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Foreign Nationals and Agencies of Foreign Governments as Persons under the Freedom of Information Act: A Question of Constitutionality

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NOTES

FOREIGN NATIONALS AND AGENCIES OF FOREIGN GOVERNMENTS AS PERSONS UNDER THE FREEDOM OF INFORMATION ACT: A QUESTION OF CONSTITUTIONALITY

I. INTRODUCTION

In 1966 the United States Congress passed, and President Johnson signed into law, the Freedom of Information Act (FOIA).[1] Under FOIA any "person"[2] who requests access to records in the hands of any agency of the executive branch of the United States government must be provided the requested information unless it is exempt from disclosure under one of the nine specific exemption provisions.[3] Passage of the Act was hailed by the news media,

1. 5 U.S.C. § 552 (1976).

2. The term "person" as defined in the Act includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2) (1976). The excluded term "agency" refers to an authority of the United States government and would not include a foreign authority. *See* 5 U.S.C. § 551 (1) (1976).

3. 5 U.S.C. § 552 specifically provides:

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an ageny in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

public interest groups, members of Congress, and the President himself as a new milestone in open government.[4]

Since the FOIA was passed, the federal courts have decided over 500 cases interpreting and applying the Act.[5] A few of those cases have interpreted the term "person," as used in the Act, to include foreign nationals and agencies of foreign governments.[6] The purpose of this note is to examine the potential for constitutional conflict implicit in those holdings in light of the President's power in the area of foreign affairs.

This note will first examine the FOIA as it is juxtaposed against the President's power in the area of foreign affairs. Particular attention in this area will be directed to the expressed congressional purpose for passage of the FOIA and the President's role as sole voice of the nation in international relations. Next, the conflicting interests will be highlighted by means of a hypothetical fact situation in which the FOIA dictates disclosure of information which the President feels must be withheld because of foreign policy considerations. Finally, this note will propose some solutions to both the practical problems presented and the constitutional implications of the conflictm

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(7) investigatory records compiled for law enforcement purposes . . . ;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

4. "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." Statement of President Johnson upon signing the Freedom of Information Act, *quoted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93RD CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCEBOOK 1 (Comm. Print 1974) [hereinafter cited as SOURCEBOOK].

5. Saloschin, Newkirk & Gavin, *A Short Guide to the Freedom of Information Act* 26 (1977), *reprinted in* U.S. DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION COMM., FREEDOM OF INFORMATION CASE LIST (1978).

6. *See, e.g.*, Stone v. Export-Import Bank of the United States, 552 F.2d 132 (5th Cir. 1977); Neal-Cooper Grain Company v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).

II. THE FREEDOM OF INFORMATION ACT

A. *Historical Background*

The FOIA was the product of ten years of effort by the Subcommittee on Government Information of the House Committee on Government Operations.[7] In 1955, when Representative John Moss was appointed chairman of that subcommittee, his letter of appointment contained the following injunction: "An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government."[8] The subcommittee's dissatisfaction with public availability of information stemmed from the performance of federal agencies under the record keeping provisions of section 3 of the Administrative Procedures Act.[9] That Act, passed in 1946, was originally intended to give access to government information. Its criteria for disclosure were so imprecise,[10] however, that the agencies governed by it most frequently used the act as a basis for denying information. The House Report on the bill which eventually became the FOIA stated: "[T]he law which was designed to provide public information about Government activities has become the Government's major shield of secrecy."[11] Because of this perceived secrecy in government, the Congress undertook to draft legislation that would provide a method to assure the accessability of government information to the public.[12]

The legislative history of the FOIA clearly indicates that Congress was concerned with providing access to information for United States citizens. The record of debates and committee re-

7. Saloschin, Newkirk & Gavin, *supra* note 5, at 1,2; *See also,* H.R. REP. No. 876, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267, 6269.

8. Letter from Rep. William L. Dawson to Rep. John E. Moss (June 9, 1955), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6268.

9. 5 U.S.C. § 1002 (1946) (current version at 5 U.S.C. § 552 (1976)).

10. The Act exempted records if secrecy was required "in the public interest" or if they related solely to "the internal management of an agency." Documents could also be withheld "for good cause found," or if the requestor was not a person "properly and directly concerned." *Id.; see also* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2421-24.

11. H.R. REP. No. 2429, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2429.

12. *Id.*

ports are replete with references to insuring the citizen's rights of access.[13] There is no consideration in the legislative history, however, of giving access to foreign nationals. The Comptroller General of the United States, in his comments on the proposed legislation, did point out that the Administrative Procedures Act (APA),[14] to which the FOIA would be an amendment, included foreign nationals in its definition of "person."[15] There is, however, no indication that his observation was noted or considered by the Congress. In its rush to draft a law that would provide the access demanded by the moment, the word "person," a logical choice, appears to have been used without regard to how that term was defined in the APA.

B. *The Role of "Persons"*

The term "person" is important in the Act in two respects. First, any "person" is presumptively entitled to access to information.[16] Second, exemption (b)(4) protects from disclosure confidential commerical or financial information which is obtained by the government from a "person."[17] These two different uses of the term in the definition of who may obtain information and whose information is protected from disclosure can lead to an interesting but anamolous result when foreign entities are included in the meaning of "person."

