

1976

Congressional Power to Demand Disclosure of Foreign Intelligence Agreements

Gordon B. Baldwin

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Gordon B. Baldwin, *Congressional Power to Demand Disclosure of Foreign Intelligence Agreements*, 3 Brook. J. Int'l L. (1976).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol3/iss1/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

CONGRESSIONAL POWER TO DEMAND DISCLOSURE OF FOREIGN INTELLIGENCE AGREEMENTS*

Gordon B. Baldwin**

INTRODUCTION

Whether Congress has the constitutional power to demand the disclosure to it of all international agreements, regardless of scope, effect, and subject, was raised in August 1972 when it passed the Case Act.¹ The Act requires the Secretary of State to transmit to Congress the text of any international agreement within sixty days of its effective date. However, if the President decides that the public disclosure of a particular agreement would be prejudicial to the national security of the United States, the agreement, instead of being transmitted to Congress, may be transmitted to the Senate Foreign Relations Committee and to the House Committee on International Relations under an "appropriate injunction of secrecy."²

The Act, on its face, applies only to "texts."³ Hence, oral international agreements need not be disclosed. Furthermore, the Act binds only the Secretary of State. Agreements executed by other executive branch departments need not be transmitted to Congress unless the Secretary, in some manner, is able to com-

* This article was begun while the author was serving as Counselor on International Law in the Department of State. However, the views expressed herein are those of the author and not necessarily those of the United States Government or the Department of State.

** Professor of Law, University of Wisconsin; B.A., Haverford College, 1950; LL.B., Cornell University, 1953.

1. 1 U.S.C. § 112(b) (Supp. V, 1975), *amending* 1 U.S.C. § 112 (1970). The Act reads:

The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

Id. The name of the Committee on Foreign Affairs of the House of Representatives was changed to Committee on International Relations on March 19, 1975, by H.R. Res. 163, 94th Cong., 1st Sess.

2. *Id.*

3. *Id.*

mand their submission to him for transmission.

This article concerns the narrower question of Congress' right to demand the text of intelligence agreements with foreign nations. This right depends upon the strength of Congress' claim of disclosure as compared to the Executive's claim of confidentiality. The article will examine the historical, legislative, and judicial bases of the Executive's right to withhold information from Congress or the public.

I. THE NATURE OF "INTELLIGENCE AGREEMENTS"

International arrangements involving the exchange of information are commonplace⁴ and are usually uncontroversial. Were it not for the cost to a foreign country of obtaining the information, such agreements often would be unnecessary because the political, scientific, technical, and economic information exchanged is normally available within the United States. Even an agreement concerning the exchange of unspecified classified information will not cause controversy if the precise scope and nature of the exchange is determined solely by the United States. Virtually all international agreements establishing information exchange arrangements are routinely published and made available to Congress and the public; ordinarily, no question of a right to withhold them arises.⁵

Intelligence agreements, however, are an exception.⁶ A com-

4. Numerous international agreements specifically calling for the exchange of information are indexed in *Treaties in Force* (1976) under such topics as Atomic Energy (agreements for cooperation concerning civil uses of atomic energy); Defense (military assistance programs); Economic and Technical Cooperation; Scientific Cooperation, Mapping, Education, Patents, and Drugs.

5. Published international agreements establishing standards for the protection of classified information include: North Atlantic Treaty Organization Agreement on the Communication of Technical Information for Defense Purposes, Feb. 7, 1971, 22 U.S.T. 347, T.I.A.S. No. 7064; Agreement with Norway relating to the Safeguarding of Classified Information with annex, Feb. 26, 1970, 21 U.S.T. 462, T.I.A.S. No. 6836; Agreement between the Parties to the North Atlantic Treaty for Cooperation Regarding Atomic Information, Mar. 12, 1965, 16 U.S.T. 109, T.I.A.S. No. 5768, 542 U.N.T.S. 145; Agreement with Italy relating to the Safeguarding of Classified Information with annex, Aug. 4, 1964, 15 U.S.T. 1494, T.I.A.S. No. 5629; Agreement with Sweden relating to Mutual Defense Assistance: Security of Information, Equipment, Materials, or Services, Jan. 30, 1961, 12 U.S.T. 98, T.I.A.S. No. 4680.

6. Throughout the entire period of the CIA's history, the Agency has entered into liaison agreements with the intelligence services of foreign powers. Such arrangements are an extremely important and delicate source of intelligence and operational support. . . . Because of the importance of intelligence liaison agreements to national security, the Committee is concerned that such

plete and satisfactory analysis of these arrangements, which the executive branch might resist disclosing even in confidence to Congress, is impossible because of their sensitivity. Their number, content, scope, and sometimes their very existence are classified by the executive branch, and it would be inappropriate, possibly illegal, to discuss intelligence agreements specifically.⁷ However, sufficient material is available to provide a basic understanding of the issues created by congressional demands for their disclosure.

From secondary sources⁸ and from past and present agreements that are available, it is possible to assume that the provisions of a modern intelligence exchange agreement might include: the establishment of means for transmittal; a list of the types of information to be exchanged; methods to maintain the confidentiality and security of the materials; a prohibition against disclosure of the information to others; a provision to use the information for specified purposes only; and an agreement, within applicable laws, to protect patentable rights revealed by the information exchanged. It may also provide that the information be transmitted directly to a country's intelligence or military agency. An agreement might also provide for its termination if its existence were disclosed.⁹

agreements have not been systematically reviewed by the Congress in any fashion.

SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BK. 1, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 94-755, 94th Cong., 2d Sess. 459 (1976) (Church Committee) [hereinafter cited as FINAL REPORT, BK. 1]. Working relationships between the CIA and other foreign intelligence services are also reported in Barnds, *Intelligence Functions*, 7 REPORT OF THE COMM'N ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY 7, 16 (1975) (Murphy Commission).

7. The Church Committee recommended that an intelligence oversight committee be kept fully informed of agreements negotiated through intelligence channels. Senator Goldwater disagreed on the ground that disclosure even to Congress might jeopardize the agreements. FINAL REPORT, BK. 1, at 591. See 121 CONG. REC. S22,896 (daily ed. Dec. 19, 1975) for a reference to classified information received from a "foreign liaison service" which the Central Intelligence Agency claims is exempt from public disclosure under exemptions 1 and 3 of Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (1970).

8. See, e.g., M. COPELAND, *BEYOND CLOAK AND DAGGER: INSIDE THE C.I.A.* (1975); W. STEVENSON, *A MAN CALLED INTREPID* (1976); F. WINTERBOTHAM, *THE ULTRA SECRET* (1974).

9. See Recommendation No. 67, SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BK. II, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, 94th Cong., 2d Sess. 331 (1976). No single criminal statute forbids the disclosure of classified information; some statutes forbid the disclosure of some types of classified information for some purposes. The inadequate protection afforded by such laws is well-known to government attorneys, but is not

Over the past several years, the existence of World War II intelligence exchange agreements has been revealed. One of the more sensational intelligence episodes involved the British break of German codes just before World War II. This "ultra secret" was so important that its existence, along with the texts of decoded German messages, was withheld from all but the most senior military and civilian officials. The British shared their discovery with the United States, pursuant to arrangements that carefully shielded the matter from those unauthorized to receive the information.¹⁰

One of the most noteworthy intelligence exchange arrangements, eventually culminating in a formal executive agreement, was that underlying British-United States collaboration in the development of the atomic bomb. In July 1940, the British ambassador proposed to President Roosevelt that a British mission of scientists and military experts be received in the United States to discuss technical matters of common interest.¹¹ By its terms, the arrangement was not intended as an international agreement,¹² although it did mark the beginning of a wartime scientific collaboration, which led to further exchanges, more formal agreements, and warmer relations, despite some bitter disputes. The first exchanges centered largely on the development of radar, specifically mentioned as a subject of common interest.¹³ The collaboration

usually appreciated by legislators or students. See generally Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

The existence of some agreements is entirely speculative. A recent report imagined the possibility of an intelligence exchange agreement between the United States and the People's Republic of China. Although no evidence points to its existence, the disclosure of such an agreement would surely result in its instantaneous termination, at least under current political conditions. See Pillsbury, *U.S.-Chinese Military Ties?*, 20 FOREIGN POLICY 50 (1975), reprinted in 121 CONG. REC. S16,532 (daily ed. Sept. 23, 1975).

