not approve of it."); see also *Buckley v. Valeo*, 424 U.S. 1, 285 n.30 (1976) (White, J., concurring) ("Disapproval [by one house] nullifies the suggested regulation and prevents the occurrence of any change in the law. . . . It is as though a bill passed in one House and failed in another."). In contrast, a veto of executive action by a congressional committee is more difficult to justify on the grounds of continuing popular support. See generally Nathanson, supra note 231, at 1091-92 (discussing committee vetoes in the administrative process).
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legislative veto. According to the Chief Justice, “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”251

In a powerful dissent, Justice White argued that the legislative veto has not been used as a means of congressional aggrandizement, but rather as a defense against the growth of executive and administrative power.252 He argued that the increased complexity of government forced “Congress [to] rely on the legislative veto as the most effective if not the only means to insure their [sic] role as the nation’s lawmakers.”253 Thus, he concluded that the Court’s decision, which “strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history,” may have a profound impact on the “modern administrative state.”254

The crux of Justice White’s dissent was the argument that even though the congressional veto may be “legislative,” it does not follow that the sole participation of one or both houses in this form of “legisla-

251. Id. at 2786 (emphasis added). In his concurrence, Justice Powell observed that the Court’s decision “apparently will invalidate every use of the legislative veto.” Id. at 2788 (Powell, J., concurring). “The breadth of this holding,” Powell continued, “gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930s.” Id. Justice Powell favored a narrower holding based on what he argued was Congress’ attempt to exercise judicial power by “decid[ing] rights of specific persons.” Id. at 2792.

As Justice Powell indicated, the peculiar form of the legislative veto at issue in Chadha—which gave Congress the power to determine the rights of specific individuals—may well violate that aspect of the separation of powers principle which is intended to further the rule of law. One of the primary functions of the separation of powers is to implement the rule of law by assuring that burdens are not imposed on individuals except pursuant to general rules known in advance. If burdens can be placed on individuals without a prior general rule, there is an increased danger of arbitrary or discriminatory government action. See Quint, supra note 3, at 39-40. Although these dangers are most commonly raised by executive action undertaken in the absence of a prior legislative rule, see, e.g., infra Part III, the dangers are not confined to the acts of executive officers. For example, a legislative bill of attainder violates this fundamental principle because in enacting such a statute the legislature proceeds against an individual without a general rule set down in advance. See, e.g., United States v. Lovett, 328 U.S. 303 (1946); see also Watkins v. United States, 354 U.S. 178 (1957) (stressing the dangers posed by congressional committees that are unrestrained by prior general rules). Similarly, when a single house of Congress imposes burdens on a specific, named individual through the type of legislative veto employed in Chadha, basic separation of powers principles are violated because the action is taken without the restrictions of a prior general rule: there were no statutory limitations on the factors that could be considered by the House in vetoing Mr. Chadha’s exemption from deportation. This argument is not affected by the fact that the veto in Chadha canceled an exception to a legal burden, instead of imposing a new legal burden. The risk of discriminatory or arbitrary action is still present. Cf. Chadha v. INS, 634 F.2d 408, 426 n.23 (9th Cir. 1980) (“In immigration matters, in particular, [the one-house veto provision] frustrates proper administration and puts a premium on extraneous considerations in the determination of legal rights.”) (quoting President’s COMM’N ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME 213-14 (1953)) (emphasis added), aff’d, 103 S. Ct. 2764 (1983).

252. 103 S. Ct. at 2796 (White, J., dissenting).
253. Id. at 2798.
254. Id. at 2810-11.

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"active" act violates the requirements of article I.\textsuperscript{255} The force of this argument is most apparent if it is disentangled from the peculiar facts of \textit{Chadha}\textsuperscript{256} and applied to the most common form of legislative veto—the veto of an executive or administrative rule.\textsuperscript{257} Certainly the exercise of a congressional veto is "legislative" in the sense that any step in the establishment or rejection of a general rule governing conduct is legislative. In the same sense, issuance of a rule by the Executive under delegated authority is "legislative," and therefore Congress could supersede any executive rule by statute, except in the rare instances in which the Executive is exercising an independent and exclusive power.\textsuperscript{258} Despite the basically legislative nature of rulemaking, the Constitution permits the delegation of much legislative responsibility to the Executive. Indeed, as Justice White remarked, "For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."\textsuperscript{259}

Consequently, the exercise of delegated power by the Executive, particularly the power to make broad general rules, could be considered improper legislation in violation of various provisions of article I, including the presentation clause.\textsuperscript{260} Despite this possible argument, the executive and administrative agencies are permitted to undertake this lawmaking function because Congress possesses the power under the necessary and proper clause to choose the means by which its decisions are implemented, and these include broad or general delegations of rulemaking authority.\textsuperscript{261} Congress has this power even though its

\textsuperscript{255} Id. at 2802-04.

\textsuperscript{256} See supra note 247.

\textsuperscript{257} This basic argument has been advanced in Schwartz, \textit{Congressional Veto in the Conduct of Foreign Policy}, in \textit{The Tethered Presidency} 77 (1981); see also 1976 International Agreements Hearings, supra note 120, at 43-44 (statement of Gerhard Casper); Abourezk, supra note 235, at 332-33.

\textsuperscript{258} Although early decisions did not view executive rulemaking as legislative, \textit{see}, e.g., United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892), that fiction has long been abandoned, \textit{see}, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). Recent cases have explicitly recognized the legislative character of executive rulemaking. \textit{See}, e.g., Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974) (finding that under OSHA, "the decision-making vested in the Secretary [of Labor] is legislative in character"). \textit{See generally} Jaffe, \textit{An Essay on Delegation of Legislative Power} (pts. I & II), 47 COLUM. L. REV. 359, 561 (1947).


\textsuperscript{261} When individual rights are not involved, the doctrine that limits Congress' ability to dele-
choice of means may violate certain formal distinctions between legis-
lative and executive functions. When individual rights are not at
issue, therefore, the generality of the necessary and proper clause al-

dows Congress to grant legislative authority to the Executive in a man-

er that overrides what might otherwise be the apparent structural

requirements of the separation of powers.

If Congress has the power under the necessary and proper clause
to disregard certain aspects of article I in granting legislative power to
the Executive, it is not clear why Congress may not condition the exer-
cise of this power in ways that lessen the danger of the delegation by
retaining some form of congressional review such as the legislative
veto. The Court's argument that these conditions constitute impermis-
sible lawmaking without the formalities required by the presentation
clause misses the point. As Justice White pointed out, once one has
reached the conclusion that the necessary and proper clause enables
Congress to delegate broad power to agencies to "issue regulations hav-
ing the force of law without bicameral approval and without the Presi-
dent's signature," it is "not apparent why the reservation of a veto over
the exercise of that legislative power must be subject to a more exacting
test. In both cases, it is enough that the initial statutory authorizations
comply with the Article I requirements."263

Justice White's view complements the proposition urged in this
Article that the need for congressional deliberation and support of a
policy becomes more pressing as the social importance of the policy
increases. This principle requires the choice of values along a contin-
num based on complex factual determinations that are often better left
to Congress than to the courts. Accordingly, the imposition of a legis-
lative veto provision can be seen as a congressional determination that
in a particular area executive policy decisions are likely to be of suffi-
cient importance to require continuing congressional supervision. In
both domestic and foreign affairs, Congress may not be able to identify
the specific future actions that will require its supervision; instead, a

gate power is widely thought to be "moribund." See Federal Power Comm'n v. New Eng. Power
Co., 415 U.S. 345, 352-54 (1974) (Marshall, J., concurring). But see Industrial Union Dep't, AFL-
that the nondelegation doctrine should have some continuing force). The decision to grant broad
policymaking powers to the Executive is itself a congressional policy decision. For example, the
decision may be that the regulated area is poorly understood or in a state of flux, and that it is
therefore not susceptible to the imposition of narrower standards with the inflexibility of statutory
law. It is also a decision, however, that regulatory power should be vested in the Executive, even
though detailed principles of regulation may not be agreed upon. Political consensus has deter-

mined the necessity of some general form of regulation.

262. See Abourezk, supra note 235, at 332.
263. 103 S. Ct. at 2802 (White, J., dissenting).
device is needed to facilitate congressional intervention when necessary. A legislative veto provision reflects the determination under the necessary and proper clause that, although practicality requires certain important decisions to be made by the Executive in the first instance, uncabined executive power presents an undue risk of unrepresentative executive lawmaking in areas that are of basic social importance and therefore of fundamental legislative concern.

This analysis suggests that the Chadha Court failed to address a pivotal issue. The Court neglected to consider its own proper role in adjudicating the allocation of policymaking authority between Congress and the President. Proponents of executive power have frequently argued that separation of powers questions involving the proper allocation of policymaking authority should generally be remitted to the political process rather than to the courts. When individual rights are not at stake, this view has some merit because the disputed interests are majoritarian and institutional in nature and thus amenable to the political process. This proposition, however, should counsel judicial restraint in reviewing legislative as well as executive action. A principal function of congressional power under the necessary and proper clause is to permit continuing majoritarian adjustment of structures that affect the allocation of policymaking authority. This certainly seems to have been the premise of the cases that upheld broad delegations of policymaking power and established the contours of the modern administrative state. To deprive Congress of all legislative vetoes is to withdraw an important political tool for allocating general policymaking authority between the legislative and the executive branches. This result will make it more difficult to resolve majoritarian disputes by majoritarian political processes in a manner that preserves both executive flexibility and the values of legislative deliberation and consent.

The fundamental, continuing question raised by Chadha is what practical restraints may be imposed upon executive policymaking by Congress after the demise of the legislative veto. Following a reaction against excessive executive claims in the early 1970s, the legislative veto assumed a major role in a practical political accommodation. The importance of the veto is evidenced by its inclusion in almost 200 statutes.


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and in framework legislation such as the War Powers Resolution and the Impoundment Control Act. President Carter asserted that the legislative veto was an undue limitation on the Executive. More accurately, however, the legislative veto did not restrain the Executive unduly, but sought to redress an historical imbalance of power. In striking down the veto, the Court has interfered with this historic accommodation. As is not unusual when the Court interferes with broad political adjustments of power, the ultimate effects of the decision are difficult to predict. It remains to be seen whether Congress can fashion alternative devices that will achieve legislative control over executive policymaking without unduly limiting executive and administrative flexibility.

III. Executive Actions That Endanger Individual Liberties

The preceding section considered the allocation of general policymaking authority between Congress and the President in domestic and foreign affairs and discussed the issues involved in determining which branch is better suited to make various decisions of policy. A different separation of powers problem arises when the Executive takes action that threatens to infringe individual liberties without specific legislative authorization. In these cases, the separation of powers doctrine involves more than the institutional question of the proper allocation of decisionmaking competence; it involves the fundamental question of how best to protect individual rights. Executive action taken against individual constitutional interests without the prior enactment of a congressional rule poses several dangers. First, there is an increased risk that the action may have been undertaken to penalize the

266. See supra note 234 and accompanying text. This technique also figured prominently in legislative proposals to regulate presidential executive agreements. See supra note 209.
267. See supra notes 228-31 and accompanying text.
268. A one immediate question raised by Chadha is the extent to which the decision invalidates actions previously taken under statutes with legislative veto provisions. See, e.g., EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983) (holding an EEOC regulation invalid because the EEOC received its authority to issue the regulation under a 1978 reorganization statute that contained a legislative veto provision); N.Y. Times, Oct. 22, 1983, at A8, col. 6 (discussing arguments of former Nixon aides that regulations for the custody of Nixon historical materials are invalid because they were issued after prior regulations were struck down by a legislative veto). Moreover, the precise coverage of the Chadha holding must still be defined. See, e.g., National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983) (stating that a committee veto of proposed oil leases may be valid because Chadha may not apply to congressional action under U.S. Const. art. IV, § 3); Javits, Who Decides on War, N.Y. Times, Oct. 23, 1983, § 6 (Magazine), at 106, col. 2 (suggesting that Chadha may not apply to the concurrent resolution procedure in the War Powers Act).
269. The points set forth in this and the following paragraph are discussed in detail in Quint, supra note 3, at 39-52.
individual on impermissible bases, such as political hostility. Without
the restrictions of a specific prior rule, the Executive may be able to
proceed against an individual and mask impermissible motivations
with a post hoc, neutral justification. Second, unless the specific
prior rule is made by Congress, members of the executive branch who
tend to identify strongly with the government's interest may assign the
legitimate government interest an unduly high weight and undervalue
the liberty interest of the individual. Recent history indicates that this
danger of distorted assessment by the Executive is particularly great in
disputes concerning law enforcement and national security—precisely
those areas in which some of the most severe risks to individual rights
are presented.

Therefore, judicial enforcement of an executive action against in-
dividuals in the absence of clear legislative authority is particularly
troublesome when individual constitutional rights are affected. When
a court upholds a government action against a claim that a constitu-
tional right has been violated, the court has accepted to some extent the
government's claim that its interest is strong enough to overcome the
countervailing constitutional interest. Since the government's claim
may rest on distorted weighing or discriminatory motivations, execu-
tive action potentially endangering individual constitutional rights or-
dinarily should not be permitted unless Congress has weighed the
government and constitutional interests and explicitly authorized the
executive action at issue.

The Carter administration took several actions that illustrate the
dangers to individual liberties that occur when the Executive acts with-
out specific legislative authorization. In each of these instances, the
Administration convinced the courts that the measures should be up-
held against individuals. These measures included enforcement of
Central Intelligence Agency (CIA) secrecy agreements, the withdrawal

270. Moreover, when the Executive acts against a political critic without a prior rule, political
hostility may result in more oppressive treatment than would otherwise have been chosen. See id.
at 45.
271. For a discussion of the structural pressures that encourage this tendency in the Executive,
see id. at 47-52.
272. See id. at 53-54.
273. See id. at 52-65 (discussing structural opportunities for the balanced protection of indi-
vidual rights that are present in congressional consideration). Specific legislative authorization
should be viewed as a necessary but not sufficient condition to the constitutionality of executive
action that threatens the constitutionally protected interests of individuals. If a court finds that the
executive action is specifically authorized by statute, the court must then proceed to determine the
(W.D. Wis.) (testing a prior restraint that was specifically authorized by statute against the appli-
cable first amendment doctrine), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).
of a passport from a dissident former CIA agent, selective enforcement of student visa regulations against Iranian nationals, and warrantless electronic surveillance of individuals. In these cases, the Carter administration advanced strong claims of executive power that bore a resemblance to those urged by the Department of Justice under President Nixon. On the other hand, the Carter administration also attempted to implement a degree of self-limitation by executive rulemaking when certain constitutional rights of individuals were threatened. These attempts, however, were tentative and incomplete. Their ultimate fate illustrates the fragility of executive self-restraint as an adequate protection for constitutional liberties.

A. Restrictions on Publications by Former CIA Agents—Snepp v. United States

The vigorous and innovative action of the Carter administration against the publishing activity of former CIA agents was an important example of executive action that threatened the constitutional rights of individuals without explicit statutory authorization. In 1977 Frank Snepp, a former agent, published a “highly critical account” of the CIA’s actions during the 1975 American evacuation of Saigon. The book was published without prior clearance by the CIA, in violation of a secrecy agreement that Snepp signed when he joined the Agency. Since the government had not foreseen the publication of this volume, it could not obtain an injunction against publication, such as that issued against a former agent in an earlier case. Instead, the Justice Department filed a civil action against Snepp, seeking contract damages for violation of the secrecy agreement or an accounting of all profits resulting from the publication.

The arguments of the Justice Department in this unprecedented

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275. See infra notes 304-14 and accompanying text.


278. An injunction against publication was issued in United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see also Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975) (a later proceeding in the Marchetti litigation). After President Carter took office, the new Administration apparently was asked to relax the government’s position on the injunction against Marchetti, but declined to do so. See Freedom of Information Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 118-19 (1977) (statement of ACLU attorney Mark Lynch) [hereinafter cited as 1977 FOIA Hearings].

action required some ingenuity because there was no specific statutory authorization for the secrecy agreement, and therefore no statutorily authorized method of enforcement. The Administration sought to establish Snepp's liability by relying on commercial conflict of interest cases against government and private employees and on cases enforcing commercial noncompetition agreements. The Administration argued that these cases supported the conclusion that Snepp had violated a fiduciary relationship created by the CIA secrecy agreement and that a constructive trust—an accounting of profits from the book—was the appropriate remedy. In effect, the government argued that commercial noncompetition cases, which raise no first amendment or other constitutional claims, should furnish a rule of decision when first amendment interests confront the government interest in national security and foreign relations. Reliance on this "authority" indicates the extent to which the judiciary was writing on a clean slate, and therefore the degree to which the Executive was asking the judiciary to implement an executive policy that potentially infringed first amendment rights without legislative guidance.

The Supreme Court upheld the district court's imposition of a constructive trust on Snepp's profits. According to the Court, the CIA

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280. The government relied on the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1976), which requires the Director of Central Intelligence to protect "intelligence sources and methods from unauthorized disclosure." See also id. § 403g (exempting CIA from disclosing personnel information). For arguments that these statutes do not provide authority for the secrecy agreement, see Quint, supra note 3, at 65-67; Note, Enforcement of CIA Secrecy Agreements: A Constitutional Analysis, 15 COLUM. J.L. & SOC. PROBS. 455, 461-67 (1980); Comment, National Security and the First Amendment: The CIA in the Marketplace of Ideas, 14 HARV. C.R.-C.L. L. REV. 655, 693-98 (1979).