A good example of this anamoly is presented by a comparison of two FOIA cases. The first, *Stone v. Export-Import Bank of the United States,*[18] involved an attempt by a candidate for the United States Senate to obtain specific information concerning the terms of a loan made by the Export-Import Bank (Eximbank) to an agency of the government of the Soviet Union. Mr. Stone was unsuccessful in obtaining that information because the court upheld Eximbank's refusal to disclose based on exemption (b)(4).[19] The court reasoned that an agency of the Soviet Union was a

13. 112 CONG. REC. 13007 (1966), *reprinted in* SOURCEBOOK, *supra* note 4, at 46, 53, 54; S. REP. No. 813, 89th Cong., 1st Sess., *reprinted in* SOURCEBOOK, *supra* note 4, at 36, 45.

14. 5 U.S.C. § 551 (1976).

15. Stone v. Export-Import Bank of the United States, 552 F.2d 132, 136, at n.6 (5th Cir. 1977).

16. 5 U.S.C. § 552(a)(3) (1976).

17. 5 U.S.C. § 552 (b)(4).

18. 552 F.2d 132 (5th Cir. 1977).

19. 5 U.S.C. § 552(b)(4).

person under the Act,[20] and the information submitted to support its loan application was the type of commercial or financial information protected by the exemption.[21] Thus, a United States citizen, for whom the Act was intended to procure information, was unable to determine the soundness of a decision to use the taxpayer's money in a loan to a foreign government. And that government, which runs little risk of competitive harm by disclosure of its financial arrangements, was protected from scrutiny by United States citizens.

In stark contrast is the case of *Neal-Cooper Grain Company v. Kissinger,*[22] involving a reverse FOIA suit[23] by a United States corporation to prevent disclosure of information regarding its activities to a foreign government. The Mexican government had requested, and the United States Customs Service was prepared to release, information about imports from Mexico which Neal-Cooper was required by United States law to provide to customs officials.[24] The court found that the Mexican government was a "person" within the meaning of the FOIA[25] and that the information requested was not confidential.[26] Although the information was requested to further an investigation of alleged violations of Mexican law, the court found there would be no harm to Neal-Cooper in disclosing the documents.[27] Thus, a domestic corporation and a United States citizen,[28] for whose benefit the Act was written, were subjected to possible foreign criminal sanctions resulting from disclosure which was not required by any treaty or executive agreement.[29]

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20. 552 F.2d 132, 137.

21. *Id.* at n.8.

22. 385 F. Supp. 769 (D.D.C. 1974).

23. The term "reverse FOIA suit" refers to those actions brought to prevent a government agency from disclosing information pursuant to a FOIA request. The information usually concerns the plaintiff who feels it should properly be exempt from disclosure under the Act. HOUSE COMM. ON GOVERNMENT OPERATIONS, A CITIZEN'S GUIDE ON HOW TO USE THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN REQUESTING GOVERNMENT DOCUMENTS, H.R. REP. No. 793, 95th Cong., 1st Sess. 12 (1977).

24. 385 F. Supp. at 772.

25. *Id.* at 776.

26. *Id.* at 777.

27. *Id.* at 779.

28. The plaintiffs included Albert Louis Hastings, a customs house broker acting as an agent for Neal-Cooper, who sued on his own behalf. *Id.* at 771.

29. *Id.* at 773.

Inclusion of foreign governments in the definition of "person" in each of these cases leads to a result which appears to be opposite the expressed congressional purpose behind the FOIA.[30] That conflict between purpose and result is not, however, the major problem posed by the definition. As the *Neal-Cooper* case points out, the FOIA, as currently interpreted, is a congressional command to the Executive to disclose any non-exempt information to any person who makes a request for that information, even if the requesting party is a foreign national or an agency of a foreign government. Therefore, the congressional command must be examined to determine its constitutionality in light of the foreign affairs power of the President.

III. THE FOREIGN AFFAIRS POWER

The foreign affairs power of the United States is not specifically enumerated in the constitution. Specific grants of power to both the executive and legislative branches touch on various aspects of international relations[31] and support claims of each to preeminence in the field. In terms of the conduct of foreign relations, however, the specific grants to the Executive, and the powers inherent in those grants, have come to be recognized as preeminent.

The first sentence of section one, article II of the constitution provides that "the executive power shall be vested in a President of the United States of America."[32] From the earliest days of our constitutional history, some commentators have interpreted this grant to include all of the executive functions which were typically exercised by the executive in eighteenth century political systems, including the conduct of foreign relations.[33] Although Presidents

30. *Id.*

31. Executive powers include the authority of the Commander-in-Chief of the armed forces, the power to make treaties and appoint ambassadors, and the duty to insure that the laws are "faithfully executed." Legislative powers include the power to "declare war," to give "advice and consent" on the making of treaties and appointments of ambassadors, and the power to make all laws "necessary and proper for carrying into execution . . . all . . . powers vested by the Constitution in the Government of the United States."