10. The history of the ultra secret is discussed at length in A. BROWN, *BODYGUARD OF LIES* (1975); W. STEVENSON, *supra* note 8; F. WINTERBOTHAM, *supra* note 8.

In 1944 an agreement between the O.S.S. and the Soviet N.K.V.D. was negotiated by General William Donovan, the New York attorney whom President Roosevelt chose to lead United States intelligence activity. However, an exchange of intelligence missions was blocked by F.B.I. Director J. Edgar Hoover, who feared that the potential benefits did not justify allowing a Soviet intelligence mission to operate in the United States. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, Bk. III, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, 94th Cong., 2d Sess. 426 (1976).

11. Aide-Mémoire from the British Ambassador (Lothian) to President Roosevelt, [1940] 3 FOREIGN REL. U.S. 78 (1958).

12. See text accompanying note 50 *infra*.

13. The first intelligence materials exchanged under these arrangements are reported in W. STEVENSON, *supra* note 8, at 143-44.

was intended to be secreted from both the public and Congress, including many who would have complained bitterly had they known of the arrangement.

A more formal intelligence exchange was developed following an October 1941 letter from President Roosevelt to Prime Minister Churchill proposing the exchange of atomic data and personnel. This agreement called for, *inter alia*, the total interchange of information and ideas, but set aside for further discussion the exchange of information of an industrial or commercial character. The agreement further provided that neither party would "communicate any information" about the atomic energy projects "to third parties except by mutual consent."¹⁴

The agreement was drafted, on the United States side, in order to avoid the constitutional and political questions which might have arisen had its scope included more than wartime arrangements. In the view of Harvey Bundy, a leading Boston attorney and adviser to Secretary of War Stimson, it was inappropriate for the President to act unilaterally, without considering whether such simple executive action would encourage the creation of a significant British postwar industrial and commercial enterprise.¹⁵

Both the ultra secret arrangements, which, because they were probably entirely oral, are not available for inspection, and the atomic research agreements, which were written and are available, obliged each party to preserve the exchanged data and not to communicate it to others without mutual consent. Arrangements of this type have modern progeny, such as the agreement recently made with Iran regarding the protection of classified data.¹⁶

Intelligence arrangements may be executed not only between heads of state, but also between comparable government agencies, *e.g.*, military commands or specialized intelligence

14. Articles of Agreement Governing Collaboration with the United Kingdom in the Matter of Tube Alloys, Aug. 19, 1943, 5 U.S.T. 1114, T.I.A.S. No. 2993. The negotiating history of the Agreement is recorded in R. HEWLETT & O. ANDERSON, *THE NEW WORLD 1939-1946*, at 255-84 (1962). The British breach of the undertaking, by transmittal of data to the French, is reported in *id.* at 331-33.

15. See Memoranda of H.H. Bundy, [1943] FOREIGN REL. U.S., CONFERENCES AT WASHINGTON AND QUEBEC 634, 636, 648 (1970).

16. Agreement with Iran Relating to the Safeguarding of Classified Information, June 6, 1974, 25 U.S.T. 1266, T.I.A.S. No. 7857. The refusal to share intelligence data is reported as one reason for Thailand's termination of the United States right to military bases in Thailand. *Washington Post*, Mar. 24, 1976, § A, at 9, col. 1.

agencies, or within an international military command.¹⁷ Although wartime arrangements are firmly rooted in the President's power as Commander-in-Chief of the armed forces, somewhat different agreements, not rooted in the Commander-in-Chief power,¹⁸ are those relating to peacetime activity involving intelligence forces. A product of such an agreement is the United States receipt of intelligence information abroad from local intelligence sources.¹⁹ Thus, confidential information may be obtained via military and non-military channels pursuant to the President's other powers granted by article II of the Constitution.

II. LEGISLATIVE HISTORY OF THE CASE ACT

The Case Act enacted a proposal that first appeared as an alternative to the Bricker Amendment.²⁰ In 1954, the proposal

17. On May 14, 1975, testifying before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, the Assistant Secretary of Defense noted that defense intelligence agreements are usually oral. See COMPTROLLER GENERAL OF THE UNITED STATES, REPORT ON U.S. AGREEMENTS WITH THE REPUBLIC OF KOREA, FEB. 20, 1976, at 11, reported in N.Y. Times, Mar. 1, 1976, at 9, col. 1.

Intelligence is also supplied under unilateral arrangements. "[W]ith the full backing of Secretary of Defense James Schlesinger, [General Alexander] Haig now provides France and other NATO allies with superior American intelligence . . ." Evans & Novak, *The Other Detente*, Washington Post, Sept. 11, 1975, § A, at 23, col. 1. For a comprehensive discussion supporting the vital need for intelligence gathering, see McDougal, Lasswell, & Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973).

18. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Totten v. United States*, 92 U.S. 105 (1875).

19. M. COPELAND, BEYOND CLOAK AND DAGGER: INSIDE THE C.I.A. 77, 226, 228-29 (1975). See also L. FITZPATRICK, THE U.S. INTELLIGENCE COMMUNITY 124 (1973); L. PROUTY, THE SECRET TEAM 187-89 (Ballantine ed. 1974); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTERIM REPORT, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, 94th Cong., 2d Sess. 238 (1975). The value of such activities is questioned in Scoville, *Is Espionage Necessary For Our Security?*, 54 FOREIGN AFFAIRS 482 (1976).

Cooperative intelligence exchanges and arrangements occur elsewhere in the world. Assistant Secretary of State Rogers, for example, stated that there was "good reason to suppose" that the Cuban Directorate of General Intelligence "cooperates closely with the Soviet KGB, as do the intelligence services of other Communist countries allied with or heavily dependent upon the U.S.S.R." Rogers, *Department Reviews Recent Developments in U.S. Policy Toward Cuba*, 73 DEP'T STATE BULL. 596, 598 (1975). For a description of the KGB's intelligence liaison department see FINAL REPORT, BK. 1, at 559-60.

20. S.J. Res. 1, 83d Cong., 1st Sess. (1953). The Bricker Amendment to the Constitution sought, *inter alia*, to prohibit the President from making any executive agreement without the consent of Congress. See Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 FOREIGN AFFAIRS 1 (1953). See also *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. (1953).

was offered by Senator Ferguson²¹ and in 1955 by Senator Knowland,²² then Majority Leader. Twenty years ago the proposal was favorably received by the executive branch because in requiring disclosure to Congress of only international agreements, it represented an acceptable alternative to the more drastic possibility of a constitutional amendment forbidding the President to make binding international agreements on his own. The proposal was adopted by the Senate in 1955 without objection, but was dropped after inaction by the House of Representatives.

In 1971, the proposal was revived in a bill introduced by Senator Case of New Jersey which was referred to the Senate Foreign Relations Committee.²³ Senator Case characterized the obligation it thrust upon the Department of State as "modest."²⁴ He applauded a description of the bill as "inherently reasonable, so obviously needed, so mild and gentle in its demands and so entirely unexceptional that it should receive the unanimous approval of the Congress."²⁵ It did, and the President signed it without comment, despite misgivings voiced by the State Department Legal Advisor.²⁶

The posture of the executive branch during the Senate Foreign Relations Committee hearings on the bill was restrained and uncontentious. In part, this diffidence is explained by the fact that only a month earlier the Executive had invoked executive privilege in refusing the Committee documents relating to foreign military assistance.²⁷ A Deputy Legal Advisor of the State Department did, however, raise doubts as to the constitutionality of the proposal,²⁸ and the Legal Advisor unsuccessfully urged an informal procedure in place of a legally imposed formal reporting requirement.²⁹ The latter stated that the Department of State was prepared to work out procedures for the distribution of sensitive agreements "of interest to Congress," but he did not publicly

21. S. 3067, 83d Cong., 2d Sess. (1954).

22. S. 147, 84th Cong., 1st Sess. (1955). The legislative history of the ancestral bills is contained in *Hearings on S. 596 Before the Senate Foreign Relations Committee*, 92d Cong., 1st Sess. 5 (Oct. 20-21, 1971) [hereinafter cited as *Hearings on S. 596*].