281. See, e.g., United States v. Drumm, 329 F.2d 109 (1st Cir. 1964) (holding that a poultry inspector breached a fiduciary duty when he served as a consultant to a company being inspected); Singer v. A. Hollander & Son, 202 F.2d 55 (3d Cir. 1953) (holding that a factory manager who disclosed his employer's trade secrets to a company in which the manager had an interest violated a fiduciary duty). For other cases relied on by the government, see Brief for the Appellee at 61-65, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), rev'd in part, 444 U.S. 507 (1980) (per curiam) [hereinafter cited as Brief for the United States].


283. [I]t is important to recognize that the issue should not be viewed as a simple matter of private contract law. These non-disclosure agreements are not really contracts. They are laws enacted by the Government, imposed upon Government employees and ex-employees that deeply affect the whole system of freedom of expression. They must be viewed in First Amendment terms, not private contract terms.


secrecy agreement was authorized by Congress, and the constructive trust and prospective injunction remedies did not violate the first amendment.285 Furthermore, the opinion in Snepp acknowledged a degree of executive power actually broader than that claimed by the government. For example, the Court suggested that even without a contractual arrangement the CIA might impose enforceable secrecy restrictions against former employees by regulation.286 Moreover, the Court implied that an enforceable fiduciary relationship might arise without express agreement or regulation from "the nature of Snepp's duties and his conceded access to confidential sources and materials."287 This language suggested that other government employees with access to "confidential sources and materials" might be subject to enforceable fiduciary duties of confidentiality even without a secrecy agreement or express regulation.288 Snepp has been widely viewed as a portentous and disturbing decision with unclear implications for first amendment doctrine.289

After its victory in Snepp, the government commenced similar actions against other former CIA employees who had failed to submit their manuscripts to the CIA for clearance before publication.290 One

Cir. 1979), rev'd in part 456 F. Supp. 176 (E.D. Va. 1978). The Court reversed the Fourth Circuit, which had held that a constructive trust was improper and had remanded the case for assessment of possible exemplary damages.

285. Id. at 509 n.3. For statutory authority, the Court relied on 50 U.S.C. § 403(d)(3) (1976). See supra note 280.

286. 444 U.S. at 509 n.3.

287. Id. at 511 n.6; see id. at 515 n.11 (noting that an employee has a fiduciary duty to protect confidential information).

288. This inference may be qualified by the Court's observation that "[fewer types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties." Id. at 511 n.6. It has also been argued, however, that Snepp might allow an agency to excise "harmful" or "detrimental" information from an employee's publications, even though the information is neither classified nor classifiable pursuant to executive order. See Pre-publication Review and Secrecy Requirements Imposed upon Federal Employees: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 19 (1980) (statement of Professor Charles C. Marson).


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of these defendants was Philip Agee, a former CIA agent who was the author or co-author of works about the CIA that criticized activities of the Agency and revealed the names of alleged agents.\footnote{291} The Justice Department pursued Agee vigorously, exercising particular ingenuity in overcoming procedural difficulties posed by Agee’s foreign domicile.\footnote{292} Agee’s case suggests the increased dangers of selective enforcement that are presented when the Executive acts pursuant to a broad and inexplicit rule. One of Agee’s defenses was that the CIA had selectively enforced the secrecy agreement against its critics, without proceeding against other violators who had written more favorably about the Agency.\footnote{293} The argument met with some success; on cross-motions for summary judgment, the district court declined to impose a constructive trust on Agee’s profits because of the possibility of selective enforcement.\footnote{294} The question of a constructive trust was postponed until trial.\footnote{295} There seems little doubt, however, that selective enforcement had taken place; the “CIA has conceded in congressional

manuscript to a French publishing company without prior CIA review. \textit{See} \textit{N.Y. Times}, Jan. 1, 1982, § 1, at 24, cols. 4-5. Ironically, the CIA recently sought to delete portions of a book being written by former CIA Director Stansfield Turner, one of the Carter administration officials who reportedly pressed for the suit against Snepp. \textit{See} \textit{N.Y. Times}, May 18, 1983, at A1, cols. 1-2. This action may raise questions about the Agency’s motives. According to one press report, “Senior intelligence officials acknowledged that there was a growing enmity between Admiral Turner and high-level officials in the Reagan administration, including William J. Casey, the current Director.” \textit{Id.}


\footnote{292} The government overcame its inability to obtain foreign service of process by intervening in a Freedom of Information Act action commenced by Agee in a federal district court and presenting its action to enforce the secrecy agreement as a counterclaim in that action. \textit{See} Agee v. CIA, 87 F.R.D. 350, 352 (D.D.C. 1980).


\footnote{294} The court noted that Agee . . . has presented evidence indicating that the CIA’s past enforcement record bears a considerable correlation with the agency’s perception of the extent to which the material is favorable to the agency. . . . [He] thus has raised a factual issue as to whether the Government’s past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security. \textit{Id.} at 509. Snepp made similar arguments, but they were rejected. \textit{See} Brief for the United States, \textit{supra} note 281, at 43-47.

\footnote{295} The district judge, however, issued an injunction against written or oral statements by Agee about the CIA without prior review by the Agency. Agee v. CIA, 500 F. Supp. 506, 509 (D.D.C. 1980).
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hearings that it has selectively enforced the prior-approval requirement against authors of books that are critical of the Agency.\textsuperscript{296}

The claim of selective enforcement, which was raised unsuccessfully in \textit{Snepp} and with some success in \textit{Agee}, emphasizes the dangers of executive action in the absence of an explicit legislative standard. When the Executive is allowed to act without clear legislative guidance, the opportunities for impermissibly motivated actions are increased with a concomitant threat to constitutional values.\textsuperscript{297} An executive rule drafted as broadly as the prepublication review standard for CIA employees allows an agency to exert prior restraint over all of its former employees with the correlative ability to waive scrutiny of those it considers favorably disposed to the agency or its goals.

Moreover, when an agency's interests are opposed to the liberty interests of individuals, the agency's actions may reflect a process in which the government's interest has been overvalued and the individual interests have been discounted or ignored. Consequently, when the CIA is permitted to proceed without clear statutory guidance against a person who has violated its secrecy agreement, the Agency may overestimate the government interests in enforcing the agreement and underestimate the first amendment interests of the former agent and his audience. These dangers are suggested in \textit{Snepp} because the government made no claim that Snepp's book actually revealed classified information.\textsuperscript{298} Instead, the government asserted the more diffuse claim that the publication of a former agent's book without prior clearance—even if the book contained no information that the CIA could have prevented from being published—increased the reluctance of foreign intelligence agencies and other persons to contribute information to the CIA in the future.\textsuperscript{299} The likelihood and gravity of such an occurrence were assessed solely by the CIA; the Court deferred to this executive finding. Indeed, when CIA Director Stansfield Turner asserted this government interest at trial, cross-examination on the gravity of the danger was curtailed.\textsuperscript{300}

Without a legislative determination of the likelihood of this occur-

\textsuperscript{296} Comment, \textit{supra} note 290, at 697 (citing Wash. Post, Apr. 6, 1980, at A10); \textit{see also id.} at 664 n.9 ("Although dozens of former CIA employees have published books relating to CIA activities without submitting manuscripts for prepublication review . . . \textit{Snepp} was the first person the government sued after publication for violation of the secrecy agreement.").

\textsuperscript{297} Although the Executive may enforce even the narrowest statute selectively, the opportunities are greatly increased when the rule has no clearly defined limits. \textit{See Quint, \textit{supra} note 3, at 43-47.}

\textsuperscript{298} \textit{See Snepp v. United States, 444 U.S. 507, 516 (1980) (Stevens, J., dissenting).}

\textsuperscript{299} \textit{See id.} at 512.

\textsuperscript{300} \textit{See id.} at 522-23 & n.13 (Stevens, J., dissenting).
rence and its relative weight in comparison with first amendment values, the Court was forced to rely on the Executive’s assessment of the danger—an assessment that may well have been inflated by the atmosphere of secrecy and suspicion endemic in intelligence agencies and influenced by the fact that the Agency was the focus of the volume’s “highly critical account.” As a result of these pressures, Snepp’s first amendment interests in expressing his views, and those of the public in receiving information necessary to judge the CIA’s performance, may have been undervalued or ignored. A more neutral assessment of the likelihood and magnitude of the danger to the governmental interests, and a more neutral balancing of that assessed danger against the first amendment interests of the individual and of the public in receiving certain criticisms of the CIA, could have been furnished by a congressional assessment. If the judiciary were to uphold executive action taken pursuant to explicit legislation, it would be deferring to a more careful and evenhanded judgment than that of an executive agency whose own interests are opposed to individual liberty interests.

Perhaps abashed by the completeness of the government’s victory in Snepp, Attorney General Benjamin Civiletti issued guidelines for future enforcement of secrecy agreements required by the CIA and other agencies. Civiletti apparently intended the Guidelines to mitigate the danger of selective enforcement and also to restrain enforcement of


302. See generally Quint, supra note 3, at 65-69. In Snepp, the countervailing first amendment interests may have received particularly short shrift from the Administration. Attorney General Bell observed:

I virtually had to order the Justice Department’s Civil Division to file the suit [against Snepp]. Its lawyers kept warning that the press would attack me on the ground that I was eroding the First Amendment’s guarantee of a free press. I told them that the suit concerned breach of contract and had nothing to do with the First Amendment or censorship.


303. For a discussion of some limitations that Congress might consider in drafting such a statute, see Quint, supra note 3, at 68. The District of Columbia Circuit recently upheld the constitutionality of some of the “substantive criteria” used in the CIA’s prepublication review against a first amendment challenge by a former agent whose magazine article had been partially censored. See McGeehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983). The court held that a de novo review was required to decide whether the material was properly classified, but concluded that deference should be accorded to “reasoned and detailed CIA explanations of [its] classification decision.” Id. at 1148.

secrcty agreements when the governmental interest was weak.\textsuperscript{305} The Guidelines are an example of attempted self-limitation by the executive branch—a course of action undertaken more seriously by President Carter than by most other recent Presidents.\textsuperscript{306} Executive self-limitation, however, generally is not acceptable as a substitute for explicit legislative rulemaking when executive action may infringe individual liberties.

The weaknesses of executive self-restraint are well illustrated by the Civiletti Guidelines. First, although they purported to impose restrictions on the Executive, the Guidelines were generally expressed as "principles" or "considerations" and contained little that actually limited executive conduct. The text expressly precluded any judicial enforcement of the Guidelines.\textsuperscript{307} Moreover, some of the "general principles" or "considerations" were those mandated by the Constitution, and others stated common sense considerations that one would expect the government to take into account in any event as a matter of prosecutorial discretion or its civil analog.\textsuperscript{308} Similarly, the procedural

\textsuperscript{305} See Department of Justice, Press Release (Dec. 12, 1980).

\textsuperscript{306} In recent years, executive rulemaking has received considerable attention as a device for inhibiting arbitrary or discriminatory executive action against individuals and as a technique that generally would implement the rule of law. See, e.g., K. Davis, Discretionary Justice 52-96 (1969). The Ford administration also attempted executive self-limitation. President Ford promulgated the first executive order that comprehensively regulated activities of the intelligence agencies, Exec. Order No. 11,905, 41 Fed. Reg. 7703 (1976), reprinted in 50 U.S.C. § 401 note (1976), superseded by Exec. Order No. 12,036, 3 C.F.R. 112 (1979), and Attorney General Levi also developed guidelines for FBI domestic security investigations and for foreign intelligence and counterintelligence investigations. See J. Elliff, The Reform of FBI Intelligence Operations ch. 5-6 (1979). Executive Order 11,905 has been superseded by intelligence executive orders issued by Presidents Carter and Reagan, while Attorney General Levi's domestic security guidelines have been replaced by less restrictive guidelines issued by Attorney General William French Smith. See infra note 320.

\textsuperscript{307} See Guidelines, supra note 304, § IV(B).

\textsuperscript{308} An example of the former is General Principle 1(a):

In deciding whether to recommend that the Attorney General file suit, the political content of a disclosure and the political viewpoint of the individual shall not be considered. Disclosures favorable to or critical of the agency shall be accorded equal treatment, and embarrassment to the agency by the disclosure shall be treated as irrelevant.

\emph{Id.} § II(B)(1)(a). \emph{Cf.} United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.) (noting that a former agent's right to criticize the CIA is protected by the first amendment), cert. denied, 409 U.S. 1063 (1972). The Guidelines, however, apparently do allow consideration of individual political views in deciding certain questions of intent. See Guidelines, supra note 304, § II(B)(1)(a).

Predictably, most of the specific considerations applicable to the filing of civil actions following disclosure of information are based on the intentional nature of the disclosure and the seriousness of the perceived danger. See, e.g., id. § II(B)(2)(a). Some sections are slightly more specific; for example, various sections recommend consideration of whether the disclosure includes "specific information about operations, structures, personnel, and activities of the agency," \emph{id.} § II(B)(2)(a)(v), whether "the disclosure is likely to result in substantial harm to particular operations of the agency or endanger individual lives," \emph{id.} § II(B)(2)(a)(vi), and "whether the disclosure contains material or information that is properly classifiable," \emph{id.} § II(B)(2)(a)(iii). These factors, however, are only "considerations" and do not limit the filing of enforcement actions. As such, they may be overridden by other "considerations" set forth in the Guidelines or elsewhere.

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guarantees in the Guidelines were only of marginal value.\textsuperscript{309} Perhaps the most significant aspect of the Guidelines was the Justice Department’s statement that it would not proceed against employees who might be subject to suit by virtue of a “fiduciary duty” alone, without an express contractual secrecy provision or relevant regulation.\textsuperscript{310} In this instance, therefore, the Justice Department may have denied itself authority that was suggested by the opinion in \textit{Snepp}.\textsuperscript{311} Finally, the Guidelines also set forth principles for enforcing constructive trusts such as the trust imposed in \textit{Snepp}.\textsuperscript{312} Although these principles counsel moderation in general terms,\textsuperscript{313} they prescribe only the vaguest limits.\textsuperscript{314}

The history of the Guidelines illustrates two infirmities of executive self-restraint as a means of protecting individual constitutional liberties. First, the limitations are so bland and imprecise that it is difficult to endow them with much content, except as a general promise to exercise an undefined measure of restraint. Correlatively, the Guidelines expressly disclaim the possibility of judicial enforcement, which might have given them a certain body and substance. Second, unlike legislative limitations in a statute, executive guidelines can be revoked by the Executive at any time; in fact, William French Smith, Attorney General under President Reagan, revoked Attorney General Civiletti’s Guidelines in September of 1981.\textsuperscript{315} Moreover, President

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\item \textsuperscript{309} For example, the declaration that “only the Attorney General may authorize the filing of suits subject to these guidelines,” \textit{id.} \textsection{} II(A), is qualified substantially by a subsequent provision that defines “Attorney General” as “the Attorney General of the United States [or] a designee.” \textit{id.} \textsection{} V. Under this provision, the Attorney General could presumably “designate” any Justice Department official to make the relevant determinations.
\item \textsuperscript{310} According to the Guidelines, the Attorney General “will not” ordinarily authorize suit “in the absence of any express clearance obligation imposed by contract or regulation.” \textit{id.} \textsection{} II(B)(3). Even without an “express obligation,” however, the Attorney General may seek an injunction if it appears “that disclosure of the material or information . . . will pose a serious and imminent threat to the national security or foreign policy of the United States.” \textit{id.} \textsection{} III(A)(2). Furthermore, the government may seek an injunction “against individuals or organizations that actively solicit persons subject to [express] obligations to violate those obligations.” \textit{id.} Under this provision, therefore, the government might proceed against a reporter or publisher who “actively solicits” an individual to violate a government secrecy agreement or regulation. This provision goes beyond the dicta in \textit{Snepp} and raises additional first amendment problems.
\item \textsuperscript{311} See supra notes 287-88 and accompanying text.
\item \textsuperscript{312} See Guidelines, supra note 304, \textsection{} III(B).
\item \textsuperscript{313} See, e.g., \textit{id.} \textsection{} III(B)(2)(b) (“The Government does not seek to reduce defendants to penury . . . ”). But cf. A. NEIER, THE LIMITS OF LITIGATION IN SOCIAL CHANGE 166 (1982) (noting that the Justice Department’s action left Snepp “flat broke and in debt”).
\item \textsuperscript{314} In one respect, moreover, this section of the Guidelines exceeds the scope of the dicta in \textit{Snepp}. The Guidelines permit monetary relief to be measured by gross receipts or net receipts. Guidelines, supra note 304, \textsection{} III(B)(2)(c). In \textit{Snepp}, however, the Court imposed a constructive trust on profits only. Snepp v. United States, 444 U.S. 507, 516 (1980) (per curiam). A remedy based on gross receipts could be considerably more draconian.
\item \textsuperscript{315} See Attorney General Policy Governing Litigation to Enforce Obligations to Submit
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Reagan recently issued a directive that purported to extend the secrecy agreement requirements, including prepublication review of manuscripts in many cases, to "[a]ll persons with authorized access to classified information."\(^3\)\(^1\)\(^6\) The directive would extend the requirement to many additional employees in agencies like the State Department, Defense Department, and Justice Department as well as the White House.\(^3\)\(^1\)\(^7\) After congressional objection,\(^3\)\(^1\)\(^8\) President Reagan suspended the plan, but one official suggested that it might be reimposed if President Reagan is reelected.\(^3\)\(^1\)\(^9\) The Carter administration's actions against Snepp, as endorsed by the Court, accordingly have assumed greater and more ominous importance, while the Carter administration's attempt at executive self-limitation has vanished with little effect.\(^3\)\(^2\)\(^0\)

Materials for Predissemination Review, 46 Fed. Reg. 45,052 (1981). The new policy retains the portion of the Guidelines that excludes consideration of a defendant's official rank or political views in a decision to file suit. See id. at 45,052-53. In contrast to Civiletti's Guidelines, the more recent policy requires the Attorney General's authorization before an enforcement action can be filed—the authorization of a designee is insufficient. Id. at 45,052.