32. U.S. CONST. art. II, § 1.

33. Alexander Hamilton, the proponent of executive power for the Washington and Adams administrations, was the first to expound this all encompassing view of the grant of executive power. In his view, the other enumerated powers of the President are examples of limitations or modifications to that power which resulted from grants of power to Congress which intrude to some extent in purely executive matters. Thus, the President's role as commander-in-chief of the armed

have frequently relied on the grant of executive power to justify their activities in international affairs,[34] the scope of that power has never been defined; nor has the executive power alone been accepted as a sufficient basis for an exercise of Presidential authority.[35]

Two other express grants of power to the President, however, have been accepted as the source of broad authority in the area of foreign affairs. The President's power to appoint and receive ambassadors[36] and to make treaties[37] have established his position as the voice and ears of the nation.[38] Through the mechanics of the diplomatic service, the President determines who will speak for the United States in foreign capitals and which spokesmen of foreign governments will be listened to in the United States. Inherent in this power to exchange ambassadors is the power to recognize nations and to determine whether or not diplomatic relations should be maintained.[39] Likewise, the power to make treaties implies an ability to initiate or terminate negotiations with foreign powers.[40] The Senate may advise and must consent to treaties,[41] but only the President may negotiate.[42] In the words of John Marshall, "The President is sole organ of the nation in its external relations, and its sole representative with foreign nations."[43]

This unique position of the President as the conduit through which pass the communications between the United States and foreign governments was recognized at an early stage of our history. In 1799 the Congress passed "An Act to Prevent Usurpation of Executive Functions."[44] Popularly titled the Logan Act, this law

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forces is specifically enumerated to clarify his role in light of the congressional power to declare war. Likewise, the power to make treaties and appoint ambassadors are specifically enumerated because of the qualification requiring consent of the Senate. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 217-18 (3rd ed. 1948).

34. *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971). Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

35. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

36. U.S. CONST. art. II, § 2, cl. 2.

37. *Id.*

38. L. HENKIN, *supra* note 35, at 37.

39. *Id.* at 41, 47-48.

40. *Id.* at 41, 48.

41. U.S. CONST. art. II, § 2, cl. 2.

42. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

43. 10 ANNALS OF CONG. 613 (1800) *cited in* L. HENKIN, *supra* note 35, at 45. *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

44. Logan Act, Ch. 1, 1 Stat. 613 (1799), (current version at 18 U.S.C. § 953 (1976)).

imposes criminal penalties upon Americans who engage in private "correspondence or intercourse" with any foreign government in an attempt to influence its conduct in relation to the United States. The Congress thus clearly dictated that whatever is communicated to a foreign government must be communicated by the Executive under our constitutional framework. The question raised by the inclusion of foreign governments as "persons" under the FOIA is whether the congressional directive to the President to communicate information to those persons unconstitutionally interferes with the presidential control of foreign relations.

IV. An Illustration of the Conflict

An example of the conflict between the disclosure required by the FOIA and a presidential decision to withhold information in the interest of foreign affairs can best be illustrated by consideration of a hypothetical fact situation.

> The government of Iran wishes to purchase military hardware from the United States. In the early stages of the negotiations, the Iranian government asks that the arrangements be kept confidential. The United States Department of Defense (DOD), in accordance with the Arms Export Control Act,[45] determines the cost of the hardware from the American manufacturer and offers to procure it for the Iranian government at the stated price. Iran then accepts the offered price, agrees to terms of payment, and signs the agreement. The Department of Defense then contracts for the equipment through its normal procurement channels. At that point the Letter of Offer and Acceptance[46] (LOA) between Iran and the United States is filed in DOD files.
>
> During the course of the Iranian dealings, the State Department has been involved in negotiations to improve United States relations with the government of Saudi Arabia. The Saudi government is concerned about the military build up in Iran, and in exchange for increased oil guarantees, seeks additional United States military aid. In an effort to improve its negotiating position, the Saudi government files a FOIA request for copies of the LOA negotiated between the United States and Iran.

For purposes of this example, it will be assumed that the President opposes disclosure of the agreement in the interest of our foreign relations with Iran as well as to protect our bargaining

45. 22 U.S.C. §§ 2751-2794 (1976).

46. Department of Defense Form 1531. *See,* 32 C.F.R. § 1206. 1303-1 (1978).

position with Saudi Arabia.

It is clear that the Saudi Arabian government is a "person" under the terms of the FOIA[47] and therefore is presumptively entitled to disclosure of the agreement. It must therefore be determined whether the Department of Defense may properly deny access to the document under one of the exemption provisions.[48]

A. *Exemption (b)(4)*

Exemption (b)(4)[49] protects from disclosure information which is commercial or financial in nature and privileged or confidential. In our scenario, the LOA contains financial information which was accompanied by Iran's request for confidentiality. As the language of this provision has been interpreted, however, it would not exempt the LOA for two reasons.

First, the express language of 5 U.S.C. § 552 (b)(4) exempts this type of information when it has been submitted to the government by a "person."[50] The government of Iran has already been shown to fit within the "person" definition.[51] Under the provision of the Arms Export Control Act, however, the financial figures are determined by the United States and presented to the foreign government.[52] The foreign government then accepts the figures by its signature on the LOA. It is thus difficult to say the figures have been submitted to the United States Government by the government of Iran. Even if such a determination is made, however, the information must still meet the test of being "privileged or confidential."[53]

The courts that have interpreted the (b)(4) exemption apply the two pronged test enunciated in *National Parks and Conservation Ass'n. v. Morton*[54] to determine whether information is privileged or confidential. To be exempt from disclosure under that test,

47. *See* 5 U.S.C. § 551 (2) (1976).