23. S. 596, 92d Cong., 1st Sess. (1971).

24. *Hearings on S. 596*, at 36.

25. *Id.* at 23, 55.

26. *Id.* at 61.

27. On August 31, 1971, the Department of Defense declined to supply several foreign military assistance plans to the Senate Foreign Relations Committee. *N.Y. Times*, Sept. 1, 1971, at 1, col. 4.

28. *Hearings on S. 596*, at 28-29.

29. *Id.* at 60.

offer any definitive plan.³⁰ His words implied that some agreements might not be "of interest to Congress," but the issue was not discussed further. Throughout the hearings, attention was focused on the congressional wish to obtain information about international agreements which Congressmen believed might lead to a major military involvement or to the deployment of nuclear weapons.

The legislative history of the Case Act plainly reveals that the executive department did not wish further confrontation with the Senate Foreign Relations Committee in late October 1971. Undoubtedly they believed that strong opposition to the bill would imply that the executive branch was withholding further secrets. One may speculate that the President's failure to comment upon the bill's deficiencies when he signed it in August 1972 was a result of the Watergate affair and the presidential campaign.

The hearings also support an understanding that the Act's purpose is not to require the reporting of all international agreements but to exclude from the reporting requirement those agreements that are mere administrative arrangements, and those that are "trivial."³¹ However, one complaint voiced then, and repeated more recently, was that "trivial" matters were sometimes in treaty form, while important issues were dealt with by executive agreement.³²

III. A STRICT INTERPRETATION OF THE CASE ACT

To construe statutes controlling foreign relations more strictly, and thus more favorably to executive power than statutes that are entirely domestic in scope, is justified if legislative power over foreign affairs is considered to be less than that over domestic affairs. This theory was introduced to the framers of the Constitution through the writings of Locke and Montesquieu, who exercised greater influence over the framers than other political philosophers.³³

30. *Id.*

31. See H.R. REP. NO. 92-1301, 92d Cong., 2d Sess. (1972), reported in U.S. CODE CONG. & AD. NEWS 3067, 3069 (1972).

32. The complaint about trivial treaties and significant executive agreements prompted Senator Richard Clark (D-Iowa) to propose legislation purporting to allow the Senate to decide whether an international agreement is a treaty. S. Res. 434, 94th Cong., 2d Sess., 122 CONG. REC. S5744 (daily ed. Apr. 14, 1976). See also 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §§ 22-25 (1970).

33. A. SCHLESINGER, THE IMPERIAL PRESIDENCY 8 (Houghton Mifflin ed. 1973); THE

Locke distinguished between two types of executive power, each of which was subject in a different degree to legislative authority. Insofar as legislative authority deals with matters of domestic concern, i.e., with relations among the population represented by the legislature, the executive's authority is limited and is subject to the legislature's paramount authority. However, in foreign relations "the whole community is one body . . . in respect of all other states or persons out of its community,"³⁴ because the Legislature cannot make laws for persons outside the nation. Executive authority, Locke continued,

is much less capable to be directed by antecedent, standing, positive laws . . . and so must necessarily be left to the prudence and wisdom of those whose hands it is in to be managed for the public good. . . . [W]hat is to be done in reference to foreigners, depending much upon their actions and the variation of designs and interest, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.³⁵

The validity of the Lockean distinction between executive power in domestic and in foreign affairs was confirmed by the diffident early congressional treatment of foreign affairs matters,³⁶ by the judicial development of the state secret doctrine,³⁷ and by the Supreme Court's repeated statements distinguishing foreign from domestic affairs.³⁸

FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES xxviii (W. Solberg ed. 1958).

34. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 121 (Gateway ed. 1955).

35. *Id.* at 122.

36. In 1790 the First Congress appropriated a lump sum for the conduct of foreign affairs, and required the President to account specifically only for the expenditures "as in his judgment may be made public." Act of July 1, 1790, ch. 22, 1 Stat. 128-29. *See also* An Act to Ascertain the Compensation of Public Ministers, ch. 56, 2 Stat. 78 (1800). *See generally* Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. — (1976). James Madison stated in January 1794 that the President might give "reasons" for refusing to disclose communications received from Great Britain. 4 ANNALS OF CONG. 250-51 (1794). On January 20, 1800, the Senate requested the President to give "such information . . . as . . . may in his opinion be proper" to the Senate regarding a treaty with France. 10 ANNALS OF CONG. 773 (1800). And on January 22, 1806, a request that the President disclose a letter from James Monroe to the Secretary of State was modified by the qualification that the President should first judge it "proper." 15 ANNALS OF CONG. 67, 70 (1806). *See also* A. SCHLESINGER, *supra* note 33, at 44.

37. *See* 8 J. WIGMORE, *EVIDENCE* § 2378 (J. McNaughton rev. ed. 1961). *See generally id.* at §§ 2367-79.

38. *United States v. Nixon*, 418 U.S. 683, 710-11 (1974); *Chicago & S. Airlines v.*

That legislative control of the Executive in the field of foreign relations is limited is apparent in the Constitution itself³⁹ and is explained by *The Federalist*. First, treaties are distinguished from general federal legislation; although both are the supreme law of the land,⁴⁰ the President makes treaties subject to the approval of only the Senate.⁴¹ Secondly, the President alone receives foreign ambassadors, and, subject to Senate approval, selects United States ambassadors.⁴² Moreover, according to *The Federalist*, the President maintains exclusive control of intelligence information obtained during the treaty-making process.⁴³ The early conception of Senators as a more mature, select group, less susceptible to popular pressures than Representatives, led the framers of the Constitution to assign a superior role in foreign affairs to the Senate.⁴⁴ Finally, rather than a confederacy of sovereigns, the Constitution sought to establish a single nation, headed by a single Executive capable of forming alliances, making treaties, and entering into "various compacts and conventions with foreign states."⁴⁵

Executive authority over foreign affairs today is evidenced by statutory interpretation of the Case Act, particularly in the definition of the term "international agreements." That term requires reference to international law and creates expectations of ultimate judicial measurement. However, in current practice, the interpretation of the Department of State is followed. Its authority to render an opinion rests upon presidential delegation of constitutional authority,⁴⁶ the Department's statutory authority in matters of foreign relations,⁴⁷ its capacity to make attractive arguments based upon international law, and its traditional dealings with international legal issues. Moreover, the Department

Waterman S.S. Corp., 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 315 (1936).

39. U.S. CONST. art. II, § 2.

40. *Id.* art. VI.

41. THE FEDERALIST No. 43 (J. Madison). "The power of making treaties is . . . neither [a purely executive nor a purely legislative function]." THE FEDERALIST No. 75, at 222 (R. Fairfield ed. 1966) (A. Hamilton).

42. U.S. CONST. art. II, § 2.

43. "[The President] will be able to manage the business of intelligence in such a manner as prudence may suggest." THE FEDERALIST No. 64, at 189 (R. Fairfield ed. 1966) (J. Jay).

44. THE FEDERALIST No. 64 (J. Jay).

45. THE FEDERALIST No. 2, at 7 (R. Fairfield ed. 1966) (J. Jay). *See also* THE FEDERALIST Nos. 18-20 (A. Hamilton & J. Madison).

46. 3 U.S.C. § 301 (1970).

47. 22 U.S.C. § 2656 (1970).

may claim special competence because it employs more full-time international lawyers than any other government agency.⁴⁸ Several Congressmen, however, have claimed that the Executive's interpretation is merely persuasive.⁴⁹ Indeed, the appropriate final decision of whether an arrangement is an "international agreement" is determined by constitutional interpretation.

