The Justiciability of Confrontation: Executive Secrecy and the Political Question Doctrine*

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In 1807 Chief Justice Marshall presided over Aaron Burr's trial for conspiracy. Confronted with a refusal by President Jefferson to produce certain subpoenaed evidence, Marshall conceded that, unlike the evidence immediately in controversy, there might be certain matters the disclosure of which the court would not compel. Yet he forewarned that such matters might also be indispensable evidence. "What ought to be done under such circumstances," he said, "presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country."[1] Ineluctably, history's apprehension has become today's reality. Congress[2] and the courts[3] now have become engaged in separate constitutional battles to obtain disclosure of the "presidential tapes"[4] from a resisting chief executive. In one case

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* Since the writing of this Note, the Watergate affair and the questions it has raised regarding executive power have continued to develop. The President and the Watergate special prosecutor remain central figures in the controversy. In the Congress, however, the role of the Senate Select Committee on Presidential Campaign Activities has largely been supplanted by the impeachment inquiry of the House Judiciary Committee. As the writer observes below, the thesis of this Note is applicable to impeachment proceedings to the extent they are considered political in nature.

1. United States v. Burr, 25 F. Cas. 30, 37 (No. 14,692d) (C.C.D. Va. 1807).

2. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 15 Cr. L.R. 2199 (D.C. Cir. May 23, 1974); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

3. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), *aff'g In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973); United States v. Nixon, (D.D.C. May 20, 1974), *cert. granted*, 42 U.S.L.W. 3689 (U.S. June 18, 1974).

4. In the early morning hours of June 17, 1972, the Democratic Party headquarters for the 1972 presidential election was broken into by individuals apparently acting for the Committee to Re-elect the President. Subsequent investigations by the Senate and a District of Columbia grand jury have revealed an effort, possibly involving White House personnel, to conceal the sources of the break-in plot. Testimony regarding the complicity of President Nixon and his chief aides is highly contradictory. The revelation of the existence of secret tape recordings of presidential conversations pertinent to this issue engendered efforts by the Senate and the District of Columbia grand jury

the President has been engaged with the Watergate special prosecutor, in the other with the Senate Select Committee on Presidential Campaign Activities. Thrust to the fore in both cases are difficult and as yet unresolved questions of constitutional law.

The dispute between Congress and the President involves this fundamental constitutional issue: whether Congress has the right to compel executive disclosure of information or, correlatively, whether the President enjoys a privilege of not disclosing the information sought by Congress. This issue frames the problem of executive secrecy, a problem involving the relationship between the executive and legislative branches of government and resting on the doctrine of separation of powers.[5] To be distinguished from "executive secrecy" for analytical purposes is the doctrine of executive privilege, involving the executive's assertion of immunity from the power claimed by the courts to require disclosure of evidence held by the executive.[6]

A critical aspect of the problem of executive secrecy is the role to be assumed by the judiciary in the ultimate resolution of the problem. This Note will endeavor to ascertain that role in light of the political question doctrine.[7] Executive privilege is without the scope of this analysis, as is the question of Congress' power to procure evidence for impeachment, at least to the extent that the inquiry in such a case should be characterized as a judicial rather than political proceeding. Consideration will first be given to the criteria articulated by the United States Supreme Court for determining whether a question is political in nature. The inadequacy of those criteria for ascertaining the political nature *vel non* of the issue under examination will be demonstrated. Examination of the nature of the interests involved in various political question cases will provide an alternative basis, implicit in past Supreme Court decisions, for the conclusion that executive secrecy is a "political question" beyond the competence of the courts. Finally, this alternative basis will be considered with respect

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to obtain those tapes. Although some of these tapes have now been released to the grand jury, the President steadfastly refuses to comply with the Senate's request for the tapes. *See generally* NEW YORK TIMES, THE WATERGATE HEARINGS (1973).

5. *See* Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CALIF. L. REV. 3, 8-9 (1959); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 755 n.1, 778 (1959).

6. *See* Younger, *supra* note 5, at 755 n.1. The nature of this power relationship rests both on notions of separation of powers and sovereign immunity. *See* Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879, 881 (1962).