48. 5 U.S.C. §§ 552 (b)(1)-(b)(9). The Exemptions which concern internal personnel rules ((b)(2)), inter-agency or intra-agency memorandums ((b)(5)), files which invade personal privacy ((b)(6)), law enforcement files ((b)(7)), reports on financial institutions ((b)(8)(1), or geological data ((b)(9)) are inapplicable to the requested document and will therefore not be discussed in the text.

49. 5 U.S.C. § 552 (b)(4).

50. *Id.*

51. *See,* note 2 *supra* and accompanying text.

52. 32 C.F.R. § 1206.1303-1 (1978).

53. 5 U.S.C. § 552 (b)(4).

54. 498 F.2d 765 (D.C. Cir. 1974).

information must be of a type which, if disclosed, either would result in competitive harm to the person submitting it,[55] or would impair the government's ability to obtain similar information in the future.[56] The financial information contained in the LOA does not meet either of these criteria. There would be no discernable harm to the government of Iran resulting from disclosure of its ability to pay a specified amount for military equipment from the United States. The purpose of the "competitive" harm standard is to protect information such as trade secrets that would harm a person's business position if possessed by a competitor.[57] Likewise, the United States Government's ability to obtain similar information in the future would not be impaired by disclosure of Iran's agreement. This test is meant to safeguard information voluntarily submitted to agencies for the purpose of government studies, legislation, or mediation of labor disputes.[58] Any government wishing to purchase equipment would be required to agree to terms in order to purchase the equipment. Since that agreement is a prerequisite to the purchase, the United States Government will be able to obtain the information in any future sale.

Iran's request for confidentiality concerning the negotiations and agreement will not in itself be sufficient to make the agreement privileged or confidential under the exemption. The court in *National Parks and Conservation Ass'n. v. Morton* indicated that a request for confidentiality, even if it is accompanied by an assurance of non-disclosure, will not automatically exempt information from the requirements of the Act unless non-disclosure would be justified under the established tests.[59] Therefore, even if the DOD acceeded to Iran's request for confidentiality, the information would not be exempt from disclosure.

B. *Exemption (b)(3)*

Exemption (b)(3)[60] directs non-disclosure of requested information if disclosure of that information is prohibited by law. Congress' intent in passing that exemption was to avoid a conflict with

55. *Id.* at 770.
56. *Id.*
57. H.R. REP. No. 1497, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2427.
58. *Id.; See also,* National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).
59. 498 F.2d 765 at 770.
60. 5 U.S.C. § 552 (b)(3) (1976).

areas in which legislation had already dictated non-disclosure of specific forms of information in the possession of government agencies.[61] Several attempts have been made in FOIA cases to prevent disclosure based on 18 U.S.C. § 1905. This general criminal statute makes it a violation of federal law for a government employee to improperly disclose business information which comes to him in the course of his employment. The courts have uniformly held that provision inapplicable to the (b)(3) exemption to the FOIA because it does not set specific guidelines for withholding information.[62]

Those holdings are a direct result of *Administrator, Federal Aviation Administration v. Robertson,*[63] in which the Supreme Court found that a statute giving broad discretionary withholding power to the Federal Aviation Administration[64] met the test of a withholding statute under (b)(3). In response to that holding, Congress amended the exemption to require that the statute in question either prohibit disclosure,[65] or if it allows discretion, that the discretion either be exercised within specified guidelines[66] or apply to specific information.[67]

Agreements for sale of military hardware by the United States cannot be withheld solely on the basis of the (b)(3) exemption because of the Arms Export Control Act. That Act requires that agreements for arms sales abroad must be as accessible to the public as possible without jeopardizing national security.[68] Similar

61. H.R. REP. No. 1497, *supra* note 57, at 2426.

62. *See, e.g.,* Neal-Cooper Grain Company v. Kissinger, 385 F. Supp. 769 (1974); Sears, Roebuck and Co. v. General Services Administration, 384 F. Supp. 996 (1974); M.A. Schapiro & Co. v. Securities Exchange Commission, 339 F. Supp. 467 (1972).

63. 422 U.S. 255 (1975).

64. The statute relied upon was the Federal Aviation Act of 1958, §1104, 49 U.S.C. § 1504 (1976), which reads in part:

> Any person may make written objection to the public disclosure of information . . . . Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public.

65. 5 U.S.C. § 552 (b)(3)(A).

66. 5 U.S.C. § 552 (b)(3)(B).

67. *Id.*

68. Any contracts entered into between the United States and a foreign country under the authority of this section . . . shall be prepared in a manner which will permit them to be made available for public inspection

provisions have been held to mandate disclosure of information rather than to authorize non-disclosure.[69] It, therefore, could not be relied upon to exempt the disclosure of the requested LOA. Presumably, the national security consideratons that would warrant non-disclosure under the Arms Export Control Act would mandate that a security classification be assigned to the agreement to protect its contents in the interest of national security.