317. The directive would subject 100,000 government employees to prepublication review, and would apparently encompass all of their political articles and memoirs for the rest of their lives. See Lewis, The Secrecy Muddle, N.Y. Times, May 5, 1983, at A31, cols. 1-2.


Although the executive order follows the basic structure of the original intelligence directive issued by President Ford, see supra note 306, President Carter's order imposed tighter restrictions on the intelligence agencies in certain areas involving constitutional rights. See Civiletti, Intelligence Gathering and the Law: Conflict or Compatibility, 48 FORDHAM L. REV. 883, 891 n.41 (1980). Moreover, President Carter's order did not authorize covert operations by the CIA in the United States. Exec. Order No. 12,036, supra, §§ 4-212, 1-808. President Carter's order, however, has been criticized for "an overreliance on secret guidelines." R. Morgan, Domestic Intelligence: Monitoring Dissent in America 77 (1980). Moreover, at least one section of the order may exceed express statutory limitations. See Marks v. CIA, 590 F.2d 997, 1009 n.16 (D.C. Cir. 1978) (Wright, J., dissenting).

Nonetheless, President Carter's executive order was a step toward a system of rational limitations on intelligence agencies. These executive restrictions are fragile, however, because a subsequent Executive may impose his own policy. Thus, in 1981 President Reagan issued a new intelligence executive order that relaxed several of the limitations in President Carter's order, including the ban on covert CIA activities in the United States. See Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 note (Supp. V 1981). The new order permits certain covert activities in the United States if they are approved by the President. Id. §§ 1.8(e), 3.4(h).

The Carter administration generally favored legislative restrictions on intelligence activities,
B. Passport Withdrawal—Haig v. Agee

Philip Agee's conflicts with the government were not limited to the enforcement of his secrecy agreement. Shortly after Americans were taken hostage in Tehran, it was rumored that Agee had been invited to participate in a tribunal to try the hostages. Secretary of State Vance revoked Agee's passport pursuant to a regulation that allowed revocation if "[t]he Secretary determines that the [passport holder's] activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The government claimed authority for this regulation in the Passport Act of 1926, which states that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . . ." Agee sued to recover his passport and prevailed in both the district and circuit courts, which held that the Act does not authorize the withdrawal of a passport for national security and foreign policy reasons in peacetime. The lower courts construed prior decisions of the Supreme Court to require express congressional authorization for passport withdrawals or at least an inference of congressional approval based on prior administrative practice. The lower courts required clear congressional authorization because the denial of the passport might impair constitutional

and supported a legislative "charter" for the intelligence agencies. The charter, however, never came to a vote in Congress. See 1980 Senate Intelligence Hearings, supra note 289; The National Intelligence Act of 1980: Hearings on H.R. 6588 Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 House Intelligence Hearings]. Only scattered portions of the proposed legislation were enacted. See, e.g., supra note 133.


322. 22 C.F.R. § 51.70(b)(4) (1983); see also id. § 51.71(a) (allowing passport revocation when denial would have been authorized).


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rights of travel and expression.\textsuperscript{326}

In the Supreme Court, the government argued that an inference of congressional authorization could be drawn from Congress' failure to revise the statute in light of what was claimed to be a "longstanding administrative construction" of the statute to permit withdrawal of a passport for national security and foreign policy reasons.\textsuperscript{327} Although the government did not rely on "inherent" executive power over passports, it implied that the statute should be construed \textit{in favor of} executive authority in an area in which the President possesses "inherent responsibilities under the Constitution."\textsuperscript{328} Thus, in the interpretation of the statute, the implications arising from a claimed grant of executive power were arrayed against the countervailing implications from the individual rights at issue. The Administration argued that executive power should prevail.

In \textit{Haig v. Agee},\textsuperscript{329} the Supreme Court agreed and reversed the judgment below. The Court adopted the government's view that ambiguous or vague statutes relating to foreign policy and national security should be construed to favor executive authority.\textsuperscript{330} The Court quoted from earlier cases that endorsed broad presidential power in foreign affairs,\textsuperscript{331} and emphasized that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."\textsuperscript{332} The Court also noted that the judiciary has a minimal role in reviewing foreign policy and national security matters.\textsuperscript{333} After this prologue, the Court found that Congress had tacitly adopted the Executive's administrative construction of the statute to allow passport withholding for reasons of foreign policy and national security. Therefore,


\textsuperscript{328} \textit{Id.} at 49, \textit{reprinted in} 122 \textit{LANDMARK BRIEFS} at 615; \textit{see also} \textit{id.} at 13, \textit{reprinted in} 122 \textit{LANDMARK BRIEFS} at 579 ("[The decision below] has impermissibly interfered with the Executive's ability to carry out its constitutional duties in the fields of foreign affairs and national security.").


\textsuperscript{330} Since the Court found statutory authorization, it reserved the question of whether passport withdrawal by the Executive can rest on constitutional power alone. \textit{Id.} at 289 n.17.

\textsuperscript{331} \textit{Id.} at 291 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)).

\textsuperscript{332} \textit{Id.} at 292 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)) (emphasis omitted). The Court also stated that under the broad authority of the 1926 Act a consistent administrative construction ordinarily should be followed, and "[t]his is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval." \textit{Id.} at 291.

\textsuperscript{333} \textit{Id.} at 292.
the regulation was authorized by the Passport Act.\textsuperscript{334} In his dissent, Justice Brennan pointed out that the Court had accepted a type of "authorization" by inference from administrative construction that was quite different from the authorization from prior manifest practice required in earlier cases like \textit{Kent v. Dulles}.\textsuperscript{335} Justice Brennan noted that the requirement of prior administrative practice should be understood "as a preference for the strongest proof that Congress knew of and acquiesced in that authority"—a degree of proof that is necessary in light of the "presence of sensitive constitutional questions in the passport revocation context."\textsuperscript{336} Furthermore, he argued that "broad statements by the Executive Branch relating to its discretion in the passport area lack the precision of definition that would follow from concrete applications of that discretion in specific cases."\textsuperscript{337} Congress cannot know precisely what it is approving if it is found to approve broad administrative policy without the content that would be given to the policy by specific instances of enforcement. Justice Brennan concluded that "[t]he Constitution allocates the lawmaking function to Congress, and I fear that today's decision has handed over too much of that function to the Executive."\textsuperscript{338}

Justice Brennan's view is generally consistent with the position advanced in this Article. Before the Executive may take action that potentially endangers individual rights, a congressional balancing of the government interest against the individual constitutional interest should take place. The clearest evidence of congressional balancing is an explicit delegation to the Executive in the statutory text. Although less clear, congressional adoption of a longstanding and well-understood administrative practice affords greater assurance that congressional balancing actually has been undertaken than congressional adoption of a broad and abstract administrative rule. Under the principles advocated in this Article, neither the explicit adoption of a vague

\textsuperscript{334} The Court emphasized Congress' failure to take affirmative steps to reject the Executive's interpretation of the Act, particularly when Congress amended the statute in 1978 without changing the regulation. \textit{Id.} at 300-01. The Court also found that the withdrawal of Agee's passport violated neither his constitutional freedom to travel nor his first amendment rights. \textit{Id.} at 306-09.

\textsuperscript{335} \textit{Id.} at 312-18 (Brennan, J., dissenting) (discussing \textit{Kent v. Dulles}, 357 U.S. 116 (1958), and \textit{Zemel v. Rusk}, 381 U.S. 1 (1965)).

\textsuperscript{336} \textit{Id.} at 315. Justice Brennan also argued that

\[\text{only when Congress has maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations—where the parties will presumably object loudly, perhaps through legal action, to the Secretary's exercise of discretion—can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion.}\]

\textit{Id.}

\textsuperscript{337} \textit{Id.}

\textsuperscript{338} \textit{Id.} at 319.
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rule by Congress nor the adoption of such a rule by congressional acquiescence is sufficient to authorize executive action that potentially infringes individual rights.

The Court rejected Justice Brennan's position and turned its back on the imperatives of the "clear statement" doctrine elaborated in earlier passport cases. Although the Court's method of statutory construction may have owed something to the expansive dicta in Curtiss-Wright, the Haig technique is substantially more questionable than the technique employed in the earlier case. In Curtiss-Wright, the Court found that a broad delegation of authority to the President in foreign affairs may be constitutional even if a similar delegation in domestic affairs might raise serious constitutional doubts. In Haig, however, the Court did not address the constitutionality of the delegation, but rather sought to determine the extent of the delegation under a cryptic statute. The Haig Court invoked the language of Curtiss-Wright to justify interpreting a statute to confer a delegation of authority that might not have been found in domestic affairs. This technique was employed in a case, unlike Curtiss-Wright, in which individual constitutional interests were threatened. Thus, while the result in Curtiss-Wright granted nothing to the President that Congress did not clearly intend to grant, the decision in Haig may grant unintended authority to the President—authority Congress may have thought it was denying. This result is particularly questionable when individual rights may be infringed and the clearest possible indication of legislative support should be required.

The potential breadth of discretion that Haig accords to the Executive creates a substantial risk that the Executive will impose burdens on individuals because of their political views or activities, but claim that the measure is justified for the protection of foreign policy or pur-

340. Id. at 319-21.
341. See, e.g., Farber, National Security, the Right to Travel, and the Court, 1981 SUP. CT. REV. 263, 279-82, 284 (noting that "the legislative record demonstrates almost complete hostility to travel control for over twenty-five years before Agee"); Comment, Authority of Secretary of State to Revoke Passports for National Security or Foreign Policy Reasons: Haig v. Agee, 66 MINN. L. REV. 667, 680 (1982) (arguing that Congress' recent actions reflected a desire to narrow executive discretion over travel rather than to broaden it).
342. To some extent, the judicial technique of Haig resembles the technique of Dames & Moore v. Regan, 453 U.S. 654 (1981). See supra notes 159-82 and accompanying text. In both cases, the Court inferred congressional acquiescence from silence and recognized that the presidential role in foreign affairs should be considered in determining legislative authority. In Dames & Moore, however, the Court reasoned from executive practice approved by Congress, while in Haig it relied upon executive construction without practice. See Comment, Illumination or Elimination of the "Zone of Twilight": Congressional Acquiescence and Presidential Authority in Foreign Affairs, 51 U. CIN. L. REV. 95, 116 (1982); see also supra note 182.
suant to another legitimate government goal.343 One need not look far into the past to find an era in which the Executive's disapproval of an applicant's political views or speech resulted in denial of a passport on the pretext that its issuance would be contrary to the national interest.344 Moreover, since the Secretary of State is responsible both for the conduct of diplomacy and for the issuance of passports, there is a particular danger that undue weight may be attributed to the government interest in foreign policy and diplomacy when it confronts the constitutional interests of travel, association, and speech.345 The Court's reminder in Haig that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"346 may presage more extended deference to what may be distorted or suspect executive judgments.347

343. This risk was suggested in a striking manner by the remarks of Solicitor General Wade McCree, Jr., during oral argument in Haig. When McCree was asked whether the Secretary of State could deny a passport to a person wishing to travel to El Salvador "to denounce" American policy, he replied:

I would say, yes, he can. Because we have to vest these—the President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context.

Haig, 453 U.S. at 319 n.9 (Brennan, J., dissenting) (quoting oral argument of Solicitor General Wade McCree, Jr.). Such unchanneled power raises a severe danger that a passport will be withdrawn in response to the domestic impact of the speech, rather than its supposed danger to foreign policy. This is particularly the case when a power, like the power to control passports, has been used capriciously in the past. See The Supreme Court, 1980 Term, 95 HARV. L. REV. 93, 205 (1981).


345. Cf. Hurwitz, supra note 344, at 278 (noting that the State Department once argued that foreign relations would be jeopardized if the Department was required to give reasons for passport cancellation).

346. 453 U.S. at 292.

347. In another action that related to rights of travel during the hostage affair, President Carter threatened to penalize former Attorney General Ramsey Clark and others for their trip to Iran to participate in a public discussion of issues. See Interview with the President, 2 PUB. PAPERS: JIMMY CARTER 1087-90 (1980-1981). The Administration argued that Clark was subject to civil and criminal penalties under regulations that blocked economic transactions with Iran promulgated under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (Supp. V 1981). This threat was ironic because President Carter tried to use Clark as an envoy to Iran at the start of the hostage affair, but Clark was denied entry to Iran. See H. JORDAN, CRISIS: THE LAST YEAR OF THE CARTER PRESIDENCY 33-38 (1982); C. VANCE, supra note 69, at 376. The threat of prosecution was ultimately withdrawn. One commentator suggested that proceedings against Clark would not have been authorized under the IEEPA in light of more explicit travel controls in other legislation and because of the threat to constitutional interests. Note, Constitutional Protection of Foreign Travel, 81 COLUM. L. REV. 902, 930 n.139 (1981).

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C. Immigration Restrictions on Iranian Students in the United States—Narenji v. Civiletti

With its atmosphere of permanent crisis and flashes of ethnic hostility, the Iranian hostage affair provided another instance of executive action that threatened to invade individual constitutional liberties. The immigration crackdown against Iranian students illustrates the dangers posed by executive action during a period of heightened emotion. On November 13, 1979, shortly after American Embassy personnel were taken hostage in Tehran, Attorney General Benjamin Civiletti issued a regulation requiring university students of Iranian nationality to submit special proof of their continued eligibility for student visa status; failure to comply would subject the students to deportation. The regulation was ostensibly intended to exert diplomatic pressure on the Iranian government. In *Narenji v. Civiletti,* the District of Columbia Circuit upheld the regulation against a challenge based on the equal protection component of the fifth amendment's due process clause.

The regulation in *Narenji* raised serious problems because no explicit congressional authorization existed for special enforcement action against aliens of a specified nationality. The Attorney General asserted authority under a general provision of the Immigration and Nationality Act that directed him to administer and enforce the Act and to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority" under the Act. In an action commenced by Iranian students, the district court enjoined the Attorney General's program. The court applied the "clear statement doctrine" of *Kent v. Dulles,* and held that the program was not authorized by Congress because the regulation threatened constitutional rights without explicit statutory authority "to discriminate

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349. *See Narenji v. Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980). At approximately the same time, President Carter prohibited further importation of oil from Iran, blocked the transfer of Iranian assets, and ordered most Iranian diplomats to leave the United States. *Brief for the Appellants at 8,* *Narenji v. Civiletti,* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980).
352. 8 U.S.C. § 1103(a) (1982); *see also id.* § 1184(a) (duration and conditions of aliens' admission). The government also cited *id.* § 1251(a)(9) (deportation authority), and *id.* § 1303(a) (authorizing special regulations for registration of certain aliens).
among aliens on the basis of national origin.\(^\text{355}\) Although distinctions on the basis of nationality had been made by Congress in immigration statutes for many years and had survived due process attacks, the district court found that more explicit congressional authorization was required before the Executive may make such a classification.\(^\text{356}\)

On appeal, the government's position in \textit{Narenji} approached an outright claim of inherent executive authority. Although the government's basic position was that the Attorney General's regulation was authorized by statute,\(^\text{357}\) the government also emphasized that under \textit{Curtiss-Wright} the Executive had some direct authority in foreign affairs "inherent in our country's status as a sovereign nation."\(^\text{358}\) The government relied on \textit{Curtiss-Wright} for the proposition that "in addition to any authority conferred upon the Executive Branch by delegation from the Congress, the President is vested with independent and inherent foreign affairs powers of his own under traditional principles of federal sovereignty as well as under specific constitutional provisions."\(^\text{359}\) The government argued that, despite some doctrinal confusion, "it is apparent that the President can often act in areas where Congress could have legislated."\(^\text{360}\)

The District of Columbia Circuit reversed the district court in an opinion that conceded a broad scope to presidential authority in the

\(^{355}\) 481 F. Supp. at 1141.

\(^{356}\) The district court stressed that aliens possess the right to be free from unequal treatment on the basis of national origin. \textit{See id.} at 1138-39. In some instances, this right protects aliens against discriminatory law enforcement on the basis of nationality. \textit{See} Yick Wo v. Hopkins, 118 U.S. 356 (1886). The court conceded that the "imperative of events" and constitutional principles lent some support to a claim of inherent executive authority, but concluded that "if the violation of equal protection inherent in the regulation at issue here is to be countenanced, 'it must be pursuant to the law-making functions of the Congress.'" 481 F. Supp. at 1143, 1145 (quoting Kent v. Dulles, 357 U.S. 116, 129 (1958)).

\(^{357}\) Brief for the Appellants, \textit{supra} note 349, at 38.

\(^{358}\) \textit{Id.} at 38-39.

\(^{359}\) \textit{Id.} at 39 u.30.