7. For exhaustive consideration of the problem of executive secrecy, apart from whether the problem raises political questions, see Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1-2), 12 U.C.L.A. L. REV. 1044, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 827 (1961); Schwartz, *supra* note 5.

to the impact of the Supreme Court's recent expansion of the concept of standing on the use of the political question doctrine to define and limit the judiciary's role in the constitutional scheme.

THE POLITICAL QUESTION DOCTRINE AND JUDICIAL REVIEW

The Dimly Illuminating Guidance of Baker v. Carr

Maintaining that certain issues must be left under the constitutional scheme to the coordinate branches of the federal government for decision,[8] the political question doctrine is engaged by the courts to aid in determining whether a dispute is so inappropriate for decision by the judiciary as to be nonjusticiable.[9] With roots extending as far back as *Marbury v. Madison*,[10] the doctrine has sponsored Supreme Court refusals to decide such issues as whether a statute was appropriately enacted by Congress[11] and whether a state constitutional provision allowing referenda was a denial of the republican form of government guaranteed by the Constitution.[12]

Despite frequent resort to the doctrine, the United States Supreme Court did not expressly isolate specific criteria for identifying a political question until 1962. Then, speaking for the majority in *Baker v. Carr*,[13] Justice Brennan declared:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the po-

8. R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 17 (1971).

9. Justiciability is a generic concept (subsuming *inter alia* the doctrine of political questions) maintaining that certain questions, because of their nature or the context in which they are presented, are beyond the reach of the courts.

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in the federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. . . .

Flast v. Cohen, 392 U.S. 83, 95 (1968) (footnotes omitted).

10. 5 U.S. (1 Cranch) 137, 170 (1803).

11. Field v. Clark, 143 U.S. 649 (1892).

12. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

13. 369 U.S. 186 (1962).

tentiality of embarrassment from multifarious pronouncements by various departments on one question.[14]

Broadly viewed, these six criteria embody two basic theories of judicial review characterizing application of the political question doctrine. According to the "classical" theory of judicial review, the existence of a political question is predicated on the existence of some arguably express textual commitment of an issue to Congress or the executive.[15] Viewed from this perspective, whether an issue is a political question is seen chiefly as a function of the separation of powers and requires merely an interpretation of the Constitution for determination. For example, the United States Supreme Court declared that the legitimate government of Rhode Island in the Dorr Rebellion was to be determined *inter alia* by Congress since that branch, in fulfilling its constitutional duty to decide which senators and representatives are to be seated, must of necessity determine the government entitled to representation.[16] The opposing theory of judicial review, which may be termed the "discretionary" theory, holds a matter nonjusticiable because of various policy limitations on judicial power which are unrelated to provisions in the constitutional text.[17] With particular regard to the political question doctrine, a finding of nonjusticiability may follow from a belief that a decision cannot be rendered without risking noncompliance by another branch; that there exists the necessity of making economic, social or military decisions beyond the competence of the courts; that the situation is such that the courts are unable to obtain adequate factual information requisite to rendering an intelligent decision; or that deference must be given to the wider responsibilities of Congress and the President.[18]

Most of the criteria set forth in *Baker* reflect this second theory. For example, a "lack of judicially discoverable and manageable standards" and the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" fall within the class of decisions whose subject matter is beyond the competence of the courts.[19] The criterion of "lack of respect due coordinate branches of government" contemplates the risk of noncompliance by

14. *Id.* at 217.
15. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 518 (1966).
16. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).
17. *See* Scharpf, *supra* note 15, at 518-19, 597 n.275; *Comments on Powell v. McCormack*, 17 U.C.L.A.L. REV. 1, 61-62, 102-03 (1969) (commentatry by Aspen & Rosen and Laughlin).
18. *See* Scharpf, *supra* note 15, at 549, 555-58, 567, 578.
19. *See* Coleman v. Miller, 307 U.S. 433 (1939) (lack of competence for determining reasonable time for ratification of a constitutional amendment); Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (lack of competence to determine what constitutes a republican form of government).

the coordinate branches with decisions not exercising appropriate deference. The need for deference to the wider responsibilities of the President and Congress may comprehend "need for unquestioning adherence to political decisions already made" or avoidance of "embarrassment from multifarious pronouncements by various departments on one question."