C. *Exemption (b)(1)*

Exemption (b)(1)[70] permits non-disclosure of requested information when secrecy is required in the interest of defense or foreign relations and when the information has been "properly classified" pursuant to an executive order. The requirement for "proper" classification is another Congressional reaction to a court holding allowing non-disclosure of documents. Prior to 1974 the exemption protected documents which were classified in the interest of national defense or foreign policy.[71] In *Environmental Protection Agency v. Mink,*[72] thirty-two members of Congress requested disclosure by the EPA of documents relating to a proposed underground nuclear test. The agency denied access to the records on the grounds they were classified documents and thus exempt from disclosure. The District Court upheld the agency claim, but the Court of Appeals reversed, holding that the lower court should have examined the documents in camera to determine whether they contained any unclassfied information which should properly be disclosed.[73] In reversing the Court of Appeals, the Supreme Court stated that the classification of the documents in and of itself was sufficient to prevent disclosure.[74] Once the District Court determined that the documents carried a security classification, its inquiry was at an end. The Court reasoned that Congress was aware of the President's classification order at the time it passed the Act and therefore since Congress had not dictated new classification criteria, it had accepted the provisions of the Executive

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to the fullest extent possible consistent with the national security of the United States.

22 U.S.C. § 2761(f) (1976).

69. Schechter v. Weinberger, 506 F.2d 1275 (1974).
70. 5 U.S.C. § 552 (b)(1) (1976).
71. 5 U.S.C. § 552 (b)(1) (1976).
72. 410 U.S. 73 (1973).
73. Mink v. Environmental Protection Agency, 464 F.2d 742 (D.C. Cir. 1972).
74. Environmental Protection Agency v. Mink, 410 U.S. 73, 84 (1973).

Order that were incorporated into the Act. The Court stated: "[T]he legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them."[75] The Court went on to indicate that Congress could have dictated new procedures or adopted its own procedures, subject to the limitations of the Executive privilege.[76]

In response to this decision,[77] Congress amended the (b)(1) exemption in 1974 to require that documents withheld pursuant to its provisions be authorized classification pursuant to the criteria of the Executive Order and that they be in fact properly classified. With this amendment, Congress gave the courts the duty, as well as the right, to determine whether documents are properly classified.[78] Judges are thus authorized to examine the documents and make their own independent determination on the need for secrecy in the interest of national security.

As this exemption is applied to the hypothetical fact situation under consideration, several problems are encountered. First, it is doubtful whether the LOA requested by Saudi Arabia will be classified at the time of the request. Because the Arms Export and Control Act requires agreements to sell arms to be made publicly accessible if possible,[79] the LOA itself is likely to contain little other than listings of types of equipment, quantity, and cost. Any specifics of a militarily sensitive nature are likely to be incorporated by reference to classified material.

At this point, the question arises whether the agreement, which was unclassified when it was signed, may be assigned a security classification subsequent to, and because of, a FOIA request for its disclosure. The current classification order, Executive Order 12065,[80] provides that such action is permissible if strict procedural requirements are met. Any document which is the subject of a FOIA request may be classified subsequent to that request only by an agency head or deputy agency head.[81] In addition to the proce-

75. *Id.* at 82.
76. *Id.* at 83.
77. H.R. REP. No. 876, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6267, 6272-73.
78. CITIZEN'S GUIDE, *supra* note 23 at 10.
79. 22 U.S.C. § 2761 (f).
80. Exec. Order No. 12,065, 43 Fed. Reg. 28949 (1978).
81. *Id.* at § 1-606.

dural requirements, the substantive requirements necessary to authorize classification also must be met.[82]

The substantive requirements of Executive Order 12065 provide that information which concerns the foreign relations of the United States may properly be considered for classification.[83] Three possible designations for classification are then available to the agency. A "top secret" classification may be applied only if disclosure of the information "reasonably could be expected to cause exceptionally grave damage to the national security."[84] The "secret" designation may be applied to information whose disclosure "reasonably could be expected to cause serious damage to the national security."[85] The final classification, "Confidential," may be applied to information that "reasonably could be expected to cause identifiable damage to the national security" if disclosed.[86] The order also provides that in cases of doubt about the appropriate classification, or whether in fact classification is proper, "the less restrictive classification should be used, or the information should not be classified."[87]

These provisions of the order, which became effective December 1, 1978, have not yet been applied by the courts in a FOIA case. The interpretations given to the provisions of the previous classification order, Executive Order 11652,[88] do, however, give some indication of the judicial treatment to be expected under the current order. In *Halperin v. Department of State,*[89] the Court of Appeals strictly interpreted the substantive requirements for classification and found that the document had not been "properly classified" pursuant to the executive order.

Halperin dealt with a reporter's request for a transcript of a "background press conference"[90] held by the Secretary of State. That document had been unclassified from the time of its origin

82. *Id.*
83. *Id.* at § 1-301(d).
84. *Id.* at § 1-102.
85. *Id.* at § 1-103.
86. *Id.* at § 1-104.
87. *Id.* at § 1-101.
88. 3A C.F.R. 154 (1972), *reprinted in* 50 U.S.C. § 401 (1976).
89. 565 F.2d 699 (D.C. Cir. 1977).
90. The background press conference is used by the State Department to disseminate information without the risk of direct attribution of sensitive statements to government sources. The rules governing these conferences require that only paraphrase be used in reporting the information which may be attributed only to unnamed "Senior State Department officials." *Id.* at 701.

until the request for its disclosure. Upon review of the document pursuant to the FOIA request, a department official noted that certain comments concerning a pending arms limitation agreement, while not themselves strictly classified, could be harmful to foreign relations if attributed to the Secretary. Due to these concerns, portions of the transcript were assigned a security classification and withheld from the requesting party.