\(^{360}\) \textit{Id.} at 39 n.31 (citing L. HENKIN, \textit{supra} note 80, at 118). The government supported its suggestions of "inherent" executive power over aliens by quoting from United States \textit{ex rel. Knauff v. Shaughnessy}, 338 U.S. 537, 542 (1950):

\textit{The right to [exclude aliens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the Nation. . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.}

Brief for the Appellants, \textit{supra} note 349, at 40. The government acknowledged that the President ordinarily would not contravene a direct congressional directive, but implied that the President's inherent authority permitted him to act in the absence of a contrary statement. \textit{See id.} at 41. The government concluded, however, that "there is no need for this Court to explore the depths of the President's inherent authority in this area, for . . . he has ample delegated authority." \textit{Id.} Although the government ultimately relied on delegated authority, it apparently argued in the district court that inherent executive power was sufficient. \textit{See} 481 F. Supp. at 1141-42.
area of immigration. The court found that the executive action was adequately authorized by the general statutory grants of enforcement power to the Attorney General. The court also found that the regulation did not violate due process because "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. . . . So long as such distinctions are not wholly irrational they must be sustained." In finding that the regulation had a rational basis, the court extended substantial deference to presidential fact-finding abilities and conceded a measure of inherent presidential authority in this area.

In Narenji as in Haig, the courts were required to consider the countervailing implications of presidential power and individual liberties in the process of statutory construction. The District of Columbia Circuit, however, failed to acknowledge that the presence of individual constitutional rights might influence the interpretation of the statute. Indeed the court failed to discuss Kent v. Dulles, the locus classicus of the clear statement doctrine in foreign affairs. Although Kent involved passport regulations and their effect on travel rights, rather than immigration and equal protection, it emphasized the propriety of narrow construction of delegated power as a protection for individual rights. Accordingly, Kent should have been distinguished carefully if an explicit congressional delegation was unnecessary in Narenji. In both Narenji and Haig, when presidential action in foreign affairs threatened individual liberties, the strict construction technique of Kent was abandoned and the courts found statutory authorization for presi-

361. 617 F.2d at 747.
362. Id.; see supra note 352 and accompanying text. The court argued that the statute need not "specifically authorize each and every action" if the action is reasonably related to the Attorney General's duties. 617 F.2d at 747.
363. 617 F.2d at 747.
364. The court observed that "the present controversy . . . lies in the field of our country's foreign affairs and implicates matters over which the President has direct constitutional authority." Id. at 748. The court concluded that the inexperience of the judiciary in these matters precluded it from judging the President's foreign policy decisions. Id.
365. This point, however, was noted by the four judges who voted to grant a rehearing en banc. 617 F.2d at 754 n.4 (Wright, Robinson, Wald, and Mikva, JJ., dissenting from denial of rehearing en banc).
367. Id. at 129.
368. For an attempt to distinguish Kent from Narenji, see 617 F.2d 750-51 (MacKinnon, J., concurring in denial of rehearing en banc) (prospective travelers in Kent were American citizens who had not violated the law, in contrast with the "non-immigrant aliens who are in violation of our immigration laws," who might be subject to deportation in Narenji) (emphasis in original). Judge MacKinnon also argued that Iranian nationals had been made a separate class for equal protection purposes because of "the violent and lawless acts which their government has allowed to be committed against the United States." Id. at 751.
dential actions in questionable circumstances.\textsuperscript{369}

\textit{Narenji} is troublesome because an executive classification based on nationality in a foreign affairs crisis poses the danger that the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme.\textsuperscript{370} In this situation, executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive.\textsuperscript{371} Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued. Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally impermissible hostility based on national origin.\textsuperscript{372} The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed towards citizens of an enemy nation during a war.\textsuperscript{373}

\textsuperscript{369} The selective enforcement upheld in \textit{Narenji} was only one of several measures taken by the Immigration and Naturalization Service against Iranian nationals during the hostage crisis. Although some of these measures were even more intrusive than the selective enforcement in \textit{Narenji}, they were upheld on similar grounds. \textit{See}, e.g., Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981) (upholding regulation limiting the discretion of immigration judges to set voluntary departure times for Iranian nationals after visa expiration); Shamsian v. Ilchert, 534 F. Supp. 178 (N.D. Cal. 1982) (upholding regulation restricting extensions of stays for Iranian nationals); Akbari v. Godshall, 524 F. Supp. 635 (D. Colo. 1981), aff'd, No. 81-2275 (10th Cir. June 9, 1983) (upholding denials of student extensions of stays for Iranian nationals); \textit{see also} Yassini v. Crossland, 618 F.2d 1356 (9th Cir. 1980) (upholding revocation of deferred departure dates previously granted to Iranian nationals).

\textsuperscript{370} President Carter called the hostage crisis “the most difficult period of my life.” J. CARTER, supra note 2, at 459.

\textsuperscript{371} There is also the danger that the Executive, frustrated in an attempt to affect the situation abroad, might seek to use persons in the United States as scapegoats. The Iranian students may have served that function. For example, some Americans probably identified Iranian students studying in America with the students who seized the embassy in Tehran. \textit{Cf. Narenji}, 617 F.2d at 752-53 (MacKinnon, J., concurring in denial of rehearing en banc). Indeed, the government’s brief in \textit{Narenji} suggested this confusion at one point. \textit{See} Brief for the Appellants, supra note 349, at 55 n.39 (justifying application of the regulation to Iranian \textit{students} in the United States partly because “it need hardly be added that those who hold our hostages in Tehran have been identified as students”).

\textsuperscript{372} Although President Carter urged restraint and fairness in the treatment of Iranian nationals in the United States, a White House statement noted that the seizure of the embassy “has provoked strong feelings here at home. There is outrage. There is frustration. And there is deep anger.” Statement Issued by the White House Concerning American Hostages in Iran, 2 PUB. PAPERS: JIMMY CARTER 2102 (1979). If the President ultimately defers to popular feelings of hostility, constitutional violations are threatened even if the Executive also urges “restraint.”

\textsuperscript{373} \textit{Cf.} J. CARTER, supra note 2, at 460 (“American anger and frustration had risen as the days passed and the prisoners were not released.”). The government did not entirely avoid inflammatory material of questionable relevance in its brief. Brief for the Appellants, supra note
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When only the allocation of power between Congress and the President is at stake, broad congressional authorization may be sufficient to justify executive action. When constitutional rights are threatened, however, the dangers of an improper or biased balancing of government and individual interests—particularly during a severe foreign policy crisis—counsel against executive flexibility of this kind. Congressional debate on a statute specifically authorizing executive actions would be more likely to accommodate both government and individual interests; therefore, the technique advocated in this Article would require specific congressional authorization as a prerequisite for executive classifications based on nationality. If a court deferred to this legislation, it would be deferring to a process that probably would give more balanced consideration to individual constitutional interests than the regulation in Narenji issued by the Executive in a time of extraordinary stress.

D. Warrantless Electronic Surveillance—Humphrey and Truong

President Carter's assertion of inherent executive power to engage in warrantless electronic surveillance in foreign intelligence cases evoked memories of the Nixon period. Although President Carter's surveillance lacked the political motivation of certain intrusions of the Nixon era, dangers to individual rights remained. To investigate re-

349, at 4 ("[The captors] have paraded some of the hostages—blindfolded and hands tied behind their backs—around the Embassy compound in public view; and they have reportedly kept the hostages bound—sometimes both hand and foot.").
374. See supra notes 260-62 and accompanying text.
375. This type of authorization has been enacted for certain immigration problems. E.g., 8 U.S.C. § 1233(g) (1982) (authorizing the Secretary of State to discontinue issuance of immigrant visas to nationals of a country that refuses to accept the return of its nationals from the United States).
376. For another argument supporting a strict nondelegation doctrine in federal equal protection cases, see Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 Yale L.J. 1403 (1982).

The asylum claims of Haitian nationals during the Carter administration also raised questions of unequal executive treatment of aliens based on national origin. The decision in one leading case, however, rested on procedural violations rather than violations of equal protection guarantees. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982); see also Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983) (finding that enforcement of the Reagan administration's policy for detention of undocumented aliens discriminated against Haitian nationals in violation of the fifth amendment, vacated on rehearing en banc, 727 F.2d 957 (11th Cir. 1984) (upholding the Reagan administration's policy, but remanding for further findings on possible abuse of discretion in discrimination by lower level officers). For another recent case involving the equal protection claims of aliens, see Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980) (upholding President Ford's order excluding aliens from most civil service employment); cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (striking down a similar order issued earlier by the Civil Service Commission on the ground that the order lacked congressional or presidential authorization).
377. See Quint, supra note 3, at 21-23, 26-29.
ported transmissions of classified documents to the government of Vietnam, Attorney General Griffin Bell authorized various forms of electronic surveillance of Truong Dinh Hung, a Vietnamese citizen, and Ronald Humphrey, a government employee suspected of transmitting information to Truong. These measures were imposed without statutory authorization or a warrant, under a claim of inherent executive power to undertake warrantless surveillance for foreign national security reasons. The press reported that both President Carter and the Attorney General viewed these cases as excellent opportunities for the reassertion of executive power over electronic surveillance.

In prosecutions of Truong and Humphrey for espionage offenses, the defendants argued that the warrantless electronic surveillance was illegal. The district court upheld the surveillance in part and observed that a warrant is not required if "the President, or the Attorney General acting at the President's designation, feels it necessary to electronically eavesdrop in his conduct of foreign affairs." The court concluded that the primary focus of the inquiry shifted from foreign intelligence to law enforcement on July 20, 1977, and that all fruits of

379. See Quint, supra note 3, at 24 & n.104. For Attorney General Bell's account of the Truong and Humphrey case, see G. BELL, supra note 279, at 108-13 (1982).
380. E.g., N.Y. Times, Feb. 11, 1978, § 1, at 2, col. 6. For another instance of warrantless foreign intelligence surveillance defended by Attorney General Bell, see United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980). Moreover, President Carter's executive order on intelligence purported to authorize warrantless searches and surveillance if there was probable cause to believe that the subject was "an agent of a foreign power." Exec. Order No. 12,036, supra note 320.

Although the issue has been raised in lower federal courts, the Supreme Court has not decided whether there is an exception to the fourth amendment's warrant requirement for foreign national security surveillance. The question was expressly reserved in United States v. United States Dist. Court, 407 U.S. 297 (1972), in which the Court invalidated warrantless surveillance in domestic national security investigations. Lower courts that have considered the issue, however, have generally found a foreign national security exception. See, e.g., United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). See generally Quint, supra note 3, at 23-24 & nn.101-02.

In 1978, Congress enacted the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (1976 & Supp. V 1981), which imposes warrant requirements for certain types of electronic surveillance in foreign national security matters. See infra note 387. The warrantless electronic surveillance of Truong and Humphrey was undertaken before the effective date of the Act; to the extent that the Executive complies with the provisions of the Act, therefore, many of the issues in Truong will not recur. It is possible, however, that an Executive might undertake surveillance in contravention of the Act on the ground that the President possesses "inherent" national security power that cannot be limited by Congress. Indeed, congressional opponents of the Act argued that the President possessed such power. See Note, The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance, 78 MICH. L. REV. 1116, 1117 & nn.9-10 (1980).
382. Id. at 55.
warrantless intrusions conducted after that date must be suppressed.\textsuperscript{383}

On appeal, the government asserted inherent presidential authority to impose warrantless surveillance in foreign national security matters, but did not argue that the President possessed this authority under all circumstances.\textsuperscript{384} Rather, the government acknowledged that certain issues of foreign intelligence surveillance fall within a category in which congressional regulation may supersede otherwise existing presidential power, and asserted that the absence of a "carefully crafted statutory framework" for foreign intelligence surveillance was controlling in this case.\textsuperscript{385} The government argued that the judiciary's lack of expertise and information on foreign intelligence and the difficulty of defining standards rendered the conclusion that a court could override the President's judgment a "startling doctrine."\textsuperscript{386} The government acknowledged, however, that the Foreign Intelligence Surveillance Act of 1978 represented an appropriate legislative framework for judicial decision.\textsuperscript{387} Thus, although it did not concede that Congress could prohibit all warrantless foreign national security surveillance, the Carter administration did recognize congressional authority to limit presidential power by requiring warrants in some foreign intelligence cases. The Administration’s acknowledgment of congressional authority was consistent with its prior and contemporaneous support of the Foreign Intelligence Surveillance Act in Congress.\textsuperscript{388}

The Fourth Circuit agreed with the district court’s finding that a

\textsuperscript{383} \textit{Id}. at 59. In contrast, the government argued that no warrant should be required "if surveillance is to any degree directed at gathering foreign intelligence," even though law enforcement might be the primary goal. United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980).

\textsuperscript{384} See Brief for the United States at 17, United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

\textsuperscript{385} "[I]n the absence of such a precise statutory guideline, the constitutional responsibility of the President properly to conduct this nation's foreign affairs creates a necessary exception to the warrant requirement as regards the use of [electronic] surveillance in counter-intelligence investigations." \textit{Id}. (emphasis in original). The government implied that warrantless surveillance could be restrained adequately by the Executive’s own restrictions. \textit{Id}. at 22-23 n.32.

\textsuperscript{386} \textit{Id}. at 21-26.

\textsuperscript{387} See supra note 380. The Foreign Intelligence Surveillance Act requires a warrant for many forms of foreign national security surveillance. 50 U.S.C. § 1801-1811 (Supp. V 1981). Warrants are issued by a special federal court composed of federal judges selected by the Chief Justice. \textit{Id}. § 1803(a). To obtain a warrant, the Act requires less than the full probable cause standard of criminal investigations, but requires a showing that approaches that standard for surveillance of United States citizens and resident aliens in most cases. \textit{Id}. §§ 1801(b)(2), 1805. According to the government, the Act "delicately balances the rights of individual privacy against the needs of effective 'counter-intelligence'." Brief for the United States, supra note 384, at 16-17. For the history of the Carter administration's position on the legislation that became the Foreign Intelligence Surveillance Act of 1978, see Quint, supra note 3, at 60-62.

\textsuperscript{388} See Quint, supra note 3, at 60-62. This deference contrasts with the Administration's argument in \textit{Goldwater v. Carter} that the President possesses inherent treaty termination power that cannot be limited by Congress. See supra note 78.
foreign affairs exception to the warrant requirement applied.\textsuperscript{389} The court found that the Executive “possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance”\textsuperscript{390} and remarked that the President is “constitutionally designated as the pre-eminent authority in foreign affairs.”\textsuperscript{391} Further, the court argued that “the complexity of [the newly enacted Foreign Intelligence Surveillance Act of 1978] suggests that the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, should be left to the intricate balancing performed in the course of the legislative process by Congress and the President.”\textsuperscript{392} The court emphasized that an appropriate balancing of individual and national security interests required legislative rather than judicial techniques.\textsuperscript{393}

As the court noted, the history and final form of the Foreign Intelligence Surveillance Act suggest the superiority of legislative balancing over judicial balancing for the purpose of devising a warrant requirement for foreign intelligence surveillance.\textsuperscript{394} What the Fourth Circuit did not recognize, however, was that the history of the Act also tends to demonstrate the superiority and greater evenhandedness of legislative balancing in contrast with executive balancing in surveillance cases.\textsuperscript{395} This history suggests that the Executive tends to overestimate the na-

\textsuperscript{390} Id. at 913.
\textsuperscript{391} Id. at 914. The court emphasized, however, that the foreign security exemption applied “only when the object of the search or the surveillance is a foreign power, its agents or collaborators.” Id. at 915 (citing Zweibon v. Mitchell, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975)).
\textsuperscript{392} Id. at 914 n.4.
\textsuperscript{393} According to the court, a judicial standard would “be particularly ill-advised because it would not be easily subject to adjustment as the political branches gain experience in working with a warrant requirement in the foreign intelligence area.” Id. at 915 n.4.
\textsuperscript{394} Id. at 914 n.4.
\textsuperscript{395} In 1977, for example, the Carter administration supported legislation providing that a warrant for foreign intelligence surveillance should issue upon a minimal showing by the government. See Quint, supra note 3, at 61. In Senate hearings, however, the Administration was unable to advance a convincing justification for such limited protection of fourth amendment rights. See id. Thereafter, Congress adopted a more stringent standard that approached the ordinary probable cause requirement for most foreign intelligence surveillance of American citizens and resident aliens. 50 U.S.C. §§ 1801(b)(2), 1805 (Supp. V 1981). Subsequently, Administration officials have acknowledged that the “intelligence agencies are functioning well” under the Act. See Civiletti, supra note 320, at 892 n.50. In this instance, the opportunity for discussion of differing views and sharp questioning of Administration officials by members of Congress probably encouraged a more deliberate and evenhanded consideration of individual and government interests than was likely to have taken place in executive consideration alone. See Quint, supra note 3, at 62.

The Foreign Intelligence Surveillance Act has been upheld against several constitutional challenges. See, e.g., United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982) (first, fifth, and sixth amendment challenges); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982) (first, fourth, and sixth amendment challenges); Note, supra note 380. Even commentators who approve of the Act, however, have criticized some of its provisions. See, e.g., Schwartz, Oversight
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ational security interest and underestimate or ignore the countervailing liberty interest in striking an appropriate balance. Since the judiciary must rely on some form of government balancing in this area—and reliance may be particularly strong in this situation because of the judiciary's lack of expertise—a reliance on executive rather than legislative balancing unduly jeopardizes fourth amendment rights. Rather than deferring to executive judgment in the absence of a statute, the Truong court should have considered the view urged in this Article that the President is not authorized to impose warrantless surveillance without clear statutory authority.