According to the conventional definition, an international agreement is an "agreement between states or international organizations by which there is manifested an intention to create, change, or define relationships under international law."⁵⁰ In interpreting its obligations under the Case Act to transfer to Congress the text of international agreements, the State Department applies five criteria, namely: 1) the intention of the parties to be bound by international law; 2) the significance of the arrangement; 3) the requisite specificity, including objective criteria for determining enforceability; 4) the necessity for two or more parties to the arrangement; and 5) the form.⁵¹

Documents intended to have only political or moral weight are not international agreements, according to the State Department, because they are not intended to be legally binding.⁵² The Final Act of the Helsinki Conference on Security and Cooperation in Europe⁵³ is an example. Agreements which by their terms are ineffective until some future time are also not within the scope of the Case Act.⁵⁴ Hence, an arrangement to exchange goods and services subject to subsequent congressional approval is not considered an international agreement reportable under the Act. The Department does not consider agreements governed by a legal system other than international law as international agreements.⁵⁵ Thus, agreements governed solely by United States do-

48. See Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962).

49. See COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 17.

50. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1965). See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2, U.N. Doc. A/Conf. 39/27, which the United States has signed but which has not yet been ratified.

51. See Letter from the Legal Adviser to Senator Abourezk, Oct. 31, 1975, on file with the author.

52. *Id.* See also Unclassified Message from the Department of State to the General Counsel of the Several Departments and Agencies of the Government and to All Diplomatic Posts, Mar. 9, 1976, on file with the author.

53. 73 DEP'T STATE BULL. 323 (1975).

54. Message of Mar. 9, 1976, *supra* note 52.

55. *Id.*

mestic law or that of a foreign country are not subject to the requirements of the Act.

Under the second criterion, trivial arrangements need not be reported to Congress.⁵⁶ For example, an agreement to sell a single map to a foreign State may be considered trivial although an agreement to sell one million maps probably would be considered significant. The third requirement is that the agreement be precise and specific.⁵⁷ Statements that are mere diplomatic niceties do not rise to the dignity of international agreements. Finally, the State Department distinguishes between gifts of information and international agreements; the latter should be bilateral in form and content.⁵⁸ Some international agreements, however, are created by parallel unilateral statements because of the underlying conditions and the understandings of the participants.

In complying with the Case Act, the Executive is also faced with the construction of the term "any" in the phrase "any international agreement." That "any" does not always mean "all" was demonstrated by the Supreme Court in a case concerning judicial review of the President's authority to approve overseas air routes:

Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject matter, are inappropriate for review.⁵⁹

In that case, the Court, after balancing executive, legislative, and judicial authority, implied an exemption from the statutorily authorized judicial review of certain presidential decisions involving rights to engage in foreign air transport. Even the dissenters agreed that because of the foreign affairs issues it would be inappropriate for the Judiciary, or Congress,⁶⁰ to review the role of the President in allocating a foreign air route. A self-denying construction leading to a less inclusive definition of "any" is, therefore, appropriate if required by the separation of powers theory, the context of the statutory demand, and the nature of the controversy.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 106 (1948).

60. *Id.* at 117. (Douglas, J. dissenting with Black, Reed & Rutledge, J.J.).

Strict interpretation of the Case Act, applying the criteria established by the Department of State, is revealed by a 1976 report of the Comptroller General focusing upon United States-Korean agreements negotiated after August 1972. This report states that of the fifty-nine agreements that were concluded with Korea after the passage of the Act, all but thirty-four were withheld from Congress.⁶¹ These unreported arrangements were withheld for a variety of reasons. Some were negotiated by agencies other than the Department of State and were not known by, or transmitted to, the Department. Others were not considered international agreements because their terms did not become binding until Congress approved an appropriation. These arrangements, however, were known to congressional appropriations committees having an interest in their subject matter.

The remaining agreements were not reported because they either were considered subordinate to, or in furtherance of, a basic agreement which was transmitted to Congress; were too vague, or were terminable at will, so as not to constitute formal international agreements; or were concluded with Korean labor unions. The latter, clearly, were not international agreements although they did involve large sums of money.

IV. QUALIFICATION OF THE CASE ACT'S OBLIGATION BY OTHER STATUTES

In order for the State Department to comply with the requirements of the Case Act, it must first secure copies of agreements made by other executive agencies. This was the purpose of the Rush Letter of 1973,⁶² sent to all executive agency heads, and of the Department of State message of March 9, 1976.⁶³ Both sought the transmittal to the Department of all arrangements that conceivably could constitute international agreements, in order that they be reviewed for Case Act compliance. Regarding agency agreements, the latter message stated:

Despite variations in prior practice, it is currently our position that agency level agreements are international agreements for

61. COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 17.

62. Letter from Kenneth Rush, Acting Secretary of State, to the Head of All Executive Branch Departments and Agencies, Sept. 6, 1973, in A. ROVINE, [1973] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 187 (1974). The request sought transmittal of a wide range of instruments to enable the Department of State to decide which agreements were reportable to Congress under the Case Act. *Id.*

63. Message of Mar. 9, 1976, *supra* note 52.

purposes of publication and transmittal to the Congress if they meet the above criteria. The fact that an agreement is signed by a particular department or agency of the United States Government, is not determinative. . . . What is important is the substance of the agreement.⁶⁴

However, with respect to intelligence exchange agreements, a clash may arise between the Case Act and other statutes governing various executive agencies. The Case Act hearings revealed no inquiry into its relationship with other statutes, and into whether any prior, more specific, laws were modified by the new reporting obligation. The Supreme Court recently reaffirmed the presumption that the repeal or amendment of precise laws by implication from broadly drafted statutes should be avoided whenever possible. The Court held in 1975 that the Freedom of Information Act⁶⁵ did not repeal specific provisions of the Federal Aviation Act⁶⁶ which permitted the Federal Aviation Agency to withhold information if disclosure were not required "in the interest of the public."⁶⁷

Thus, under the mandate of the 1949 statute establishing the Central Intelligence Agency,⁶⁸ it is arguable that the more sensitive intelligence agreements need not be reported to Congress. Under the statute, the Director of Central Intelligence is given broad responsibility and undefined authority in the area of foreign intelligence gathering. He is, moreover, "responsible for protecting intelligence sources and methods from unauthorized disclosure."⁶⁹ Insofar as the intelligence arrangements involve "sources and methods" within the protective power of the Director, the Secretary of State would violate the statute if the intelligence "sources and methods" were disclosed.

Whether the 1949 statute applies to Congress, and, hence, qualifies the Case Act is uncertain but is a tenable position. For example, legislative authority over the Executive's foreign rela-

64. *Id.* at 5.

65. 5 U.S.C. § 552 *et seq.* (1970).

66. 49 U.S.C. § 1301 *et seq.* (1970), *as amended*, (Supp. V, 1975).

67. *Adm'r, FAA v. Robertson*, 422 U.S. 255 (1975).

68. Central Intelligence Act of 1949, 50 U.S.C. § 403 *et seq.* (1970).

69. *Id.* § 403(d)(3). The Director of Central Intelligence claimed in April 1972 that the State Department's list of executive agreements which was supplied to Senator Sam Ervin (D.-N.C.) included "all agreements" with foreign States. He implied that liaison arrangements are not agreements with foreign States. *Hearings on S.3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., at 329, 332, 345 (1972).

tions power is more limited than over his domestic tasks. Also, the Case Act is silent about intelligence agreements, although Congress was aware of their existence and has enacted legislation concerning them. In addition, the statutory qualification of the Case Act helps to avoid the constitutional question of legislative authority and is reasonable if it is coupled with the constitutional claim that Congress has no paramount concern in the subject of foreign intelligence gathering.

Furthermore, when two statutes conflict, the one supported by the terms of an international understanding will prevail.⁷⁰ An international understanding that the terms of an agreement will not be disclosed outside the executive branch would help support this argument. Finally, Congress can assert its own claim to intelligence information by passing a narrow statute requiring the transmittal to it of specific information.⁷¹

The reporting obligation of the Case Act may also be qualified by the statutory authority of the Secretary of State to manage the affairs of his department.⁷² Both Congress⁷³ and the Judi-

70. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Restatement of Foreign Relations* declares, "[t]he duty of a state to give effect to the terms of an international agreement to which it is a party . . . is not affected by a provision of its domestic law that is in conflict with the agreement . . ." *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 140 (1965).