The Court held that the agency's classification was improper both procedurally and substantively. The court found that subsequent classification was not procedurally allowed because Executive Order 11652 required a classification to be assigned to a document at the time it originated.[91] Nevertheless, the court proceeded to analyze whether the agency action complied with the substantive terms of the order. The deposition of the agency official who assigned the classification indicated he had taken the action because he felt disclosure "would be prejudicial to national interests."[92] The court compared this rationale to the terms of the order, which authorized classification of information if its disclosure "could reasonably be expected to cause damage" to national security,[93] and found that the standard used did not comply with the language of the directive and was therefore improper.

Executive Order 12065[94] seems to have solved the procedural problem of *Halperin v. Department of State*[95] by specifically authorizing classification subsequent to a FOIA request for disclosure.[96] The problems with substance, however, still exist. Assuming for purposes of the hypothetical fact situation that the Executive's perceived harm to national security is neither "exceptionally grave"[97] nor "serious,"[98] the agency is limited to a choice of either classifying the document "Confidential," or imposing no classification. In light of the directive to use the least restrictive classification in cases of doubt,[99] it could be argued that any classification in this case would be substantively improper. Even if the classifying authority has no doubt about the propriety of the classification,

91. *Id.* at 704.
92. *Id.*
93. Exec. Order No. 11,652, *supra* note 88, at § 1(C).
94. 43 Fed. Reg. 28949 (1978).
95. 565 F.2d 699 (D.C. Cir. 1977).
96. Exec. Order No. 12,065, *supra* note 80.
97. *See* note 84 *supra.*
98. *See* note 85 *supra.*
99. *See* note 87 *supra.*

the criteria for imposing a "Confidential" classification pose problems. The requirement that the harm resulting from disclosure of the information be "identifiable"[100] is seemingly more strict than that of Executive Order 11625. A court that interprets that provision as strictly as the *Halperin* court could conceivably require a specific demonstration of harm which the executive branch would be unable to provide. In that case, the classification would be improper under exemption (b)(1) and disclosure of the LOA would be required despite Presidential opposition.

V. The Constitutional Issues

The key to determining the constitutionality of the FOIA as it applies to foreign nationals and agencies of foreign governments lies in a distinction between dissemination of information and creation of policy. Assuming, arguendo, that Congress has the constitutional authority to direct disclosure of information, the FOIA, on its face, is constitutional. When, however, the disclosure directed by Congress acts to restrict the President's power to make a foreign policy decision, as it does in the proposed hypothetical, it must be interpreted to be unconstitutional as applied.

A. *Interference with the Classification Decision*

The Supreme Court stated in *Mink*[101] that Congress did not have to accept the existing executive classification criteria for FOIA purposes. The court, however, also indicated that whatever system Congress established must give due regard to the privilege of the President. When Congress amended the first FOIA exemption in response to that decision, it neither established its own criteria nor amended the President's. Rather, Congress inserted the courts into the classification process in direct disregard of the principle of separation of powers and without the deference to executive decisions encouraged by *Mink*.

In 1936, the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*[102] emphasized the "very delicate, plenary and exclusive power"[103] of the President in foreign affairs. Subsequent decisions in the area of foreign relations have indicated that the courts continue to show deference to executive deci-

100. *See* note 86 *supra*.
101. E.P.A. v. Mink, 410 U.S. 73 (1973).
102. 299 U.S. 304 (1936).
103. *Id.* at 320.

sions made in the exercise of that power. The Court dealt with the issue again in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[104] when it considered a Civil Aeronautics Board award of an overseas air route. The Board's proposed order had been reviewed by the President who had directed changes be made in the interest of the "national welfare."[105] Refusing to exercise judicial review of that portion of the order which resulted from the President's directive, the court stated:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences . . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[106]

Five years later, in *United States v. Reynolds*,[107] the court again refused to look into the background of a presidential decision to withhold information because of foreign affairs considerations. *Reynolds* involved a demand for evidence made by a claimant suing the United States under the Federal Tort Claims Act.[108] The demand was refused on the basis of a claim of executive privilege in the interest of foreign affairs. In upholding the Executive's claim, the court noted the impropriety of judicial second guessing of foreign affairs decisions.[109]

Two decisions by the Supreme Court in recent years have resulted in holdings that have given less than automatic deference to Executive claims of privilege, but neither has restricted the broad foreign affairs language of *Waterman*[110] and *Reynolds*.[111]

104. 333 U.S. 103 (1948).
105. *Id.* at 111.
106. *Id.*
107. 345 U.S. 1 (1953).
108. 28 U.S.C. §§ 2671-2680 (1976).
109. United States v. Reynolds, 345 U.S. 1, 10 (1953).
110. 333 U.S. 103 (1948).
111. 345 U.S. 1 (1953).