Another important issue in Humphrey and Truong was whether duplication of classified documents and transmission of the copies violated section 641 of Title 18 of the United States Code, which prohibits the theft of government property. Here again, the Executive invoked a broad and inexplicit statute to achieve a result that might endanger constitutional rights under some circumstances. The government argued that transmission of classified foreign policy information is "theft" because that information is "closely analogous to . . . other types of intellectual property which are subject to legal protection." The government brushed aside possible first amendment issues because the defendants had made no attempt to distribute the information publicly and because "firm government policy [generally] precludes the use of [section] 641 to bring a prosecution for theft of government information where the property was obtained or used 'primarily for the purpose of disseminating it to the public . . . ."
In a thoughtful opinion, Judge Winter argued that section 641 was inapplicable. He noted that “government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of [section 641] threatens to impinge upon rights protected by the first amendment.” If section 641 penalized the disclosure of classified information, “it would greatly alter [the] meticulously woven fabric of criminal sanctions” by effectively superseding explicit statutes that penalize the disclosure of classified government information only in narrowly defined circumstances. Moreover, Judge Winter noted that Congress had several opportunities to enact a comprehensive criminal statute for the unauthorized disclosure of classified information, but consistently declined to do so. These factors led Judge Winter to conclude that Congress did not intend to penalize the disclosure of classified information under section 641.

This position is consistent with the technique of statutory construction advocated in this Article. Without explicit congressional adoption of a criminal penalty for actions with first amendment implications, it is not clear that Congress has undertaken the delicate balancing required when national security and first amendment interests collide. If a court defers to the Executive’s balancing of interests in construing the statute, it may well be deferring to a balance in which the government interest has been overvalued and the individual constitutional interests have been undervalued or ignored.

In sum, the Carter administration made strong assertions of executive power in four areas that affected individual rights: CIA secrecy agreements, passport restrictions, selective enforcement of visa requirements, and warrantless electronic surveillance. In each of these areas, the Administration’s position prevailed in the courts. In none of these cases, however, did the courts subject the government’s interest to care-

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find the information to be classified in order for it to be covered by § 641; the instructions required “only that [the information be] contained on government paper or in a government office somewhere.” Brief for Truong Dinh Hung at 78 n.43, United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980). The defense contended that this construction made § 641 “far more serious than the establishment of an ‘Official Secrets Act,’” which would protect classified information only. Id. The defense also argued that the statute was unconstitutional for vagueness and overbreadth. See id. at 82.

403. 629 F.2d at 922-28 (opinion of Winter, J.). Two members of the panel declined to review the conviction under § 641 because the sentences under that section were concurrent with the sentences under the other counts. Id. at 931 (Russell & Hall, JJ., concurring and dissenting).

404. Id. at 925 (opinion of Winter, J).

405. Id. at 926.

406. Id. at 927.

ful scrutiny. Rather, the courts accepted the Executive's statement that the government interest should prevail over the individual constitutional interests, despite the danger of a distorted executive balancing of interests. Since courts cannot always effectively probe the bases of the Executive's decisions, the dangers of distorted executive balancing suggest that the judiciary should not uphold executive action that threatens constitutional rights without the safeguard of congressional balancing evidenced by explicit statutory authorization.

IV. Executive Privileges and Immunities

In addition to the two basic types of separation of powers issues, which are discussed in Parts II and III, there is a third category that is best viewed as ancillary to the more fundamental issues of the first two. This category includes questions that do not directly involve the substantive authority of Congress and the Executive, but rather concern the attributes of the respective branches that are necessary for the adequate performance of their roles. Sometimes these issues arise from specific textual provisions, such as the President's appointment power or the legislator's immunity for speeches and debates. During the Carter administration, however, the most important disputes focused on claims of executive privileges and immunities that are not specified in the Constitution, but may be implied by the general functions of the executive branch or the structure of the federal government. In recent years, several Administrations have asserted vigorously that implied privileges or immunities protect members of the executive branch from the imposition of ordinary legal burdens. These Administrations have argued that special doctrines are necessary for the Executive to function, and courts have sometimes been sympathetic to this argument.

Executive privileges and immunities, however, can affect the allocation of policymaking power and imperil individual rights. Indeed, few assert that these doctrines possess intrinsic value; to do so would be to revert to mystical concepts of monarchy. Rather, executive privileges and immunities must be justified by their value in carrying out appropriate executive functions. Accordingly, these privileges and immunities should be rejected if they are unnecessary for this purpose, or

409. U.S. Const. art. I, § 6, cl. 1; see, e.g., Gravel v. United States, 408 U.S. 606 (1972).
410. See L. Tribe, supra note 65, § 4-14, at 202-12.
if they unduly impair underlying values of the separation of powers discussed in Parts II and III by limiting the congressional role in basic policymaking or by threatening the protection of individual rights. Executive privileges and immunities, therefore, should be analyzed in the context of the underlying separation of powers issues discussed above.

During the Carter administration, litigation arose over two types of privileges and immunities issues. First, several cases considered the extent of the Executive's ability to withhold information from Congress and the public. In some instances, the Administration adopted a favorable position toward disclosure of information by the executive branch. For example, in litigation over President Nixon's papers and tape recordings, the Carter administration defended congressional regulation and opposed Mr. Nixon's assertion of an executive prerogative of secrecy. Moreover, the Administration generally favored increased disclosure by adopting new policies on Freedom of Information Act exemptions, classification of national security information, and transmission of information to Congress. In litigation by individuals against various intelligence officials, however, the Carter administration asserted a broad "state secrets" privilege that insulated national security information from disclosure. These claims of executive necessity seriously imperiled the availability of redress for the violation of individual constitutional rights.

A second type of issue arose when President Carter's Justice Department argued that executive officials are absolutely immune from civil liability for illegal or unconstitutional acts. The Department, representing former President Nixon and members of his administration, strongly favored the insulation of executive power over the protection of individual rights. Although asserted by the Department as an advocate, this position was in accord with other instances in which the Administration supported the imperatives of executive power against individual constitutional rights.

A. Executive Withholding of Information

1. Continuing Litigation over the Nixon Tapes and Other "Presidential Historical Material."—At the end of the Watergate affair,

412. See infra notes 431-37 and accompanying text. The Carter administration viewed this litigation as a dispute between a past Executive and a present Executive rather than as a true separation of powers controversy. See infra note 435 and accompanying text.
413. See infra notes 445-68 and accompanying text.
414. See infra notes 475-95 and accompanying text.
415. See infra notes 509-32 and accompanying text.
416. See infra note 509 and accompanying text.
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*United States v. Nixon*\(^{417}\) set the stage for future consideration of executive privileges of confidentiality. In ordering the delivery of White House tapes to the district judge, the Supreme Court concluded that the President does not possess an absolute privilege that insulates him from revealing confidential communications under all circumstances.\(^{418}\) The Court also found that the President is not absolutely immune from judicial process while he remains in office.\(^{419}\) Although the immediate effect of the decision was to limit certain executive claims, the opinion recognized a constitutionally based privilege for confidential communications to the President.\(^{420}\) Moreover, the Court appeared to acknowledge a sweeping constitutional privilege for military, diplomatic, and state secrets.\(^{421}\)

Disputes over the publication of presidential and other executive records affect both the allocation of policymaking authority and the protection of individual rights. Administrations have argued that secrecy is necessary for presidential decisionmaking because it encourages candor among executive officials when they give advice.\(^{422}\) Publication of presidential documents, however, assists Congress and the citizenry in scrutinizing and evaluating the Executive's decisions. Furthermore, when continuing policy choices by either the Executive or Congress rest on earlier executive decisions, the record of those decisions may be necessary for an adequate review of present policy.\(^{423}\) If the material relates to important policy decisions, it is difficult to justify withholding the information from Congress and the public. As the social importance of the policy decision increases, the need for legislative deliberation and consent and for sufficient information to make an adequate decision increases correspondingly.

The availability of executive documents may also be essential for

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418. 418 U.S. at 705-07.
419. *Id.* at 706.
420. *Id.* at 708.
422. The Court adopted this basic position in *United States v. Nixon*, 418 U.S. 683, 705-06 (1974). It is unclear, however, whether confidentiality is necessary to elicit candid advice. Moreover, even with the privilege it is not certain that advice to the President will remain confidential. *See, e.g.,* Z. Brzezinski, *supra* note 189 (memoirs of President Carter's National Security Advisor describing advice given by named advisors on various issues to be decided by President Carter); C. Vance, *supra* note 69, at 37 (noting that leakage of confidential information to the press was widespread and reduced frankness).
423. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 452-54 (1977). The publication of the Pentagon Papers, for example, provided a more complete understanding of a series of executive foreign policy decisions, and may have accelerated the congressional policies that led to the end of American involvement in Indochina. *See* Quint, *supra* note 3, at 9-14.
the protection of constitutional rights. For example, historical records obtained under the Freedom of Information Act and by Congress revealed that for many years the CIA engaged in covert mail openings and other activities that invaded the constitutional rights of individuals. These revelations led to the curtailment of continuing CIA programs that threatened individual rights. Similarly, the publication of presidential records may reveal whether the President or his close advisors have engaged in activities that imperiled the constitutional rights of individuals. Claims of executive privilege, therefore, raise the question of whether special protections are necessary for the executive branch to carry out its assigned responsibility, or whether special protection would unduly insulate executive officials from political responsibility, historical evaluation, and appropriate judicial control.

The scope of the privileges acknowledged in United States v. Nixon continued to be the subject of litigation during the Ford and Carter administrations. Shortly after President Nixon's resignation in 1974, Congress enacted the Presidential Recordings and Materials Preservation Act to ensure government control of the famous White House tape recordings and other presidential material of the Nixon administration. The Act required the Administrator of General Services to take immediate possession of the tapes and presidential papers and to review the material for the purpose of separating historical from purely personal matter. The statute contemplated that personal items would be returned to former President Nixon, while public access

424. See 3 Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess. 559-636 (1976) [hereinafter cited as 3 Intelligence Activity Report]; see also 1980 Senate Intelligence Hearings, supra note 289, at 181, 249 (discussing the CIA programs).

425. See, e.g., Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (imposing liability for the CIA's mail opening program).


428. With respect to the Nixon materials, the Act superseded a 1955 statute which assumed that a former President owned his presidential materials and contemplated that he might donate the materials to a presidential library under conditions that he would determine. The 1974 Act also invalidated an agreement entered into between former President Nixon and the Administrator of General Services under President Ford, which accorded former President Nixon extensive control over the disposition of the presidential material of his Administration. See Letter of Agreement Between President Nixon and General Services Administrator Arthur Sampson, 10 Weekly Comp. Pres. Doc. 1104-05 (Sept. 8, 1974). Previously, Attorney General Saxbe had issued an opinion which concluded that former President Nixon's presidential materials were his personal property. 43 Op. Att'y Gen. No. 1 (1974); see Nixon v. Richey, 513 F.2d 430, 439-40 n.81 (D.C. Cir. 1975).

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eventually would be granted to most of the remaining historical material.\footnote{430}

Immediately after passage of the Act, former president Nixon filed an action challenging its constitutionality.\footnote{431} The Justice Department under President Carter argued that the statute was an appropriate means of assuring preservation of the historical record.\footnote{432} Although Nixon viewed the compelled retention of his papers as a violation of the presidential privilege of confidentiality and an undue invasion of executive power,\footnote{433} the Justice Department's argument cast the statute in an entirely different light. The government noted that the incumbent President supported the statute and that initial review of the Nixon material would be performed exclusively by executive department personnel.\footnote{434} Therefore, the case did not present a separation of powers dispute between Congress and the Executive, but rather an easily soluble controversy between the claims of a past Executive and the more pressing needs of the current Executive.\footnote{435} The government emphasized that a current administration needs the documents of past administrations for present problems and for general historical purposes.\footnote{436} Moreover, the Administration flatly asserted that the privilege for confidential communications "does not pertain to disclosure to incumbent officials of the Executive Branch."\footnote{437}

\footnote{430. Because Congress considered President Ford's Administrator too favorable to former President Nixon, it disapproved three sets of proposed regulations under the Act's one-house veto provisions. \textit{See} Bruff & Gellhorn, supra note 238, at 1397-1403. It was not until 1977 that a final set of regulations was promulgated. 42 Fed. Reg. 63,626 (1977). \textit{But see supra} note 268 (noting the claim of former Nixon aides that the present regulations are invalid because they resulted from unconstitutional legislative vetoes).


\footnote{434. \textit{See} Brief for the Federal Appellees, supra note 432, at 18-19, \textit{reprinted in} 98 LANDMARK BRIEFS at 359-60.

\footnote{435. "In short, there is no violation of the principle of separation of powers when Congress acts to preserve the Executive Branch's access to executive papers and materials, and that is all that is involved at this stage of the operation of the Act." \textit{Id.} at 25, \textit{reprinted in} 98 LANDMARK BRIEFS at 366.

\footnote{436. \textit{See id.} at 27-29 & n.12, \textit{reprinted in} 98 LANDMARK BRIEFS at 368-70 & n.12 (emphasizing the need for Nixon administration materials on the SALT talks, China, Vietnam, and the Middle East).

\footnote{437. \textit{Id.} at 32, \textit{reprinted in} 98 LANDMARK BRIEFS at 373. The Administration did acknowledge, however, that the privilege could be asserted by a past President. \textit{See id.} at 33, \textit{reprinted in} 98 LANDMARK BRIEFS at 374. It also remarked that a statute would be open to question if it}
In *Nixon v. Administrator of General Services*,\(^4\) the Supreme Court upheld the statute. The Court emphasized that the executive branch retained initial custody of the documents and that Presidents Ford and Carter supported the legislation.\(^5\) Unlike the Justice Department, however, the Court did not find these facts to be dispositive. Rather, the Court balanced the competing interests much as it had done in *United States v. Nixon*, and concluded that the strength of the congressional objective justified any minimal intrusion on executive powers and confidentiality that might occur in this case.\(^6\) Temporary custody by the executive branch and the support of an incumbent President were only factors—albeit important factors—in striking the balance.\(^7\)

Although the use of an ad hoc balancing process may have reflected the general doctrine of the first *Nixon* decision, in one respect the case against the presidential privilege was even stronger in the second *Nixon* case than in the first. In *United States v. Nixon*, no specific statute struck the balance between the competing interests; accordingly, the Court adjudicated the dispute without congressional guidance. In *Nixon v. Administrator of General Services*, however, the Court was faced with a legislative determination that the value of public possession of Nixon’s papers for the proper functioning of government outweighed any future interference or chilling effect on executive branch activity that might arise from disclosures allowed under the statute.\(^8\) The statute and its legislative history imply a congressional finding that

...infringed unduly on executive confidentiality, but concluded that the Act adequately protected those interests. See id. at 31, reprinted in 98 LANDMARK BRIEFS at 372.


\(^5\) Id. at 441.

\(^6\) Id. at 443-46, 451-55.

\(^7\) Id. at 441-55. The Court also emphasized that the tapes and documents would be screened by trained archivists and that the statute provides an opportunity for the assertion of any presidential privileges before the material is released. Id. at 450-52.

The Carter administration’s argument that the dispute was actually between a past Executive and a present Executive was not applicable beyond the circumstances of the second *Nixon* case, because the 1974 Act contemplated eventual public release of presidential material. The argument possessed whatever force it had because the Act was considered on its face only, and questions of custody and archival screening by the Administrator were the only issues ripe for adjudication.

Indeed, the next stage of the Nixon tapes litigation involved regulations issued under the 1974 Act that contemplated public access to certain tapes. In *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), cert. denied, 459 U.S. 1035 (1982), the District of Columbia Circuit upheld regulations that established public "listening centers" for certain White House tapes and provided for archival screening of tapes and dictabelts that might contain President Nixon’s diary. President Carter's Justice Department represented the Administrator of General Services and argued for the validity of the regulations. As in the second *Nixon* case, the regulations were upheld on their face. See id. at 358. Thus, further challenges to the release of specific material remain possible.

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the understanding of executive policies likely to be fostered by the release of the Nixon papers, and the redress of constitutional violations that might be disclosed by the materials, were values particularly worthy of protection. If the Court had found that Congress' evaluation of the competing considerations was incorrect and that it violated an implicit presidential privilege, the Court would have decided a case in favor of the President when his power was at its "lowest ebb"—a rare event in constitutional adjudication. Instead, the Court correctly found that an implied generalized presidential privilege could not prevail over a statute that expressed a balancing undertaken by Congress pursuant to the necessary and proper clause.

2. Executive Rules for the Disclosure of Information.

(a) Disclosure of information to the public.—President Carter's rules for the release of executive branch information to Congress and the public also reflected a general policy of increased disclosure. Although routine executive branch information may not describe policy at the same high level as presidential materials, it is often more useful for congressional policymaking and for public and congressional scrutiny of executive action. Since 1967, the


444. In subsequent legislative testimony, Carter administration officials acknowledged broad congressional authority over the custody and disposition of presidential documents. Since the 1974 Act applied only to records of the Nixon administration, more general legislation was proposed for government control of presidential documents. During hearings on this legislation, a representative of the Office of Legal Counsel stated that it is our conclusion that the subject matter of this bill is well within the province of Congress, that it deals with matters appropriate for congressional concern, and that its underlying purposes may constitutionally be achieved. . . . We think . . . that, at least insofar as declaring the President's official papers to be public property is concerned, Congress' action is not subject to serious challenge. Presidential Records Act of 1978: Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 95th Cong., 2d Sess. 109, 112 (1978) (statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel) [hereinafter cited as Presidential Records Hearings]. The Office of Legal Counsel did argue, however, that a statute might be unconstitutional if executive confidentiality was not adequately protected. See id. at 118, 124-30.