71. See Letter from Attorney General to Rogers Morton, Secretary of Commerce, Sept. 4, 1975, Concerning Subpoena Issued by the Interstate and Foreign Commerce Comm'n to the Secretary of Commerce, on file with the author. See also 42 OP. ATT'Y GEN. 46 (1974) (request for tax return information concerning President Nixon); 41 OP. ATT'Y GEN. 221 (1955) (request by the Senate for information held by the FCC); 27 OP. ATT'Y GEN. 150 (1909) (subpoena by a Senate committee of confidential information held by the Commissioner of Corporations).

72. 22 U.S.C. § 2651 *et seq.* (1970), formerly ch. 4, 1 Stat. 28 (1789).

73. Foreign Assistance Act of 1974, 22 U.S.C. § 2422 *et seq.* (1970), as amended, (Supp. IV, 1974) provides:

(a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion . . . to the appropriate Committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

See also Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3) (1970), which provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against . . . attack . . . ,

ciary⁷⁴ have recognized the President's authority to collect foreign intelligence information. That authority, like any executive power, may be delegated by order or by necessary implication.⁷⁵ If the authority is delegated to the Secretary of State, he in turn may direct his employees to collect foreign intelligence information, authorizing any reasonable means to achieve the collection.⁷⁶ If the intelligence information gathered must be exchanged with a foreign agency, legal authority to do so lies more in the Secretary's statutory responsibilities to administer the affairs of the Department of State than in the exercise of his delegated power to make executive agreements. In other words, the intelligence agreement is essentially an administrative method of gathering intelligence, rather than an executive agreement of international legal dimensions. The latter is an exercise of the President's article II power; the former is authorized by administrative law.

The distinction between administrative power and the power to make international agreements appears in the Rush Letter,⁷⁷ which was designed to obtain information from other agencies so that instruments "of political significance" could be culled from those considered trivial. Similarly, in 1972, the Department of Defense urged differentiation between agreements which are international instruments under international law and binding arrangements which are not required to be registered under Article 102 of the United Nations Charter.⁷⁸

to obtain foreign intelligence information . . . , or to protect national security information against foreign intelligence activities

74. *Totten v. United States*, 92 U.S. 105 (1875).

75. 3 U.S.C. § 301 (1970).

76. 5 U.S.C. § 301 (1970). *See also* 22 U.S.C. § 2658 (1970). Courts give the force of law to regulations issued pursuant to statutory authorizations. *See, e.g.*, *Northern Ind. Pub. Serv. Co. v. Walton League*, 423 U.S. 12 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Caha v. United States*, 152 U.S. 211 (1894); *G.L. Christian and Associates v. United States*, 320 F.2d 345 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

77. *See* note 62 *supra*.

78. Article 102 of the United Nations Charter provides:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provision of paragraph 1 of the Article may invoke that treaty or agreement before any organ of the United Nations.

Lauterpacht suggests that military type arrangements are not international agreements within the meaning of the United Nations Charter. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 922 n.4 (8th ed. H. Lauterpacht 1955).

However, the distinction between administrative power and the authority to establish international agreements is an elusive one and is difficult to apply consistently in practice. Moreover, although the distinction would qualify the obligation of the Case Act, its application might be resisted by the Department of State, which is primarily responsible for managing foreign affairs.

V. THE PRESIDENT'S CONSTITUTIONAL POWER TO EFFECT INTELLIGENCE AGREEMENTS

Withholding the text of intelligence agreements from Congress has become increasingly controversial in light of persistent congressional demands and the expansive State Department interpretation of the term "international agreement." This issue requires the examination of the following questions: What is the constitutional basis for the negotiation of intelligence arrangements? If constitutional authority exists, does that authority justify, under any facts, withholding the agreements from Congress? What facts would a court consider relevant to justify non-disclosure?

The constitutional basis for the negotiation of foreign intelligence agreements rests upon several aspects of the President's article II authority. It may be linked to his duties as Commander-in-Chief because military intelligence is essential in considering, planning, and executing military actions, even in peacetime.⁷⁹ It may be executed pursuant to the President's more vaguely defined authority to represent the United States in foreign relations.⁸⁰ It may also be considered as fulfilling his duties to execute faithfully laws and treaties.

The scope of Congress' power to demand the text of an agreement will necessarily depend upon analysis of the precise presidential powers invoked, the laws which the agreement may implement, and the contents of the agreement. Congress' power to appropriate funds and oversee their use might support a disclosure of the financial aspects of an agreement,⁸¹ but might not

79. U.S. CONST. art II, § 2.

80. *Id.* art. II, §§ 2, 3.

81. *Id.* art. I, § 9. The necessity for secret executive department expenditures relative to military operations and foreign negotiations was recognized by George Mason during the Virginia debates on the Constitution. 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 326 (M. Farrand ed. 1911). See Note, *C.I.A.'s Secret Funding and the Constitution*, 84 YALE L.J. 608 (1975).

sustain a request for disclosure of the type of information involved.

The power of the President as Commander-in-Chief is exclusive, hence, Congress' demands for texts that concern military intelligence will be weak. Furthermore, an agreement based on several presidential powers may be so inextricably linked with the President's power as Commander-in-Chief that disclosure of a part in which Congress has a paramount interest would significantly impair the confidentiality of the whole. The question of disclosure, therefore, can be answered only through a process of balancing the factual setting of the claim, the extent of the executive power asserted, and the nature of the competing demands of other branches of the government and of other parts of the Constitution.

At the Case Act hearings,⁸² some constitutional defects in the Act were indicated by the late Professor Alexander Bickel of Yale. Bickel noted that some agreements may be of no concern to Congress because their subjects are exclusively within the sphere of presidential authority.

The only possible difficulty I can see with S. 596, therefore, is that the President might decline to transmit an agreement which he views as executed in exercise of his own independent power and of no proper concern to Congress. I would seriously doubt the wisdom of a President taking such a position in any circumstances I can now imagine short of full-scale hostilities, but I should suppose that if his function as commander responsible for the safety of troops was involved, he might well be on sound constitutional ground in involving executive privilege and withholding a document from Congress.⁸³

Senator Case responded by insisting that Congress had authority at least to ask for copies of agreements which fall within the exclusive domain of the President.⁸⁴ But Professor Bickel, an otherwise friendly witness called at the request of the Senate Committee, demurred. "In those cases Congress has the authority to request but not to require."⁸⁵

Thus, if an intelligence agreement involved the exercise of a power committed to the President by the plain text of the Consti-

82. *Hearings on S. 596.*

83. *Id.* at 27.

84. *Id.* at 28.

85. *Id.*

tution, such as the power to receive an ambassador, or the power to grant pardons, the President's claim to withhold the agreement would rest upon strong grounds because these powers are specifically vested exclusively in the President;⁸⁶ neither Congress nor the Judiciary could validly interfere.⁸⁷ An agreement, therefore, to obtain intelligence information in return for a secret pardon or an agreement involving the exchange of emissaries would clearly embody one of the President's exclusive prerogatives.

John Jay, an experienced attorney and diplomat, suggested that intelligence gathering arrangements are within the sole power of the President.⁸⁸ In his view, they are a purely executive function linked to the treaty negotiation process, and the information so gained need not be reported to Congress. Consequently, the person gathering the information would "be relieved from apprehension of discovery."⁸⁹ The confidentiality of intelligence gathering was thus equated to an informer's privilege, one recognized in the common law⁹⁰ and protected today.⁹¹ This parallel was affirmed and qualified in 1958 by the United States Court of Appeals for the Second Circuit. "[T]he scope of the privilege of the United States with respect to state secrets, like its similar privilege to withhold the identity of confidential informants, 'is limited [only] by its underlying purpose.'"⁹² With respect to intelligence gathering, that purpose is to enable the President and his agents to obtain sufficient information to perform competently their foreign affairs responsibilities.

The authority of the President to contract for intelligence was recognized by the Supreme Court in *Totten v. United States*,⁹³ an action based upon a contract allegedly made by President Lincoln with a secret agent. Justice Field, writing for a unanimous Court, upheld the President's contractual authority in the absence of statute.