New York Times Company v. United States[112] dealt with a question of prior restraints on the first amendment rights of citizens. The government sought to prevent publication of "The Pentagon Papers" because of the alleged detrimental effect publication would have on national security and foreign relations. The government's application for a preliminary injunction was denied on the ground that the "heavy burden" required to justify a prior restraint of first amendment rights had not been met.[113] This holding was not the result of decreased judicial deference to foreign affairs decisions, but rather was a result of the increased weight given the opposing position of a citizen's exercise of a constitutional right. *New York Times* is in accord with previous decisions giving priority to constitutionally guaranteed individual rights over foreign affairs considerations.[114] This countervailing interest is not present in a FOIA case involving a foreign national's exercise of a statutorily created right.

The second decision, *United States v. Nixon,*[115] denied a broad assertion of executive privilege to withhold documents requested for a criminal prosecution. While denying the blanket privilege asserted by the President, the court noted that the claim was not based on an asserted need to protect military or diplomatic secrets. Chief Justice Burger indicated that greater deference would be called for[116] if such a claim were made, and cited with approval the language of *Waterman*[117] and *Reynolds*[118] as authority for that proposition.

As this history of judicial decisions clearly shows, the Supreme Court's interpretation of the constitution has taken the courts out of the decision making process in the area of foreign affairs. The court has recognized that certain political decisions, so long as they do not impinge upon the constitutional rights of citizens, are beyond the competence of the courts. As the majority indicated in *Sabbatino*[119] this recognition has constitutional underpinnings and is developed from an analysis of the role of each branch of the

112. 403 U.S. 713 (1971).
113. *Id.* at 714.
114. *See, e.g.,* Lamont v. Postmaster General, 381 U.S. 301 (1965); Reid v. Covert, 354 U.S. 1 (1957); Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972).
115. 418 U.S. 683 (1974).
116. *Id.* at 710.
117. Chicago and Southern Air Lines v. Waterman S.S. Corp. *supra* note 106.
118. 345 U.S. 1 (1953).
119. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Federal Government within the constitutional framework. The courts feel free to enter the realm of foreign affairs by applying the policy formulated in the political branches to determine the rights and duties of litigants resulting from that policy.[120] They do not properly question the wisdom or correctness of the policy itself.

By directing the court to examine classified documents in camera to determine the propriety of an executive decision to withhold information from a foreign government, the FOIA attempts to place the court in a role which it is not constitutionally allocated. Procedures by which the propriety of classification may be questioned are established in Executive Order 12065.[121] When these procedures are utilized and the Executive determines that classification is proper in the interest of national security, he or she has made a foreign policy decision. Requiring, or even allowing a court to question that decision is beyond the power of Congress.

B. *Adverse Precedent*

In addition to the questionable constitutionality of injecting the courts into the process of determining foreign policy, the FOIA raises a second constitutional issue by the mere fact that it requires the President to transmit information, regardless of how innocuous it may be, to a foreign government. The constitution created a system in which the foreign relations of the United States are governed by the the concurrent powers of the Executive and Legislative branches.[122] Under that system, as one commentator has written, "The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, . . . ; each branch was granted important powers over the same area of activity."[123]

120. [O]nce sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking . . . to determine whether the situation is such that statutes designed to assure American neutrality have become operative . . . . Still again, though it is the executive that determines a person's status as representative of a foreign government, . . . , the executive's statements will be construed where necessary to determine the courts jurisdiction. . . .

Baker v. Carr, 369 U.S. 186, 212-13 (1962).

121. Exec. Order No. 12,065, *supra* note 80, at § 3-5.

122. *See* L. HENKIN, *supra* note 35, at 104-05.

123. A. SOFAER, *supra* note 33, at 60.

In this "battle" for supremacy, the role of historical precedent is paramount. Presidents seeking to exercise power and legislators seeking to limit that power and assert a superior congressional role rely on the precedents of the past to justify their positions.[124] This "common law" interpretation of constitutional power prevails until the Supreme Court makes a determination on the proper allocation of power in its role as the ultimate interpreter of the constitution.[125] From that point on, judicial interpretation rather than precedent determines the superior position. The problem presented by the FOIA in this respect is that it presents the danger of reinserting precedent in the area of communications with foreign governments.

The statements of the Supreme Court in *Curtiss-Wright,*[126] *Waterman,*[127] and *Sabbatino,*[128] all indicated that the court interpreted the constitution to place the conduct of negotiations with foreign nations in the hands of the Executive. Congress itself supported this position by passage of the Logan Act.[129] In the FOIA, however, Congress has dictated the transmission of information to foreign governments on a continuing basis. While transmission of information is arguably different from directing negotiations, by setting a precedent that enables Congress to direct communication with foreign governments the FOIA encourages a constitutional conflict. The decisions of federal courts directing disclosures of information in conformance with the FOIA, in the future, could, be relied upon to support a Congressional mandate to the President to transmit a Sense of the Congress Resolution to a foreign power. If, as the Supreme Court has stated, the Constitution entrusts the conduct of foreign relations to the President, then interpreting the FOIA to mandate such communication with foreign governments unconstitutionally interferes with that Executive power.