In 1978, President Carter signed the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (Supp. V 1981), which provides for government ownership of presidential materials, excluding the private papers of the President, with restrictions on access to certain categories of information for not more than 12 years. After 12 years, public access is permitted under the Freedom of Information Act. See id. § 2204(c). When he signed the Act, President Carter stated that it would "make the presidency a more open institution" and further the goal of "making sure that our Government is not above the law." Statement by President Carter on Signing H.R. 13,500 into Law, 2 PUB. PAPERS: JIMMY CARTER 1965-66 (1978). The statute did not apply to President Carter's term of office, but would have applied to a second term if he had been reelected.

release of executive branch documents has been governed primarily by the Freedom of Information Act (FOIA), a statute of profound importance that was intended to produce wide public disclosure of executive and agency information. The Act requires the release of “agency records” to any person who files a request, unless the records fall into one of several exceptions. Although the Act contemplates maximum disclosure, habits of bureaucratic secrecy persist and the Executive has often sought a narrow construction of the Act through a broad interpretation of the exceptions or otherwise. Moreover, the Executive’s position, particularly in national security matters, has often been adopted by the courts.

The Carter administration announced a position on the release of information under the FOIA that was more favorable to disclosure than the position required by the terms of the statute. In a letter to the heads of federal departments and agencies, Attorney General Griffin Bell announced that “the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful [to legitimate public or private interests], even if the documents technically fall within the exemptions of the Act.” According to this policy statement, the Administration would not defend the withholding of certain material that technically might be exempt from disclosure under the statute if the factors favoring withholding were not sufficiently weighty. Although the overall impact of this policy is unclear, it did provide increased disclosure in some instances. Even if Attorney

447. Id.
448. See, e.g., Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980) (argument that State Department records deposited in the Library of Congress are not subject to disclosure under the FOIA even if they were improperly removed from the State Department); Sims v. CIA, 642 F.2d 562 (D.C. Cir. 1980) (argument that researchers who worked for the CIA on behavior modification are “intelligence sources” and that their identities are therefore exempt from disclosure under the FOIA). For a discussion of similar arguments in the early years of the Act, see Relyea, The Presidency and the People’s Right to Know, in THE PRESIDENCY AND INFORMATION POLICY 31-32 (H. Relyea ed. 1981) (Johnson and Nixon administrations).
451. For indications that the policy had some impact on the administration of the Act, see Letter from William G. Schaffer, Deputy Assistant Attorney General, to Senator James Abourezk (Nov. 17, 1977), reprinted in 1977 FOIA Hearings, supra note 278, at 933-35 (Exhibit 132). For an example of the CIA’s release of a document under Bell’s guidelines, see Marks v. CIA, 590 F.2d 997, 999 & n.5 (D.C. Cir. 1978) (release of a document relating to intelligence methods). See also 1977 FOIA Hearings, supra note 278, at 102-03, 429-32 (testimony and letter of various Carter administration officials) (noting that after the Carter administration took office, the government
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General Bell’s program was effective, however, later events illustrated the fragility of executive self-limitation. Soon after President Reagan took office, Bell’s policy letter was withdrawn by Attorney General William French Smith, and the Reagan administration returned to a policy of greater secrecy under the Act.

President Carter issued another rule that favored disclosure in a manner similar to Attorney General Bell’s FOIA guidelines. Executive Order 12,065 set forth revised standards for the classification of “national security” information. Under the order, information that otherwise would be properly classifiable was to be declassified if “the need to protect such information [is] outweighed by the public interest in disclosure of the information.” Thus, a weighing of the benefits of disclosure might result in the release of information that fell into a classified category. Moreover, the order stated generally that declassifica-

changed its position and acknowledged the CIA’s sponsorship of the vessel Glomar Explorer). But see Comment, Developments Under the Freedom of Information Act—1981, 1982 DUKE L.J. 423, 425 n.19 (suggesting that the policy was unsuccessful in promoting the release of information).

In contrast to the Attorney General’s position favoring increased disclosure, officials of both the CIA and the FBI objected to the breadth of disclosure required under the FOIA and suggested amendments that would have narrowed the application of the Act. See, e.g., Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong., 1st Sess. 2-14, 162 (1979) (testimony of Frank C. Carlucci, Deputy Director of the CIA); id. at 64-114 (statement of William H. Webster, Director of the FBI); 1980 Senate Intelligence Act Hearings, supra note 289, at 18 (statement of Stansfield Turner, Director of the CIA).

Furthermore, notwithstanding the apparent liberality of the Attorney General’s guidelines, President Carter’s executive agencies sometimes withheld information of undeniable value to the public in order to protect government interests of questionable weight. See, e.g., Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980) (withholding State Department opinions on the legal status of Israeli-occupied territories), cert. denied, 452 U.S. 905 (1981).


454. The order superseded a previous executive order on classification issued by President Nixon and was promulgated after the Carter administration “took the unprecedented step of soliciting public comment” on a first draft. See Fox & Weiss, The FOIA National Security Exemption and the New Executive Order, 37 FED. B.J., Fall 1978, at 1, 1. The drafting process “was characterized by a significant degree of openness and public participation.” HOUSE COMM. ON GOVERNMENT OPERATIONS, SECURITY CLASSIFICATION POLICY AND EXECUTIVE ORDER 12,356, H.R. REP. NO. 731, 97th Cong., 2d Sess. 31 (1982) [hereinafter cited as SECURITY CLASSIFICATION REPORT]. One provision contained in a draft of the order—but deleted from the final version after criticism—authorized a broad secrecy agreement requirement for employees with access to classified information. See Comment, supra note 290, at 698 n.229.

tion was favored in doubtful cases. Although the order "continued the pattern of the previous security classification orders in further restricting classification authority," it was criticized for the breadth and vagueness of several important definitions. Like previous executive orders governing classification, this order lacked statutory authorization and rested primarily on a claim of inherent executive power.

Since the FOIA has an exception for information properly classified pursuant to an executive order, reducing the scope of classification in an executive order should eventually result in increased availability of government information under the FOIA. Like Bell's FOIA policy, however, Executive Order No. 12,065 did not survive under the succeeding Administration. President Reagan issued an executive order that superseded No. 12,065; the new order deletes the balancing provision of President Carter's order and delegates greater authority to classifiers to restrain the dissemination of information. The increased scope of classification under President Reagan's order appears to be part of a comprehensive attempt to impose greater government secrecy in many areas. President Reagan's new order underscores the uncertainty of executive self-limitation. Rules that seek to vindicate the imperatives of popular decisionmaking and to protect individual rights against government secrecy are likely to achieve greater stability and effectiveness if they are enacted by Congress as statutes that cannot be changed by executive fiat.

(b) Disclosure of information to Congress.—Public disclosure of information serves the broadest interests of democratic decisionmaking because it makes information available to both Congress and the electorate. Disclosure allows Congress to act with greater accuracy and understanding in policymaking and increases the ability of Congress

457. See Security Classification Report, supra note 454, at 11; see Fox & Weiss, supra note 454, at 16.
459. See id. at 12.
460. Exec. Order No. 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C.A. § 401 note (West Supp. 1984); see Security Classification Report, supra note 454, at 36. Among other things, the new order revoked President Carter's requirement that the prospective danger posed by disclosure be "identifiable" before information can be classified. Section 1.3(b) of the new order also allows classification of information that is not dangerous in itself, if "in the context of other information" it might damage national security. See generally Note, Developments Under the Freedom of Information Act—1982, 1983 Duke L.J. 390, 394-401. For a recent proposal to revive the balancing test of President Carter's order by amending the FOIA, see S. 1335, 98th Cong., 1st Sess., 129 Cong. Rec. 57161-65 (daily ed. May 19, 1983).
461. See, e.g., supra notes 315-17 and accompanying text.
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and the electorate to monitor executive policies and executive implementation of congressional policies. Even if security concerns may make full public disclosure undesirable, however, it is difficult to justify withholding information from Congress or specified committees under procedures designed to limit public access. If these procedures are effective, secrecy will be preserved and Congress will be able to review and examine executive actions.462

This view underlies the accommodation that permits the House and Senate Intelligence Committees to monitor the work of the intelligence agencies. Instituted after the intelligence investigations of the mid-1970s, this arrangement operated particularly well during the Carter administration.463 Moreover, the Carter administration provided foreign policy information to Congress with a degree of candor that "constituted a turning point in congressional policy for the Department of State."464 Secretary of State Cyrus Vance issued a memorandum to State Department personnel which declared that "it shall be the policy of the Department of State to extend the full resources of the Department so as to provide Congress with the information it requires to fulfill its constitutional role in the formulation of foreign affairs."465 The memorandum further indicated that "effective cooperation with Congress [is] a personal responsibility for every [State Department] officer."466 There is evidence that the memorandum had a substantial effect in practice.467 In contrast, however, congressional committees

462. See supra note 217.
463. When the [Intelligence] Committees have requested information, it has been supplied, and in almost every case, in the degree of detail requested... [I]n the four years of the Committee's existence, we have yet to have had even to suggest a subpoena. We have been able to work out difficulties through negotiation. ABA Conference on Intelligence Legislation 38 (June 26-28, 1980) (remarks of William G. Miller, Staff Director, Senate Select Committee on Intelligence); see FOREIGN POLICY CONSULTATION, supra note 66, at 34.

Although the Administration claimed that it gave advance notice of covert CIA actions to the Intelligence Committees in almost every instance, CIA Director Stansfield Turner resisted a statutory requirement of prior notice. Turner argued that a statutory requirement "would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." 1980 House Intelligence Hearings, supra note 320, at 10-11. Such a measure, however, was eventually enacted by Congress and signed by President Carter in 1980. See supra note 133.

464. FOREIGN POLICY CONSULTATION, supra note 66, at 42.

465. Memorandum from Secretary of State Vance to State Department Personnel (Apr. 5, 1978), reprinted in id. at 73 app. A.

466. Id.

467. A Congressional Research Service Study observed that "[t]ime and again [State Department] officers... commented that 'it is now policy' that the Department make available to Congress, almost without exception, whatever it requests." Id. at 42. The study concludes that the memorandum undoubtedly established a new environment within the Department of State for cooperation with Congress. Id. Despite the increase in available information, however, the memorandum did not attempt to further the consultation process by requiring information to be furnished to Congress before it was requested. Id.
other than the Intelligence Committees apparently continued to face obstacles in obtaining intelligence information relating to foreign policy.468

When the arrangements for the flow of information to Congress reach an impasse, a formal claim of "executive privilege" may be raised. President Nixon, for example, asserted very broad claims of the privilege.469 Although the Carter administration also asserted the doctrine of executive privilege against congressional demands for information on several occasions,470 the issues were neither as sharply drawn nor as significant as in similar disputes during the Nixon and Reagan administrations.471 The executive privilege claims asserted by President Carter were resolved through the political process; indeed, almost all disputes over information between the Executive and congressional committees have been politically resolved. In these cases, the institutional interests of the Executive and Congress are sharply opposed, and the judiciary has been reluctant to intervene.472 If a justiciable controversy is presented, however, a court presumably would balance the countervailing executive and legislative interests as indicated in United States v. Nixon.473 Moreover, as this Article has advocated, a court should consider the importance of the matter to which the requested information is related: as the importance of a given policy decision increases, the need for legislative deliberation and consent—and adequate information to perform those functions—increases correspondingly. If Congress enacted a statute defining rules for the delivery of information to its committees and providing for judicial enforcement, however, the courts should enforce the statute as they enforce the FOIA. Congress would have made a determination under the neces-

469. See Quint, supra note 3, at 29-33.
470. See J. SUNDOQUIST, supra note 67, at 332; Remarks by President Carter at a News Conference, 1 PUB. PAPERS: JIMMY CARTER 1094 (1978).
471. See Quint, supra note 3, at 29-33. For an important assertion of executive privilege by the Reagan administration, see United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) (refusal of the Administrator of the EPA to deliver documents to a House subcommittee investigating allegedly lax enforcement of an environmental statute). The Administration eventually reversed its position and agreed to provide the information to the subcommittee. See N.Y. Times, June 8, 1983, at A14, col. 6.
sary and proper clause concerning the relative weights to be attributed to the countervailing interests.\textsuperscript{474}

3. \textit{Executive Secrecy and Individual Liberties—The State Secrets Privilege.}—The preceding sections demonstrated that the Carter administration generally assumed a posture favorable to more disclosure than has been common in other recent administrations. In sharp contrast with this general position, however, the Carter administration advanced a broad state secrets privilege in several cases in which the assertion of executive power threatened individual rights. Although statutes may possibly have supported some assertions of the privilege,\textsuperscript{475} the government’s main contention was that the privilege was derived from the Constitution. The judiciary adopted this view and upheld the privilege in decisions that denied claimants redress for alleged deprivations of their constitutional rights. Assertions of the privilege, therefore, may have the effect of denying the underlying right and may “[vitiate] constitutional and statutory constraints on executive power.”\textsuperscript{476}

The Carter administration invoked the state secrets privilege to defeat civil actions for alleged deprivations of constitutional rights by intelligence agencies that occurred during earlier Administrations. In \textit{Halkin v. Helms},\textsuperscript{477} for example, antiwar activists sued federal intelligence officials, alleging that their telephone and telegraph communications had been intercepted unconstitutionally by warrantless electronic surveillance conducted by the National Security Agency (NSA).\textsuperscript{478}

\textsuperscript{474} For statutes that require information to be reported to Congress, but do not specifically provide for judicial enforcement, see, \textit{e.g.}, \textit{Classified Information Procedures Act}, 18 U.S.C. app. \S 13 (1982) (requiring the Attorney General to report to the Intelligence Committees on cases that are not prosecuted because classified material might be disclosed); statutes cited supra note 216.

\textsuperscript{475} See infra note 505.


\textsuperscript{477} 598 F.2d 1 (D.C. Cir. 1978). This case, referred to below as \textit{Halkin I}, was followed by a second decision that is referred to as \textit{Halkin II}. See infra note 488.

\textsuperscript{478} The National Security Agency, a branch of the Defense Department, uses satellites and other methods to intercept and collect international radio and telephone communications. \textit{See generally} J. \textit{Bamford, The Puzzle Palace: A Report on America’s Most Secret Agency} (1982). Although President Truman created the NSA without specific statutory authorization,
The communications were allegedly intercepted pursuant to two NSA programs that monitored the activities of individuals who opposed the Vietnam War. In *Halkin I*, the Secretary of Defense argued that the case should be dismissed because the state secrets privilege prohibited disclosure of information about the NSA's interception of telephone and telegraph communications and thus prohibited disclosure of whether plaintiffs' messages had been intercepted. According to the government, disclosing the identity of persons whose messages had been intercepted might reveal which electronic circuits are monitored by the NSA and thus permit countermeasures by hostile governments. The government also argued that the technical nature of the surveillance and the Secretary's expertise militated against judicial review.

The District of Columbia Circuit endorsed the government's position and upheld the privilege. The court concluded that the plaintiffs would be unable to prove their case without the privileged material and therefore dismissed the complaint. The court declined to shift


The first program, MINARET, was a surveillance program that added the names of as many as 1200 Americans, including antiwar and civil rights activists, to the words that triggered the NSA's computer recording of international communications. See *Halkin I*, 598 F.2d at 4. In the second program, SHAMROCK, telegraph companies delivered copies of international telegrams to the NSA for review. See 3 INTELLIGENCE ACTIVITY REPORT, supra note 424, at 735-83. These programs were discontinued in the mid-1970s after they were exposed by committees investigating the intelligence agencies. Id. at 740-44.

*See* Brief of Official Defendants-Appellees at 29-30, *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978). The government made this argument, among others, in public documents and testimony. In addition, the government filed a set of in camera affidavits that were unavailable to the plaintiffs or to the public. *Halkin I*, 598 F.2d at 5. Moreover, the Deputy Director of the NSA also testified in camera. Id.

The government also argued that the state secrets privilege insulated the NSA from disclosing the identity of the plaintiffs whose telegraph messages were reviewed under the SHAMROCK program because the disclosure might reveal the "targeted" circuits and the technical capacity of the NSA and might have "diplomatic consequences." See *id.* at 35-36.

The technology is fragile; the risks and costs of disclosure evade exact proof. Under these circumstances, where the risks and costs are explained, a court must defer to the judgment of the Secretary of Defense rather than substitute its own, necessarily less expert and informed, judgment for that of the head of the agency in which the expert capability resides.

*Id.* at 17. The government argued that the Secretary's intelligence duties arise from the President's constitutional responsibilities under article II. *Id.* at 22. Further, the government flatly remarked that the privilege was "within the constitutional prerogatives of the executive." *Id.* at 40 n.48.

*Halkin I*, 598 F.2d at 11.