86. See *Schick v. Reed*, 419 U.S. 256 (1974).

87. The textual commitment doctrine underlies *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormick*, 395 U.S. 486 (1969).

88. THE FEDERALIST No. 64 (R. Fairfield ed. 1966) (J. Jay).

89. *Id.* at 184.

90. See 1 S. GREENLEAF, LAW OF EVIDENCE § 250 (16th ed. 1899).

91. *Roviaro v. United States*, 353 U.S. 53 (1957); *Scher v. United States*, 305 U.S. 251 (1938); *In re Quarles and Butler*, 158 U.S. 532 (1895); *Vogel v. Gruaz*, 110 U.S. 311 (1884).

92. *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958), citing *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

93. 92 U.S. 105 (1875).

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are . . . binding⁹⁴

Furthermore, the Court unanimously upheld the President's authority to preserve the secrecy of these arrangements. The Court, through dictum, suggested that the power was not restricted to wartime operations, nor was it grounded only in the Commander-in-Chief powers.

The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. . . . This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, *or upon matters affecting our foreign relations*, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.⁹⁵

The *Totten* claim was unusual only in that it led to litigation. Secret presidential agents have always played an important role in American life. Presidents since Washington have appointed special agents to perform a variety of overt and covert activities abroad; more than 400 such agents were appointed during the first century following independence.⁹⁶ Similarly, soon after World War II, Justice Jackson referred approvingly to President

94. *Id.* at 106.

95. *Id.* (emphasis added). A brief history of United States military intelligence operations during the American Revolution, described by William Colby in testimony before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, appears in 121 CONG. REC. S18,731-32 (daily ed. Oct. 28, 1975).

96. S. Doc. No. 231, pt. 8, 56th Cong., 2d Sess. 337-62 (1901); H.R. REP. No. 387, pt. 2, 66th Cong., 1st Sess. 5 (1919). See also H. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS (1929).

The activities of William J. Donovan, leader of the O.S.S., are now well documented in W. STEVENSON, *supra* note 8. His initial mission, at the behest of President Roosevelt, was to Great Britain in July 1940, during which he obtained significant intelligence data from King George VI. This mission was kept secret even from the American Embassy in London. No one then questioned Roosevelt's legal authority to send such an agent, or to engage in intelligence collection arrangements, both of which were critically important in winning World War II. *Id.*

Roosevelt's use of intelligence reports which "are not and ought not to be published to the world,"⁹⁷ in a passage happily and frequently cited by the intelligence community.

The power of the Executive to withhold international agreements from the public is well established in practice and is recognized at common law in the many and diverse state secret cases.⁹⁸ In fact, Congress' current constitutional claim to receive the text of international agreements presents a novel issue because of the tolerance of secret diplomacy which Congress has demonstrated for many years.⁹⁹ The history of the United States abounds with examples of agreements neither contemporaneously released to the public nor disclosed to Congress. The existence of the Roosevelt-Katsura agreement of 1905 was not disclosed until 1924;¹⁰⁰ a clause of the Lansing-Ishii agreement of 1917 remained a secret until 1922;¹⁰¹ and one of the Roosevelt-Litvinov agree-

97. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Justice Jackson's opinion, however, rests upon judicial incompetence to review, not upon the constitutional limits of the authority of Congress.

98. The most frequently litigated state secret claims involve disputes between the Judiciary and the Executive. Therefore, the reasons supporting the rule that state secrets may be withheld from the courts do not necessarily apply to withholding them from Congress. Those cases, however, do uphold the existence of executive power to gather and maintain foreign intelligence information. See *Totten v. United States*, 92 U.S. 105 (1875); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967). The cases differ as to the role of the court in examining the documents. See *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. Supp. 353 (E.D. Pa. 1912) (*in camera* inspection denied). *Contra*, *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (*in camera* judicial inspection ordered). See generally Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). The House of Lords reconfirmed a similar state secret doctrine in *Conway v. Rimmer*, [1968] A.C. 910. There, the English court adopted a balancing of interests test to determine whether, in a private action for malicious prosecution, certain government reports concerning the plaintiff should be disclosed.

99. For examples of secret diplomacy during the Washington, Adams, and Jefferson administrations, see Sofaer, *supra* note 36.

100. See E. CORWIN, *THE PRESIDENT* 444 (4th ed. 1957); Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 659 (1945); McDougal & Lans, *Treaties and Congressional Executive Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 552, 552 n.91 (1945); Reiff, *The Proclaiming of Treaties in the United States*, 44 AM. J. INT'L L. 572 (1950).

101. Letter from the Secretary of State to the Japanese Ambassador on Special Mission, [1917] FOREIGN REL. U.S. 264 (1926); Aide-Mémoire from Secretary of State to the Japanese Chargé, [1922] 2 FOREIGN REL. U.S. 595 (1938). The United States obtained from Japan a promise not to take advantage of wartime conditions in China in order to obtain special rights. The Japanese believed that the arrangement, if published, would cause domestic political difficulties. However, the failure to disclose resulted in deepening

ments of 1933 was not disclosed until 1945, and then inadvertently.¹⁰² The arrangements at the Yalta Conference of 1945 in which the President agreed that the Soviet Union could have three votes in the General Assembly of the United Nations were not immediately disclosed,¹⁰³ nor were other wartime agreements between Roosevelt and Churchill which had post-war implications.¹⁰⁴ A 1942 political-military agreement with Brazil remains unpublished, although it is no longer in effect.¹⁰⁵ All of these, at the time, would have been interesting to the Congress insofar as they involved national interests and basic policies.

The law creating the State Department¹⁰⁶ supplies further evidence of the intention of the framers to accord the executive branch exclusive responsibility in the field of foreign affairs. Under the Articles of Confederation, the Continental Congress had created a Department of Foreign Affairs and had resolved that any member of Congress could have access to the records and papers of the Department.¹⁰⁷ This was changed in 1789 in one of the first statutes passed under the new Constitution. It created a successor department entitled to have "the custody and charge of all records, books and papers" previously collected.¹⁰⁸ The new office was responsible only to the President, and the Secretary of State was directed to "conduct the business of the said department in such manner as the President of the United States shall from time to time order and direct."¹⁰⁹ The new law contained no provision for congressional inspection of the records. The differ-

anti-Japanese sentiment in the United States. T. BAILY, *DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 635 (8th ed. 1969).

102. B. FARNSWORTH, WILLIAM C. BULLITT AND THE SOVIET UNION (1967). The understanding was eventually published in *Foreign Rel. U.S., Soviet Union 1933-1939*, at 26 (1952).

103. United States Delegation List of Tripartite Decisions at Yalta, [1945] *FOREIGN REL. U.S., CONFERENCES AT MALTA AND YALTA* 947 (1955); Memorandum of Decisions reached at the Crimean Conference in the Matter of the Two Soviet Republics, *id.* at 991.

104. A. SCHLESINGER, *supra* note 33, at 151.

105. Telegram from Secretary of State to the Ambassador in Brazil, [1942] *FOREIGN REL. U.S.* 662 (1962). Other alleged agreements withheld from Congress included those with Ethiopia (1900), Laos (1963), Thailand (1964 and 1967), and Korea (1966). *Hearings on S. 596*, at 5.

106. Act of July 27, 1789, ch. 4, 1 Stat. 28.

107. The Resolution under the Articles of Confederation is found in a footnote to the Act of July 27, 1789. *Id.*

108. Act of July 27, 1789, ch. 4, 1 Stat. 28. For a current application of this principle, see 31 U.S.C. § 107 (1970), authorizing the Secretary of State to certify that expenditures involving foreign nations shall not be specified. See 31 U.S.C. § 54 (1970), exempting such expenditures from examination by the Comptroller General.

109. Act of July 27, 1789, ch. 4, 1 Stat. 28.

ence in language was surely deliberate because, in contrast, the Secretary of the Treasury was directed to report to the Congress; Congress intended to make no claim of full disclosure against the Executive on matters of foreign relations.¹¹⁰

The issue of the Senate's right to view foreign affairs documents was raised in an early, precedent-setting incident which has not been recently discussed in the context of presidential-congressional disputes. On January 24, 1794, the Senate, much distressed by the behavior of the French Revolutionary Government, considered a resolution directing the Secretary of State to submit to the Senate diplomatic correspondence from the United States Minister in France to the Secretary of State. The resolution apparently was considered impolitic, if not unconstitutional, and was amended to read "that the President of the United States be requested," rather than directed, to give the Senate the diplomatic correspondence between the United States and France.¹¹¹ The bill passed by a vote of 13-11.