VI. The Solution

The first step toward resolution of the conflict created by the FOIA would be to specifically exclude foreign nationals and agen-

124. *See* L. Henkin, *supra* note 35 at 89-92.
125. Marbury v. Madison, 5 U.S. 137 (1 Cranch) 117 (1803).
126. *See* text accompanying note 103 *supra.*
127. *See* text accompanying note 106 *supra.*
128. Banco Nacional de Cuba v. Sabbatino, *supra* note 119.
129. 18 U.S.C. § 953 (1976).

cies of foreign governments from the provisions of the Act. Because the definition currently in use is applicable to the entire Administrative Procedure Act,[130] a total exclusion of foreign nationals from the meaning of the term "person" would be inappropriate. That action would deprive foreign nationals of protections currently extended by the application of standardized administrative procedures. The better choice would be to amend the FOIA section of the APA to include a provision that, for purposes of this section, the term "person" does not include foreign nationals or agencies of foreign governments.

An alternative method of resolution would be to replace the term "person" with the term "individual" as Congress did when it enacted the Privacy Act.[131] As "individual" is currently defined, the term includes only United States Citizens and aliens admitted for permanent residence.[132] Use of this term would avoid the problem of granting access to foreign entities, but it would not adequately serve the intent of Congress. The FOIA as currently applied extends its benefits to partnerships, corporations, associations, and public or private organizations other than agencies, as well as to "individuals."[133] The legitimate needs of these entities for access to information should continue to be met through the FOIA. For that reason, a specific exclusion of foreign entities from the meaning of the term "person," only as it applies to the FOIA, seems the better choice.

Unfortunately, mere definitional exclusion of foreign entities from the FOIA terms will not solve the foreign affairs problem of disclosing official information to foreign governments. The Act currently places no restrictions on the use or dissemination of information obtained by a requesting "person." Such limitations, of course, would be inconsistent with the policy of making information publicly available. Due to this lack of limitations, however, a foreign government, finding itself cut off from direct access to information through the FOIA, could still obtain the information through the use of a United States intermediary.

Current United States law does not contain any prohibition against the transmission of unclassified information by a citizen to a foreign government. Criminal sanctions governing classified doc-

130. Administrative Procedure Act, 5 U.S.C. § 551 (1976).
131. Privacy Act of 1974, § 3, 5 U.S.C. § 552a (1976).
132. *Id.* at § 552a (a)(2).
133. *See* Administrative Procedure Act, 5 U.S.C. § 551(2) (1976).

uments are not applicable to publicly available information.[134] As *Halperin*[135] points out, however, even information which is not confidential may adversely affect foreign relations if it is officially attributed to or obtained from the United States government. Public writings or commentary attributing a comment or position to an official government source may be explained away or ignored in official negotiations. But official government documents asserting the same position may disrupt the course of those negotiations.

The Foreign Agents Registration Act of 1938[136] originally contained a provision which would have assisted in a resolution of this problem. That Act required any person acting within the United States as an agent, servant, or attorney of a foreign principal to register with the Attorney General as a foreign agent.[137] Application of this law in the context of the FOIA would have given the government notice that an individual was requesting information on behalf of a foreign government. A 1966 amendment to the Foreign Agents Registration Act restricted the scope of its application.[138] As "agent" is now defined under the Act, an individual must carry out specific functions aimed at advancing the political position of his principal within the U.S. before that individual is required to register as a foreign agent.[139] One who acted merely to obtain information on behalf of a foreign government would not be required to register as an agent of a foreign principal.

In order to further insure the safeguarding of the Executive's role in foreign affairs, a provision similar to the agency test of the original Foreign Agents Registration Act should be included in the FOIA. Persons requesting information on behalf of foreign entities should be required to indicate that fact in their requests. This would enable executive branch officials to examine the possible foreign affairs implications of disclosure. Such a provision should also grant complete executive discretion in deciding whether disclosure will be made.

In the final analysis, however, the courts must take the necessary steps to preserve the constitutional role of the Executive in foreign affairs and to prevent future conflict. The first step in this

134. *See* 18 U.S.C. § 798 (1976).

135. Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977).

136. 22 U.S.C. §§ 611 et seq. (1976).

137. *Id.* at § 612(a).

138. An Act to amend the Foreign Agent's Registration Act of 1938, as amended, § 1, Pub. L. No. 89-486, 80 Stat. 244 (1966).

139. 22 U.S.C. § 611(c) (1976).

process is for the courts to follow the lead of the Supreme Court in *Mink*[140] by refusing to delve into the motives of the Executive in classifying information or making foreign policy decisions. Failure to do otherwise could lead to a constitutional conflict of far greater impact than the current problems. Fortunately, the cases to date that have included foreign entities as "persons" under the FOIA have presented situations in which the position of the Executive regarding disclosure has concurred with that of the foreign government. A case in which the court interprets the FOIA to support the foreign government's position, however, could force the Executive into a position in which his interpretation of his constitutional role would force him to refuse to abide by the court's decision. The constitutional implications of that possibility should far outweigh any interest even the Congress might have in ensuring the accessibility of information to foreign governments.

Lloyd F. LeRoy

140. Environmental Protection Agency v. Mink, 464 F.2d 742 (D.C. Cir. 1972).