*Id.* at 5, 11.
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the burden of proof, resolve issues of fact against the defendants, or take other measures that might have compensated for the loss of the privileged evidence.\textsuperscript{485} The court emphasized that the state secrets privilege is absolute and "must head the list" of privileges.\textsuperscript{486} Therefore, courts "should accord the 'utmost deference' to executive assertions" of the state secrets privilege.\textsuperscript{487}

In \textit{Halkin II},\textsuperscript{488} the same plaintiffs alleged that they had been subject to unconstitutional surveillance by the CIA because of their anti-war activity.\textsuperscript{489} The plaintiffs also alleged that the CIA had included their names on NSA "watch lists," through which the CIA requested that the NSA monitor their telephone and telegraph communications.\textsuperscript{490} Although the government conceded that some of the plaintiffs had been under surveillance, President Carter's CIA Director, Stansfield Turner, refused to disclose additional information, including in most instances the identities of the plaintiffs involved and the techniques used for surveillance.\textsuperscript{491} Turner invoked the state secrets privilege and claimed that releasing the information would identify CIA sources and endanger diplomatic relations by disclosing cooperative arrangements with foreign intelligence agencies.\textsuperscript{492}

\textsuperscript{485} See \textit{id}. at 10-11.
\textsuperscript{486} \textit{Id}. at 7.
\textsuperscript{487} \textit{Id}. at 9 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)). Commenting on this result, Judge Bazelon observed that the decision is dangerously close to an open-ended warrant to intrude on liberties guaranteed by the Fourth Amendment. . . . [U]pholding the privilege in this case precludes all judicial scrutiny of the signals intelligence operations of NSA, regardless of the degree to which such activity invades the protection of the Fourth Amendment. . . . As elaborated by the panel, the privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens who are the target of the government's surveillance.

598 F.2d at 12-14 (Bazelon, J., dissenting from denial of rehearing en banc).

\textsuperscript{488} Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

\textsuperscript{489} Plaintiffs alleged that they had been subject to surveillance by the CIA in Operation CHAOS, which investigated certain American citizens who opposed the Vietnam War—purportedly to determine whether they were connected with foreign interests. \textit{See id}. at 981-84. \textit{See generally} 3 \textit{INTELLIGENCE ACTIVITY REPORT}, \textit{supra} note 424, at 679-721 (describing Operation CHAOS).

\textsuperscript{490} Although the plaintiffs' action against the NSA defendants was dismissed in \textit{Halkin I}, plaintiffs claimed that CIA officials were liable for submitting the watch lists to the NSA. \textit{Halkin II}, 690 F.2d at 984. Even though \textit{Halkin I} precluded the plaintiffs from attempting to prove that their messages had actually been intercepted by the NSA, they argued that there should be a presumption "that the submission of a name [to NSA] resulted in interception of the named person's communications." \textit{Id}.

\textsuperscript{491} \textit{See id}. at 985.

\textsuperscript{492} In his public affidavit, Turner asserted that in significant part the information recoverable from the files of the CHAOS project is information either supplied by foreign governmental liaison sources or otherwise witnessing their cooperation. While in a general sense it may be acknowledged that CIA derives information through liaison arrangements with foreign governments, the fact of CIA interaction with authorities of a particular foreign government may not be acknowl-
The court accepted the government's position, and upheld the privilege on the ground that "the disclosures sought here pose a 'reasonable danger' to the diplomatic and military interests of the United States."\(^4\) According to the court, disclosure "could strain diplomatic relations... by generally embarrassing foreign governments who may wish to avoid... allegations of CIA or United States involvements," or by subjecting those governments to "political or legal action."\(^5\) Since the plaintiffs conceded that they could not prove their case against CIA officials without the surveillance information, and because declaratory and injunctive relief were found inappropriate, the court affirmed the trial court's dismissal of the action.\(^6\)

The *Halkin* litigation is the most striking of several recent assertions of the state secrets privilege that ultimately resulted in the denial or impairment of constitutional claims of individuals against executive officers.\(^7\) Although the discussion in the *Halkin* cases is cast in terms
of an evidentiary privilege, the result denies any protection or vindication of individual constitutional rights that might otherwise have been available through injunctive relief or damages. As Judge Bazelon noted, these cases insulate officials from judicial redress for constitutional violations and effectively extinguish the underlying constitutional right.\textsuperscript{497} Indeed, under the \textit{Halkin} doctrine, judicial examination of entire classes of constitutional violations may be foreclosed.\textsuperscript{498} The \textit{Halkin} cases accomplish this result by executive decision, without legislative balancing and with only the most superficial judicial review.

Whenever executive interests conflict with individual constitutional rights, however, Congress should initially balance the government and individual interests.\textsuperscript{499} If an executive interest is cast as an "evidentiary privilege," congressional balancing is still necessary if the effect of the privilege is to impair redress for constitutional violations. In those instances—as in cases in which more "substantive" executive measures threaten individual rights—there is a significant danger that the Executive will conduct a balancing of the government and individual constitutional interests that is unreliable and skewed in favor of the government's own interest.\textsuperscript{500} An executive official who possesses secret information may well overvalue the strength of the Executive's secrecy interest and undervalue the countervailing constitutional interest.\textsuperscript{501} For example, the fear of diplomatic embarrassment from the disclosure of American connections with foreign intelligence services, asserted by the government in \textit{Halkin}, is sufficiently doubtful as a counterweight to individual constitutional rights that some judgment other than the Executive's own decision should be required. Moreover, the likelihood of distorted executive judgment is particularly severe in

\textsuperscript{497} Halkin I, 598 F.2d at 13-14 (Bazelon, J., dissenting from denial of rehearing en banc).
\textsuperscript{498} See id. at 12-14 ("[U]pholding the privilege in this case precludes all judicial scrutiny of the signals intelligence operations of NSA."); see also Statement of ACLU Attorney, Mark H. Lynch, Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee 1-2 (June 8, 1983) ("[T]he recent expansion of the state secrets privilege by the courts has made it virtually impossible for citizens to challenge electronic surveillance which is claimed to concern foreign intelligence or counterintelligence matters.").
\textsuperscript{499} See supra Part III.
\textsuperscript{500} See supra notes 271-73 and accompanying text.
\textsuperscript{501} Cf. Calhoun, \textit{Confidentiality and Executive Privilege}, in \textit{The Tethered Presidency} 172-73 (1981) (noting that each branch, particularly the executive, thinks that it "owns" the information it develops); \textit{1977 FOIA Hearings}, supra note 278, at 73 (statement of Senator Abourezk) (noting the danger of politically motivated overclassification).
these cases because a decision in favor of secrecy may insulate executive officers themselves from possible liability.

The judiciary, however, has been willing to defer to the Executive on the state secrets privilege. Most appellate courts agree that "the trial judge should accord considerable deference to recommendations from the executive department" on questions of the privilege.502 Furthermore, courts have concluded that the privilege is absolute:503 if a state secret of any level of importance is present, the standard prevents disclosure regardless of the strength of any countervailing constitutional or other individual interest.504 Thus, judicial deference is built into the standard; a court cannot consider individual rights and must defer to an executive determination that may have undervalued or ignored those rights. Vindication of individual constitutional rights, however, should not be confided primarily to the Executive when its interests are adverse to those rights.

Consequently, when the state secrets privilege endangers redress for constitutional violations, the privilege ordinarily should not defeat liability in the absence of a specific authorizing statute. Such a statute would represent a balancing of individual constitutional interests with executive secrecy interests, a balancing that the Executive cannot undertake objectively and that the judiciary has declined to perform. Although a statute may not be able to answer all questions, substantial congressional guidance should be required. Without statutory guidance, the courts should not permit the privilege to defeat redress for plausibly asserted constitutional violations. In such cases, the information should not be withheld unless damages are awarded to the plaintiffs or unless it is possible to make adequate procedural provisions to compensate plaintiffs for the loss of the evidence.505

502. Ellsberg v. Mitchell, 709 F.2d 51, 58 (D.C. Cir. 1983). Moreover, courts should be willing "to credit relatively speculative projections of adverse consequences" asserted by the Executive. Id. at 58 n.35.

503. See, e.g., Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978).

504. The litigant's need for the information is considered only to determine the extent of the disclosures the government must make publicly or in camera to demonstrate that state secrets are actually involved. See United States v. Reynolds, 345 U.S. 1, 11 (1953). For proposals to change the doctrine and require a balancing of countervailing interests in determining the existence of the privilege, see Zagel, The State Secrets Privilege, 50 Minn. L. Rev. 875, 910 (1966); Note, supra note 476, at 584-89.

505. In many state secret cases, the defendant is a present or former government official, rather than the United States government. Because it may be unfair for a privilege claim by the government to result in the liability of an individual, indemnification by the government might be called for. Cf. Ellsberg v. Mitchell, 709 F.2d 51, 69 n.74 (D.C. Cir. 1983) (suggesting indemnification to resolve a similar problem).

Whether any statutes currently provide for a state secrets privilege is a complex question that should be resolved in litigation. The Federal Rules of Evidence contemplate that the courts will
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B. Executive Immunity from Suit

The second executive privileges and immunities issue litigated during the Carter administration was the extent to which the President and other executive officials are immune from tort liability for unconstitutional actions. This immunity, which is similar to the state secrets privilege in its potential impact on individuals, surfaced in a series of civil actions filed against former President Nixon and other officers for alleged violations of constitutional rights. A final vestige of the Nixon era, these cases again posed issues of executive accountability and, in develop common law privileges, but do not explicitly authorize a state secrets privilege or any other governmental privilege that might defeat the vindication of constitutional rights. See Fed. R. Evid. 501. The history of the Federal Rules, moreover, is rather unfavorable to a broad state secrets privilege. Congress rejected the section on privileges in the proposed Federal Rules, in part because of the breadth of the proposed state secrets and governmental information privileges included by the Advisory Committee at the suggestion of the Nixon administration. See Berger, How the Privilege for Governmental Information Met Its Watergate, 25 Case W. Res. L. Rev. 747 (1975).

With respect to the NSA and the CIA, however, more specific statutes must be considered. A 1959 statute, for example, states that nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.


Although the NSA and CIA statutes exempt some material from disclosure under the FOIA, it does not necessarily follow that these provisions authorize withholding information from discovery in cases like Halkin. Cf. Socialist Workers Party v. Attorney General of the United States, No. 73 Civ. 3160 (S.D.N.Y. June 10, 1977) (finding that NSA and CIA statutes do not create a privilege, although the Constitution does). The interests in favor of disclosure are stronger in a civil action for violation of constitutional rights than in a FOIA action in which the claimant need only have a desire to obtain the information. More fundamentally, however, it seems unlikely that these statutes were intended to resolve the conflict between executive secrecy and the vindication of individual constitutional rights typified by cases such as Halkin. Nor do these statutes address the question of whether the loss of evidence in state secrets cases should be redressed by reversing the burden of proof or through some other procedural technique when constitutional rights are at issue.

the views of some, raised the question of whether the President and other officials are subject to law. Although in *United States v. Nixon* the Supreme Court concluded that values of efficient administration do not give an incumbent President absolute immunity from judicial process, the Court had no occasion to consider whether similar considerations insulate a former or incumbent President from tort liability for actions taken while in office.

The resolution of this issue again requires balancing executive and individual interests, although from a somewhat different perspective than the balancing discussed in Part III. Like the state secrets decisions, these cases raised the question of whether effective judicial redress for possible infringements of constitutional rights should give way to the claimed imperatives of executive power. In approaching this question, the Carter administration took the position that claims of executive power should prevail over the redress of constitutional rights. Therefore, the Administration's position on executive immunity was in accord with its position on the state secrets privilege and also with its positions favoring executive power against individual liberties, asserted more directly in the cases considered in Part III. In each of these areas, strong executive claims pose the same danger: judicial acceptance of executive assertions without a statute risks deference to a judgment in which government interests have been overvalued and individual constitutional interests undervalued or ignored.

The first case in this series was *Butz v. Economou*, in which a

506. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982) (White, J., dissenting) (Absolute presidential tort immunity "places the President above the law. It is a reversion to the old notion that the King can do no wrong."); 68 CORNELL L. REV. 236 (1983).


508. Id. at 706.

509. Unlike the government's positions in the cases discussed above, arguments for executive immunity were advanced by the Justice Department on behalf of individual litigants—present and former government employees being sued in their individual capacities—rather than on behalf of the government itself. It is at least theoretically possible, therefore, that these positions did not coincide with the actual views of the Administration, but rather were positions that the Department thought it should assert on behalf of its individual clients as a matter of professional responsibility. This possibility is diminished, however, by a Justice Department policy that requires a former or present government employee to be represented by private counsel, rather than by the Department, if "the adequate representation of the employee requires the making of an argument which conflicts with a government position." See Letter from Assistant Attorney General Barbara Babcock to the Senate Subcommittee on Administrative Practice and Procedure (Oct. 4, 1977), reprinted in *Staff of the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95TH CONG., 2D SESS., JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS 315, 350 (Comm. Print 1978).

commodities dealer sued President Nixon's Secretary of Agriculture for allegedly violating the first amendment by retaliating against the plaintiff for his criticism of the Agriculture Department.\(^{511}\) Representing the former Secretary, the Carter administration argued that executive officials have an absolute tort immunity for unconstitutional actions taken within the scope of their authority.\(^{512}\) According to the government, a less inclusive immunity would impair the efficiency of government by instilling a fear of liability in executive officers.\(^{513}\) The Justice Department acknowledged that an absolute immunity might prevent tort liability for abuses of power by the Nixon Administration, a specter from the very recent past.\(^{514}\) The government argued, however, that this result was a regrettable but necessary price to pay for a vigorous and efficient executive branch.\(^{515}\) In a 5-4 decision, the Supreme Court rejected the government's position and concluded that the Secretary of Agriculture was not absolutely immune from civil liability for unconstitutional acts performed in the general course of his official activity.\(^{516}\) Rather, the Court found that the Secretary possessed only a qualified immunity, which insulates him from liability for official action unless he "knows or should know" that his acts are unconstitutional, or unless he acts with the "malicious intention" of causing injury.\(^{517}\)

In a subsequent case that also arose from events of the Nixon era, the Justice Department under President Carter asserted absolute tort immunity on behalf of the former President and his advisors Halderman, Kissinger, and Mitchell. In *Halperin v. Kissinger*,\(^ {518}\) a former National Security Council official sought damages from former President Nixon and his advisors for the warrantless wiretapping of his tele-

\(^{511}\) *Id.* at 482-83.


\(^{513}\) See Brief for Petitioners, *supra* note 512, at 28-31, reprinted in 104 LANDMARK BRIEFS at 88-91.

\(^{514}\) *Id.* at 34-35, reprinted in 104 LANDMARK BRIEFS at 94-95.

\(^{515}\) *Id.* at 33, reprinted in 104 LANDMARK BRIEFS at 93.

\(^{516}\) 438 U.S. at 494-95.

\(^{517}\) *Id.* at 498-500, 506-07 (citing Scheuer v. Rhodes, 416 U.S. 232 (1974), and Wood v. Strickland, 420 U.S. 308 (1975) (state officials)). According to the Court, the finding of a qualified immunity is "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507. Further, the Court found that subordinate officials in the Department of Agriculture who perform adjudicatory or prosecutorial functions are entitled to the absolute immunity that is extended to judges and prosecutors generally. *Id.* at 508-17.

\(^{518}\) 606 F.2d 1192 (D.C. Cir. 1979), *aff'd per curiam by an equally divided Court*, 452 U.S. 713 (1981).
phone.\(^{519}\) *Halperin* was argued against the background of *Butz*, in which the qualified immunity doctrine was applied to cabinet members, but not to the President. Therefore, the Justice Department argued that the office of President possesses special constitutional attributes that require an *absolute* immunity from civil liability for violations of individuals' constitutional rights.\(^{520}\) According to the government, absolute presidential immunity was justified by history, precedent, and policy.\(^{521}\) The government also opposed qualified presidential immunity because the resulting inquiry into the President's state of mind might force him "to reveal not only the intimate details of executive decision-making but also the confidential and highly sensitive information on which he based his actions."\(^{522}\) This result was "directly at odds" with the "presumptive privilege" of confidentiality recognized in *United States v. Nixon*.\(^{523}\) The government argued that an absolute privilege is especially important in national security and foreign affairs—supposedly at issue in the *Halperin* case—because "secrecy is essential to the proper execution of these presidential powers."\(^{524}\)

The Supreme Court in *Halperin* was equally divided on the question of presidential immunity, thereby affirming the circuit court's con-

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\(^{519}\) *Id.* at 1195. President Nixon ordered the wiretapping in an attempt to discover the source of various press disclosures, including disclosure of the secret bombing of Cambodia. *Id.* at 1196.

\(^{520}\) According to the government, the President has an "absolute immunity inherent in the Office . . . under Article II of the Constitution . . . ." Brief for the Petitioners at 17, *Kissinger v. Halperin*, 452 U.S. 713 (1981), reprinted in *123 Landmark Briefs*, supra note 153, at 524. The government also asserted that the lower court committed an "unwarranted assertion of judicial authority in personal damage actions to engage in routine oversight of the President's official conduct" when it found liability. *Id.* at 17-18, reprinted in *123 Landmark Briefs* at 524-25.

\(^{521}\) "Damages actions against the President challenging the legality of his official acts would constitute a substantial intrusion into the President’s constitutional responsibilities. The risk of personal liability would serve to inhibit the fearless and decisive exercise of presidential authority . . . ." *Id.* at 26, reprinted in *123 Landmark Briefs* at 533. The government also noted that sanctions other than tort liability were available; it observed that the acts that gave rise to Halperin's civil action against former President Nixon formed a basis for the second article of impeachment approved by the House Judiciary Committee. *Id.* at 30 n.28, reprinted in *123 Landmark Briefs* at 537 n.28.