One month later, President Washington responded in a short note transmitting some of the documents, but omitting all the letters written to him personally. He also deleted "particulars which in my judgment for public considerations, ought not to be communicated."¹¹² The Senate did not protest. All the correspondence from Ambassador Gouverneur Morris was eventually published in 1832. The letters reveal very candid assessments of French politics, personalities, and military affairs, together with forthright opinions which would have proved embarrassing, or even grounds for diplomatic protest by the French Government.¹¹³

110. *Id. Contra*, R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 199 (1974). Berger sees the omission in the 1789 law as understandable and refuses to attribute to the First Congress an intention to surrender the power to obtain information. However, a fundamental purpose of the Constitution was to create a single executive to manage foreign affairs. See, e.g., Madison's statement of July 19, 1789, 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 81, at 316. The inadequacies of the Articles of Confederation were clearer to statesmen then than to some critics today. To read the Constitution as Berger does would require a return to pre-constitutional days. See, e.g., Winter, Book Review, 83 *YALE L.J.* 1730 (1974).

111. 4 *ANNALS OF CONG.* 37-38 (1794). See also Sofaer, *Executive Privilege: An Historical Note*, 75 *COLUM. L. REV.* 1318, 1319-20 (1975).

112. 1 *AMERICAN STATE PAPERS, FOREIGN RELATIONS* 329 (1833).

113. *Id.* at 329-30. Gouverneur Morris wrote: "French troops are extremely undisciplined"; French emigrants serving with France's opponents "will be more injurious to their friends than to their enemies"; anarchy "exists to a degree scarcely to be paralleled" and "the great mass of French population would consider even despotism as a blessing"; "there exists also a mortal enmity between different parties in the Assembly"; "the French nation" is like "cattle before a thunder storm." *Id.*

At the same time, Washington transmitted complete copies of other diplomatic documents, sometimes with injunctions of confidentiality.¹¹⁴ Again, the Senate did not protest.

The foregoing incident merits attention. Scholars commonly cite as constitutional authority the practices of our first Presidents and Congresses, because they included many of the Constitution's draftsmen.¹¹⁵ These early practices support the argument that the framers intended the President to possess considerable discretionary authority to withhold foreign affairs information.¹¹⁶

The need for confidentiality is rooted in the nature of the executive branch—particularly in the executive department's responsibility as the executing, negotiating, and policy-implementing branch of the government. The distinction between legislative functions, which do not involve such responsibilities, and executive functions was sharpened recently by the Supreme Court in *Buckley v. Valeo*.¹¹⁷ There, the Court found that Congress improperly exercised executive functions by appointing members of the Federal Elections Commission. Furthermore, the Court engaged in balancing to determine the appropriate functions of each branch; to permit the achievement of more important goals, it permitted "significant interference with First Amendment Freedoms."¹¹⁸

VI. BALANCING THE POWERS OF THE PRESIDENT WITH THE DEMANDS OF THE CONGRESS

No formal sanctions for failing to transmit international agreements are specified in the Case Act, an omission that some advocates of complete disclosure would remedy with criminal penalties.¹¹⁹ As the Act is presently constituted, therefore, it is

114. *Id.* at 413. See Sofaer, *supra* note 111.

115. *Myers v. United States*, 272 U.S. 52, 122-37 (1926); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816).

116. The Supreme Court also recognized the executive claim of confidentiality in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). At the trial, the Attorney General refused to testify to matters relating to his official transactions. Chief Justice Marshall responded by stating that there might be a right to refuse testimony, and that "if [the Attorney General] thought that anything was communicated to him in confidence he was not bound to disclose it." *Id.* at 143.

117. 424 U.S. 1 (1976).

118. *Greer v. Spock*, 424 U.S. 828, 853 (1976) (Brennan, J., dissenting), *citing* *Buckley v. Valeo*, 424 U.S. 1 (1976).

119. See Baldwin, *The Foreign Affairs Advice Privilege*, 1976 Wis. L. Rev. 16, for a discussion of the efforts of the House Select Committee on Intelligence Activities to obtain the text of a classified memorandum from Secretary of State Kissinger.

difficult to envisage a case or controversy involving a demand for disclosure susceptible of judicial resolution. One possibility is for the Congress to invoke its contempt power.¹²⁰ Assuming that the courts were unavoidably confronted with the necessity of adjudicating an executive-congressional dispute concerning the transmittal of an intelligence agreement, there is sufficient judicial and historical material available to conclude that the executive branch could present a strong constitutional claim justifying withholding the agreement from Congress.¹²¹ The constitutional argument would involve establishing that the agreement rests solely on presidential powers, or that under the particular circumstances the constitutional balance of authority requires that it be withheld from the Congress. That balance is established by a test of necessity: a finding that the public's total and overall interest is served by allowing confidentiality within the executive branch, thereby supporting a decision to withhold from the Congress.

Congressional interest in the agreements might be expressed by any one of the six committees presently having jurisdiction over intelligence matters, *i.e.*, the House and Senate committees dealing with appropriations, foreign affairs, and the armed forces. Presently, thirty-nine members of Congress, and their staffs, numbering over 100 persons, have access to materials submitted to these committees. Furthermore, rules of both the House and Senate permit any member of Congress to examine any committee file.¹²² It would thus be very difficult under current rules to control the access of 645 persons to intelligence materials. Control is especially difficult because it is likely that some members and their staffs may conscientiously believe that no secrets should be withheld from the public. Moreover, under the Speech and Debate Clause,¹²³ it is constitutionally impossible to apply criminal sanctions to disclosure in the course of legislative duties.

Even before *Marbury v. Madison*¹²⁴ in 1803, the Supreme

120. 2 U.S.C. § 192 (1970). Courts have recognized Congress' right to punish for contempt as an inherent part of its legislative power under the Constitution, article I, section 1. *See, e.g.*, *Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Dougherty*, 273 U.S. 135 (1927); *Marshall v. Gordon*, 243 U.S. 521 (1917); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). *See also* Baldwin, *supra* note 119; Freund, *On Presidential Privilege*, 88 HARV. L. REV. 13, 38 (1974).

121. *See* text accompanying notes 33-61 *supra*.

122. *See, e.g.*, House Rule XI(2)(e)(2), W. BROWN, RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 94TH CONGRESS (1975).

123. U.S. CONST. art. 1, § 6.

124. 5 U.S. (1 Cranch) 137 (1803).

Court utilized a test of functional necessity to determine the scope of each government branch's power.¹²⁵ In *Marbury* the Court concluded that despite the absence of firm language in the Constitution, courts have authority to review the constitutionality of acts of Congress because of the judicial power and obligation to maintain the superiority of the Constitution over all legislative acts. Without this power, a court could not effectively execute its constitutional mandate.

The test of functional necessity underlies *In re Neagle*,¹²⁶ which examined presidential power in the absence of a statute. In *Neagle*, the Court upheld the President's power, without statutory authorization, to order a deputy United States marshal to protect a United States Supreme Court Justice. The marshal killed a former California judge who was assaulting Justice Field of the Supreme Court in a railroad station dining room. In federal habeas corpus proceedings, the marshal claimed he was acting in pursuance of a law of the United States. No federal statute, however, authorized his act. State authorities argued that both jurisdiction and the measure of criminal liability were supplied by state law alone.¹²⁷ The Court rejected the state claim and construed the President's article II powers as including "a duty to enforce the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protections implied by the nature of the government under the Constitution."¹²⁸ That duty was to assure that a federal judge be able to do his job. If federal force is reasonably necessary to further that end, the President may order it. The *Neagle* holding supports the legality of orders to protect any United States agent, and his immediate family, so as to better enable him to fulfill his duties.

The test of functional necessity also underlies *McCulloch v. Maryland*,¹²⁹ which enlarged the legislative power of the Congress against the states.¹³⁰ More recently, the test has been applied to limit congressional claims in *Gravel v. United States*.¹³¹ In

125. In *Bas v. Tingy* (The Eliza), 4 U.S. (4 Dall.) 37 (1800), the Supreme Court construed several acts of Congress as authorizing a war, thus triggering the application of the law of prize. Justice Bushrod Washington stated that "every contention by force between two nations, in external matters, under the authority of their respective governments, is . . . public war," despite the lack of a formal declaration. *Id.* at 40.

126. 135 U.S. 1 (1890).

127. *Id.* at 58-60.

128. *Id.* at 64.

129. 17 U.S. (4 Wheat.) 316 (1819).

130. *Id.*

131. 408 U.S. 606 (1972).

Gravel, the Supreme Court determined the scope of protection afforded by the Speech and Debate Clause. The measure of the congressional privilege, said Justice White, was whether or not it was "essential to the deliberations" of the Congress or whether "the integrity or independence" of the Congress would be threatened if the privilege were denied.¹³² The Court concluded that the need of the legislators for free and uninhibited debate did not require immunity for activities relating to a private publication of material obtained in a legislative capacity. The need for unhindered debate gave congressional staff members derivative protection of the Speech and Debate Clause to enable them to aid the legislative process. However, the clause did not protect either the staff or Congressmen in their non-legislative activities. The Court found no need for such protection beyond the scope of congressional duties.

Recently, a federal court of appeals applied the functional necessity test in deciding that a congressional committee's need to obtain data was insufficient under the circumstances to overcome the presumptive executive privilege to withhold data from the Congress. In *Senate Select Committee v. Nixon*,¹³³ the court found that certain presidential communications, sought by the Senate Select Committee on Presidential Campaign Activities (Ervin Committee), were presumptively privileged and that "the presumption [could] be overcome only by an appropriate showing of public need."¹³⁴ The court held that the Committee failed to show its need inasmuch as impeachment inquiries were already underway.

In evaluating competing constitutional claims, wisdom dictates repeating the advice of John Jay.

In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more the object of attention; and the government must be a weak one indeed if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole.¹³⁵

The inescapable challenge that the test of functional neces-

132. *Id.* at 625.

133. 498 F.2d 725 (D.C. Cir. 1974). *Contra*, Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975).

134. 498 F.2d at 730.

135. THE FEDERALIST No. 64, at 191 (R. Fairfield ed. 1966) (J. Jay).

sity presents, as a measure of executive power to withhold intelligence agreements, is that a court would be required to voice a theory of government that is unpopular today. It would be compelled to uphold the theory that the capacity of elected representatives in the field of foreign affairs is limited, and that the capacity to govern effectively requires some secrecy and withholding of information from the Congress.

The distinction between the powers of those who govern and those who represent is not sharp. Indeed, the functions are interdependent. A civilized government, Walter Lippman wrote twenty-one years ago, embodies two interdependent functions: it must govern through an Executive who is the "active power in the state, the asking and proposing power"; and it must represent, through "assemblies which have the consenting power, the petitioning, the approving and the criticizing, the accepting and the refusing power."¹³⁶ Effective and civilized government assumes that the two powers will be in balance, "that they will check, restrain, compensate, complement, inform and vitalize each one the other."¹³⁷ Achievement of this extraordinary objective may rest upon the ability of the Court to find the appropriate balance.

Given a justiciable setting, the Supreme Court has not been reluctant recently to umpire disputed separation of powers claims. In recent cases, including *United States v. Nixon*,¹³⁸ the Court has rejected broad arguments that the separation of powers doctrine settles the issues.¹³⁹ Instead, the Court has emphasized the particular facts, the context and setting, and the arguments advanced to support each claimant. The ultimate result may depend more upon which party is held to the burden of proof, and the extent to which deference is given to the opinions of one branch in preference to those of another. The broad language of several opinions, the historical role of the President in foreign affairs, and the need for the nation to be represented in its international relations by a single voice coalesce to allow the prediction that the Court will honor an opinion of the President that a

136. W. LIPPMANN, *THE PUBLIC PHILOSOPHY* 30 (Atlantic-Little Brown ed. 1955).

137. *Id.* at 55.

138. 418 U.S. 683 (1974).

139. *Id.* (Executive vs. Judiciary). *See also* *Gravel v. United States*, 408 U.S. 606 (1973); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Executive vs. Judiciary; the Pentagon Papers case); *Powell v. McCormick*, 395 U.S. 486 (1969) (Judiciary vs. Legislature); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Executive vs. Legislature).

particular intelligence agreement should be withheld. However, the more a claim to withhold is rooted in specific facts, or is founded on reasoned opinion, the more likely it is that it will be accepted by the Court and by the public.

In order to prevail over Congress, the Executive need not, and should not, argue that Congress totally lacks power to inquire into the existence of international agreements. Nor should the Executive rely upon the broad statements of inherent constitutional power voiced by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*¹⁴⁰ That opinion, however, stresses in dicta the fact that the President necessarily has informational facilities not available to Congress, and it implies a power to withhold secret information from Congress.

The following hypothetical situations illustrate the types of facts that a court might find persuasive in permitting non-compliance with the Case Act. Such facts might be disclosed in sworn testimony, perhaps at an *in camera* hearing, without compromising the agreement's impact nor disclosing enough information to reveal the name of the country involved:

1. The unnamed foreign party to the agreement has been assured that its contents would not be disclosed to another branch of government because of the desire of the foreign country to maintain an appearance of neutrality or to avoid severe political embarrassment.
2. The agreement involves the location, duties, and safety of military and other personnel who are under the orders of the President in his capacity as Commander-in-Chief.
3. The subject matter of the exchange concerns weapons, inventions, and contingency plans which our adversaries should not know, and which are so sensitive that the danger of disclosure would be increased by compliance with the Case Act.
4. Inextricably linked with the agreement is information supplied by associates and advisers of the President, which was intended to help the President. Here one can rely on the opinion

140. 299 U.S. 304 (1936). The Court faced the question of the extent to which Congress could delegate legislative powers over foreign affairs to the President. According to the Court, the foreign affairs power arises not from the Constitution, but as a "necessary concomitant of nationality." *Id.* at 318. The Court then went on to hold that the same constraints on congressional delegation of power to the Executive in domestic cases, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), are inapplicable in the area of foreign relations. For an in-depth criticism of the *Curtiss-Wright* decision, see Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

of the Supreme Court in *United States v. Nixon* as well as in *Marbury v. Madison*.¹⁴¹

5. Disclosure of one agreement would trigger demands on the United States to enter into similar agreements with other nations. For example, if an agreement with Ruritania, by which Ruritania obtains certain technical advice, were disclosed, then Lilliput, Ruritania's adversary, would make similar demands which, for some reason (*e.g.*, costs too much, Ruritarians are friends and gentlemen, Lilliputians cannot be trusted, etc.), the United States does not wish to honor.

6. The agreement was achieved by bribing the President, King, or other head of state of Ruritania in such a manner that United States law was not violated although Ruritanian law might have been.

7. The agreement is with a nation with which the United States does not wish to acknowledge even more conventional diplomatic ties.

CONCLUSION

Wisdom, if not constitutional law, dictates that the executive branch be as forthcoming and conciliatory with Congress as the circumstances permit. These qualities would be evidenced if the Executive submitted those parts of an intelligence agreement that would not seriously jeopardize its objective. The name of the country involved might be deleted, or parts of the text might be excised, or a summary might be offered. The more information disclosed, the less likely that Congress will find its prerogatives threatened and the more likely that the withholding will be acceptable.

A major difficulty with the Case Act is its unqualified command requiring the disclosure either to the public, or to the Congress, of "all" international agreements. The constitutional difficulties are underscored by the statute's necessary corollary, namely, that the President may never withhold an international agreement from the Congress. That proposition is dangerously broad and presents practical difficulties to a workable government. The need for an informed Congress must be balanced against the exigencies of effective government in resolving inter-branch conflicts arising under the Case Act.

141. See text accompanying notes 138 & 124 *supra*.