\(^{522}\) *Id.* at 33, reprinted in *123 Landmark Briefs* at 540.

\(^{523}\) *Id.* (citing *Nixon*, 418 U.S. 683, 708 (1974)).

\(^{524}\) *Id.* at 39, reprinted in *123 Landmark Briefs* at 546. Moreover, the government argued that in these areas “vigorous and resolute” presidential action is particularly necessary and that litigation would “be beyond the ken of the trier of fact.” *Id.* at 40, reprinted in *123 Landmark Briefs* at 547.

The Justice Department also argued that an absolute tort immunity extended to the President's advisors Kissinger, Haldeman, and Mitchell. Since the President delegates the performance of various duties, the government argued for a derivative immunity for delegated authority. *Id.* at 44-48, reprinted in *123 Landmark Briefs* at 551-55. Moreover, the government asserted that anything less than absolute immunity for advice given to the President would impair the President's privilege of confidential communication. *Id.* at 48-49, reprinted in *123 Landmark Briefs* at 555-56.
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cclusion that the President had only a qualified immunity.\footnote{525} In the later case of
\textit{Nixon v. Fitzgerald},\footnote{526} however, the Court held that Nixon, "as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts," at least when Congress has not expressly acted to create liability.\footnote{527} The President's immunity extends to actions "within the 'outer perimeter' of his official responsibility."\footnote{528} According to the Court, absolute tort immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."\footnote{529} In a companion case, the Court held that presidential advisors possess only a qualified immunity.\footnote{530} This holding, however, expanded the protection given to all executive officers because it eliminated the element of "subjective" bad faith or "malicious intention" as a ground for withdrawing the immunity.\footnote{531} Moreover, the Court suggested that presidential advisors and other executive officers may possess absolute immunity when carrying out national security and foreign policy functions.\footnote{532}


\footnote{526} 457 U.S. 731 (1982).


\footnote{528} \textit{Id.} at 756.

\footnote{529} \textit{Id.} at 749. In subsequent proceedings in \textit{Halperin}, a district court recently applied the \textit{Fitzgerald} standard and held that President Nixon was absolutely immune from liability for the wiretapping of Halperin's telephone. Halperin v. Kissinger, 578 F. Supp. 231 (D.D.C. 1984).

\footnote{530} Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).

\footnote{531} \textit{Id.} at 815-19. A district court applied the revised test of qualified immunity set forth in \textit{Harlow} and found that President Nixon's advisors Kissinger, Haldeman, and Mitchell were immune from liability for the Halperin wiretap. \textit{See} Halperin v. Kissinger, 578 F. Supp. 231 (D.D.C. 1984); \textit{see also} Zweibon v. Mitchell, 720 F.2d 162 (D.C. Cir. 1983) (holding a former Attorney General immune under the \textit{Harlow} test for electronic surveillance of the Jewish Defense League).

\footnote{532} Harlow v. Fitzgerald, 457 U.S. 800, 812 & n.18 (1982); \textit{see The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 226-36 (1982)}. This suggestion is ominous because an absolute immunity for national security and foreign policy functions "could be used to shield large segments of executive branch operations that offer especially potent opportunities for abuse—including the work of the Defense and State Departments, the CIA, and the FBI." \textit{Id.} at 236.

Executive officials also may have the benefit of the absolute immunity created for certain judicial and quasi-judicial functions. \textit{See supra} note 517. The absolute immunity for prosecutorial acts, for example, insulated former Attorney General John Mitchell from claims that he maliciously prosecuted Vietnam War demonstrators to prevent them from exercising first amendment rights. Dellums v. Powell, 660 F.2d 802 (D.C. Cir. 1981). Former attorneys general, however, are not absolutely immune from liability for acts unrelated to the judicial process. \textit{See, e.g.,} Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) (warrantless electronic surveillance), \textit{cert. denied}, 453 U.S. 913 (1981); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (supervision of police).

In a related legislative proposal, the Carter administration sought to amend the Federal Tort
In *Fitzgerald*, the Court neglected the appropriate role of Congress in balancing claims of executive power and individual constitutional rights. Judicial deference to executive claims of an absolute tort immunity for constitutional violations presents acute dangers in the absence of a statute establishing the immunity and regulating the circumstances in which it can be asserted. The successful invocation of an absolute tort immunity may well deny any redress for the defendant's violation of constitutional rights. Moreover, the Executive is most likely to overvalue its own interests and undervalue liberty interests in the absolute immunity cases; what is at issue is the personal liability of executive officers, rather than an injury to government interests with which the officials may identify. The absence of a statute granting immunity, therefore, should militate against recognizing an absolute immunity. Whether the executive branch will actually be disrupted by the defense of constitutional tort actions, and whether executive officers will act with insufficient vigor and resolution through fear of liability, are basically questions of legislative fact. Before a court should defer to such claims, Congress should make its own evaluation of these assertions. To require legislative action before redress for constitutional rights can be denied by an absolute executive immunity is to recognize the grant of power to Congress to make all laws "necessary and proper" to effectuate not only its own powers, but those of the other branches as well. A requirement of legislative action acknowledges that when constitutional rights are involved, the creation of an absolute immunity

Claims Act to grant absolute immunity to all executive employees against tort liability for acts within the scope of their employment. In return, the Administration's proposal provided for government liability for certain constitutional torts of its employees, eliminated a good faith defense, allowed liquidated damages, and permitted the victim to participate in agency disciplinary proceedings against the employee. See Amendments to the Federal Tort Claims Act: Joint Hearings on S. 2117 Before the Subcomm. on Citizens and Shareholders Rights and Remedies and the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 5-20 (1978) (testimony of Griffin B. Bell, Attorney General of the United States) [hereinafter cited as *Federal Tort Claims Amendment Hearings*]. See generally Bell, Proposed Amendments to the Federal Tort Claims Act, 16 HARV. J. ON LEGIS. 1 (1979). Despite the potential for an increased frequency of recovery, however, legislators were concerned that decreased personal accountability would encourage more misconduct:

[The Administration proposal to insulate all Federal officials from civil suit, no matter how blatant and egregious their misconduct, is a serious error. To adopt that approach is to surrender the long-term interests of the American public to the immediate needs and concerns of the Justice Department. In the aftermath of Watergate, I, for one, cannot accept the tortured argument that removing individual accountability will lead to more responsible Government. *Federal Tort Claims Amendment Hearings*, supra, at 356 (statement of Sen. Percy). Ultimately, the Carter administration's proposals were not enacted. For more recent proposals for legislative change, see Madden, Allard & Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469 (1983).

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must follow a congressional determination that the immunity is indeed “necessary and proper” for the protection of executive interests.\textsuperscript{534}

Since there is no general statutory right of action against federal officers for constitutional torts, damage claims for constitutional violations may rest on implied causes of action without explicit congressional authorization.\textsuperscript{535} Despite the judicial origin of these actions, it does not follow that the Court should be free to create absolute immunities for executive officers without congressional guidance. Recognition of an implied constitutional cause of action and the creation of an absolute executive immunity rest on different bases. Recognition of an implied constitutional cause of action rests on a decision that basic constitutional values require a remedy for violations of “personal interests in liberty,” and a recognition that the traditional remedy for these violations is damages.\textsuperscript{536} Creation of an absolute tort immunity, however,

\textsuperscript{534} Cf. Barr v. Matteo, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting) (finding absolute executive immunity “demands the resolution of large imponderables which one might have thought would be better the business of the Legislative Branch”); Van Alstyne, supra note 476, at 119 (noting that the “Constitution expressly commits [most] questions of executive convenience and expediency solely to Congress”).

This Article urges that absolute immunity for constitutional torts should be unavailable without a statute creating and regulating the immunity. Since this position rests on the need to protect constitutional rights, any existing absolute immunity for nonconstitutional torts would be unaffected. See, e.g., Barr v. Matteo, 360 U.S. 564 (1959) (finding absolute immunity for a nonconstitutional tort); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896) (same). Moreover, a judicially devised qualified immunity for constitutional torts might not be affected because that immunity may protect the fairness interests of individual officers rather than the institutional interests of the Executive. It may be unfair to impose personal liability on an officer who had no reason to believe that acts taken for the benefit of the public were unconstitutional. When creating a qualified immunity, therefore, the court might balance two sets of individual fairness interests, instead of balancing individual against government interests. But cf. Scheuer v. Rhodes, 416 U.S. 232, 240-42 (1974) (emphasizing institutional interests in the recognition of a qualified immunity). No individual fairness interest can exist, however, when the official knew or should have known that his actions were unconstitutional. Thus, a claim of absolute immunity can be justified only by finding that the efficient functioning of the executive branch outweighs the individual constitutional interests. This is a finding that should be made by Congress rather than by the Executive.

\textsuperscript{535} See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In some cases, however, there may also be a statutory cause of action against a federal officer. The complaint in Fitzgerald, for example, asserted three causes of action: two based on alleged statutory violations that arguably gave rise to an implied statutory right of action, and one based on the first amendment. 457 U.S. at 740 & n.20.

\textsuperscript{536} In Bivens, for example, the Court seemed to rest its opinion on three propositions, each of which involves the assessment of constitutional values rather than the determination of “legislative fact.” First, the fourth amendment “guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.” Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971). Second, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Id. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). Third, “damages [historically] have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” 403 U.S. at 395; see Nixon v. Fitzgerald, 457 U.S. 731, 789 (1982) (White, J., dissenting).

Although Justice Harlan stated in Bivens that the Court should weigh “policy considerations” in recognizing constitutional tort actions, even his opinion ultimately depends on constitutional

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does not rest upon an equivalent decision of principle, but depends instead upon a debatable assessment of legislative fact. Underlying absolute immunity is a finding that government officials will not act with sufficient vigor because of possible constitutional tort liability.\textsuperscript{537} This conclusion, and the assessment of its relative importance compared to individual rights, contains a large, irreducible element of factual judgment. If the court upholds an absolute immunity, it will necessarily defer to one branch or another with respect to the assessment and weighing of these factual issues. When Executive and individual constitutional interests are opposed, this assessment and weighing should be undertaken by Congress in the first instance and not by the Executive.\textsuperscript{538}

V. Conclusion

President Carter took office with rhetoric that presaged a degree of collaboration and cooperation with Congress that would have been unique among recent Administrations. The promise of the rhetoric, however, was only partially fulfilled. The Administration’s style lacked the dominant concern for executive aggrandizement that marked the Nixon administration, and the Carter administration did

values, such as the judiciary’s “particular responsibility” to protect constitutional rights and the importance of uniform federal law. 403 U.S. at 407, 409 (Harlan, J., concurring). Although later cases observe that \textit{Bivens} depended partially on the value of deterring future offenses, see, e.g., Carlson v. Green, 446 U.S. 14, 25 (1980), that factor is not mentioned prominently in the \textit{Bivens} opinion and the decision is justifiable without it.

\textsuperscript{537} Cf. Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949) (noting that the fear of inhibiting vigorous executive action is the motive for an absolute tort immunity), \textit{cert. denied}, 359 U.S. 949 (1950).

\textsuperscript{538} The Court in \textit{Fitzgerald} considered tort immunity only and had no occasion to discuss the extent of the President’s criminal liability for acts committed during his term—a liability which the Constitution acknowledges in the period following impeachment and removal. U.S. Const. art. I, \S 3. After the Watergate affair, Congress was concerned that the potential criminal liability of high executive officers might be ignored by a Justice Department under the President’s control. Therefore, Congress enacted the Ethics in Government Act, which requires the Attorney General to appoint an independent special prosecutor to investigate criminal charges against the President or other high level officials. 28 U.S.C. \S\S 591-598 (Supp. V 1981). \textit{See generally} Kramer & Smith, \textit{The Special Prosecutor Act: Proposals for 1983}, 66 Minn. L. Rev. 963 (1982); Simon, \textit{The Constitutionality of the Special Prosecutor Law}, 16 U. Mich. J.L. Ref. 45 (1982). The Carter administration supported the basic provisions of this legislation. \textit{See Special Prosecutor Legislation: Hearings on H.R. 2835 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 2-23 (1977) (testimony of John M. Harmon, Acting Assistant Attorney General); Remarks by President Carter on Signing the Ethics in Government Act into Law, 2 Pub. Papers: Jimmy Carter 1854-55 (1978) (stating that the special prosecutor provision “is necessary in response to the lessons that we have learned to the embarrassment of our country in the past”). After experience with the Act, Carter administration officials urged that the statute be amended to narrow its coverage and otherwise reduce the stringency of its provisions. \textit{See, e.g.}, Civiletti, \textit{Post-Watergate Legislation in Retrospect}, 34 Sw. L.J. 1043, 1053-56 (1981). Some of these suggestions were embodied in the Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (amending 28 U.S.C. \S\S 591-598).
accommodate congressional authority in several areas. In certain in-
stances, however, President Carter asserted executive power as force-
fully as other recent Presidents. In domestic affairs, he sought to
employ remote statutes in a manner that closely resembled an assertion
of "inherent" executive power. In foreign affairs, he made extensive
assertions of authority in terminating the Taiwan Mutual Defense
Treaty, seeking to rescue the hostages, and entering into the Iranian
accords. Moreover, in Snepp and other important cases the Carter ad-
ministration claimed executive power to act against the constitutionally
protected interests of individuals without explicit statutory authority.
Although President Carter generally favored a more liberal informa-
tion policy, his Administration invoked a broad state secrets privilege
against individuals seeking redress for alleged constitutional violations,
and the Administration argued for an absolute executive tort immunity
against constitutional claims.

In analyzing the separation of powers issues posed during the
Carter administration, this Article has employed three approaches.
First, basic policymaking authority ordinarily should be allocated to
Congress rather than to the President because of the former's represent-
ative and deliberative process. Accordingly, as the economic and social
significance of the policy decision increases, the need for congressional
participation also increases. This principle should be applied in both
domestic and foreign affairs, but because of its generality courts may
have to defer to executive judgments in certain doubtful cases. Ulti-
mately, however, Congress has the authority to determine the alloca-
tion of power more precisely under the necessary and proper clause.
Second, when Executive action threatens the constitutional rights of in-
dividuals, the action should be impermissible if it is not specifically
authorized by Congress. A legislative rule is necessary to mitigate the
danger of impermissible political motives and to reduce the likelihood
that a preliminary balancing by the Executive of government and indi-
vidual interests will be distorted in favor of the Executive's interests.
Finally, this Article has argued that executive privileges and immuni-
ties ordinarily should be analyzed in light of the underlying values im-
plicated by the privilege or immunity. When individual constitutional
rights are not at stake, the judiciary may balance competing interests,
subject to more explicit regulation by Congress. In contrast, an execu-
tive privilege or immunity that denies redress for a possible violation of
constitutional rights should not be recognized without explicit Congres-
sional authorization.

From an historical perspective, an examination of the Carter ad-
ministration also suggests some more general reflections. President Carter was faced with severe internal and foreign crises; these crises subjected him to intense political pressure which may have impelled him to assert executive power for the purpose of achieving specific substantive ends. For example, President Carter acknowledged the pressures exerted on his Administration by inflation. The clearest example, however, was the Iranian hostage crisis, an event that gave rise to four of the major problems discussed in this Article: the attempted rescue, the Iranian executive agreement, Agee's passport litigation, and the immigration controls on Iranian students. A grave political crisis of this sort engenders pressure for strong executive action and tends to encourage the disregard of structural considerations. Promises given in advance to observe structural limitations—the War Powers Resolution, for example—may be overwhelmed by the pressures of the actual event. In such cases, the promises need not be flatly repudiated; rather, the Executive may give a narrow interpretation to their abstract terms. Narrow interpretation may be coupled with a claim of exclusive competence to interpret the statutory regime. An Executive may believe in general that structural limitations safeguard various forms of political liberty. Nonetheless, because political attention and the pressure for concrete results are focused on him, the President may feel compelled to assert extensive power in the pursuit of a specific end regardless of his general views on the importance of structural limitations.

A related point suggested by the history of this period is that one must view the Executive's claims of self-restraint with great reserve. Perhaps executive self-limitation may sometimes be effective. As lasting restrictions, however, the Carter administration's attempts at executive self-limitation were ineffectual. The Administration's Guidelines on secrecy agreements, for example, lacked substance from the outset, and the Guidelines and other limiting regulations were withdrawn swiftly by the following Administration. Moreover, it seems likely that such guidelines—even if they remain in effect—are also subject to the pressures of individual cases, which may result in a narrow executive interpretation of its own attempts at self-limitation.

Recognition of these factors leads to a conclusion that is related to broader historical themes. The history of the Nixon administration provides a contemporary illustration of the dangers that republican theorists have seen historically in excessive executive power. The history of the Carter administration further suggests that, in order to mitigate those dangers, it is not sufficient to seek executive officers who hold abstract views favorable to the limitation of executive power.

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When those individuals are subject to the pressures of executive office, they can succumb to the apparent needs of the moment or pacify themselves with attempts at self-limitation that may well be ephemeral. Moreover, in the absence of legislative guidance, the courts may not be reliable in restraining executive power. The history of this period emphasizes that if executive policymaking authority is to be restricted, these restrictions must be imposed by clear and sustained legislative action, rather than by reliance on executive forbearance or self-limitation by even the most willing and accommodating executive officers.