Despite the policy-oriented content of the last five *Baker* categories, their vagueness allows them to be applied so as to subordinate the policy considerations to a classical approach to the political question doctrine. The most recent example is *Powell v. McCormack*.[20] The major issue in *Powell* was the extent of the House of Representatives' discretion to exclude an individual duly elected to that body. By casting the *Baker* criteria in the classical mold, the Supreme Court purported to minimize the clash with the legislative branch threatened by judicial resolution of the issue.[21] The Court observed that determination of the issue

> would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of the respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for nonjudicial discretion."
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> . . . Petitioners seek a determination . . . which . . . requires an interpretation of the Constitution—a determination for which clearly there are "judicially . . . manageable standards." Finally, a judicial resolution . . . will not result in "multifarious pronouncements by various departments on one question." For . . . it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.[22]

Under this sort of application of the political question doctrine, the courts may reach any issue with some arguable reference to the constitutional text. Yet the Supreme Court has *not* proceeded to the merits in all such cases.[23] Indeed, the justiciability of the issue in *Powell* is not as obvious as Chief Justice Warren's majority opinion would have one believe. In the court of appeals, Judge Burger applying the same criteria reached a contrary result.[24] Given the *Baker*

20. 395 U.S. 486 (1969).
21. *See* Note, *Congressional Power to Exclude Members-Elect*, 83 HARV. L. REV. 62, 67 (1969).
22. 395 U.S. at 548-49.
23. *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946); Field v. Clark, 143 U.S. 649 (1892); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
24. Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968), *rev'd*, 395 U.S. 486 (1969). For a discussion in support of Judge Burger's position, see *Comments on Powell v. McCormack, supra* note 17, at 94-97 (commentary by Rice).

criteria's susceptibility to equivocal application, it is not surprising that they offer little guidance in determining whether the executive secrecy issues under consideration are political questions.

The Baker Criteria and the Problem of Executive Secrecy

The "textually demonstrable commitment" criterion, except in cases where the propounded textual commitment is reasonably specific, is an illusive guide for identifying political questions[25]—the political nature of executive secrecy not excepted. If determination of the executive secrecy issue is viewed merely as a matter of deriving, through constitutional interpretation, the existence and scope of implied powers and immunities from the powers and immunities expressly delegated in the Constitution, then the issue is reachable by the courts on the commitment basis.[26] The courts need only assert the *Powell* claim that, in deciding in a particular instance whether Congress has the right to compel executive disclosure or whether the President has a privilege of not disclosing, they are merely discharging their duty to interpret the Constitution. On the other hand, it has been contended that the notion of separation of powers manifest in the constitutional text is an interpretive basis for finding an absolute executive discretion to withhold information. That is to say, the Constitution may be interpreted as absolutely committing disclosure decisions to the executive.[27]

Like the textual commitment basis, the need for judicially discoverable and manageable standards does not go far toward demonstrating whether the political question doctrine should be invoked when the courts are faced with an issue of executive secrecy. This lack of guidance, caused by the flexibility of the criterion, is exemplified by the Supreme Court's attitude toward the guaranty clause of Article IV. Early constitutional adjudication removed the application of the guaranty clause from judicial consideration on the ground that the courts were without competence to formulate standards for the "Republican Form of Government" guaranteed by that clause.[28]

25. *See* Scharpf, *supra* note 15, at 539; *cf.* Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439, 458 (1965). Even the notion of specificity of commitment may prove unworkable. *Compare* Powell v. McCormack, 395 U.S. 486 (1969), *with* Berger, *supra* note 7, at 1352 ("Some constitutional grants are clearer than others, for example the power expressly given Congress to pass upon the 'qualifications of its own members.' [U.S. CONST. art. I, § 5(1), cl. 1.]").

26. *See* Berger, *supra* note 7, at 1352-55; Kramer & Marcuse, *supra* note 7, at 900.

27. *See* Nixon v. Sirica, 487 F.2d 700, 770-75 (D.C. Cir. 1973) (Wilkey, J., dissenting); Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941, 1010-13 (1958); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 107 (1948).

28. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

Yet the Supreme Court recently has suggested that the clause contains judicially cognizable outside limits on the sort of government a state may impose on its residents.[29] Guaranty clause aside, the Court's recognition of its competence to provide extensive substantive content to such vaguely illuminated textual provisions as due process[30] and its development of standards in the sophisticated economic field of antitrust suggest that the judiciary is capable of developing and managing requisite standards for a given question if it so chooses. In fact, courts have provided standards for the disclosure of information by the executive branch in litigation not involving the issue of executive secrecy.[31]

So far as the third criterion is concerned, a decision that the executive does or does not possess certain discretion to withhold information may be viewed as "lack of due respect" for either the legislature or the executive, depending on which branch comes out on the short side of the issue's resolution.[32] But given the Supreme Court's engagement in several issues reaching the core of executive and legislative power,[33] this consideration is not particularly compelling when the Court seeks to ascertain whether a given issue is a political question.[34]

The three remaining *Baker* criteria are no more helpful than the three just considered.[35] Indeed, the criteria predicating nonjusticiability on the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" or the "need for unquestioning adherence to a political decision already made" collapse in circularity. The very questions in search of answers are what "policy determinations [are] of a kind clearly for nonjudicial discretion" and what are "political decisions." Close analysis reveals that the final criterion likewise founders in circularity. Abstention to avoid "embarrassment from multifarious pronouncements" presupposes the ascendancy, or at least equality, of the views of some other department of government.[36] Yet the ordering of the decisional priorities of the

29. *See* Baker v. Carr, 369 U.S. 186, 222 n.48 (1962).

30. Tollett, *supra* note 25, at 469.

31. *See* United States v. Reynolds, 345 U.S. 1 (1953); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), *aff'g In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973). For discussion of the executive's evidentiary privilege, see Hardin, *supra* note 5.

32. Field v. Clark, 143 U.S. 649 (1892).

33. *See* Powell v. McCormack, 395 U.S. 486 (1969) (extent of congressional power to exclude duly elected members); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (scope of presidential enforcement powers beyond legislative provision and scope of presidential reserve powers).

34. *See generally Comments on Powell v. McCormack, supra* note 17, at 67 (commentary by Aspen & Rosen).

35. The remaining three criteria have apparently been of little utility in practice. *See* Berger, *supra* note 7, at 1352.

36. The criterion apparently springs from the field of foreign affairs: "Not only

three departments of government is precisely the issue in determining the applicability of the political question doctrine.

The six *Baker* standards state conclusions rather than reasons. However useful they may be in classifying past decisions, they offer little guidance in analyzing new problems arising under the political question doctrine. As the Supreme Court ultimately conceded in *Baker*, determining whether an issue is a political question involves "the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[37] This equivocal characterization is not to say that the political question doctrine is without meaningful content. The *Baker* criteria (at least the first three) and the cases which illustrate them present fragmentary notions of the judiciary's proper role in the governmental triumvirate. Moreover, the very ease of expansion and contraction of the doctrine's purview by the Supreme Court, when viewed with respect to the types of interests involved in cases in which the doctrine has been or arguably could have been applied, is telling of that role.

THE POLITICAL QUESTION DOCTRINE—AN INTEREST ANALYSIS

The Promptings of Collective and Individual Interests

The interests pressed upon the courts in cases presented to them are of two general types—individual and collective.[38] Individual interests are those which particularly affect individuals or determinate groups in society. Generally, everyone in society possesses these individual interests. When they are infringed, however, they are usually infringed in such a manner that at any given time not everyone will suffer sufficiently to desire vindication in his own behalf. For example, ownership of property is an individual interest because of the degree to which it affects each member of society on an individual basis. In contrast, collective interests do not particularly affect each individual *qua* individual. When these interests are impaired, large indeterminate segments of society suffer. Adequate enforcement of the law is an example. When remiss enforcement by the executive

does resolution of [foreign affairs] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand a single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962). The question, however, is *whose* single voice is to make the statement and why.

37. *Id.* at 217.

38. One writer has coined the expressions "Hohfeldian" and "non-Hohfeldian" plaintiffs to respectively refer to those plaintiffs seeking the vindication of individual interests and those seeking the vindication of collective interests. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968).

infringes on this interest, the insecurity visited on a given individual is indistinguishable from that suffered by every other member of society.[39] To be sure, there is no fine demarcation between the two categories of interests.[40] Nevertheless, all such interests are orderable into "a spectrum of interests of varying intensities"[41] vis-à-vis members of society, with many interests clearly lying at one end of the spectrum or the other.

Consideration of a few cases illustrates the influence of these interests on the political question doctrine. One example of the impact of individual interests on the doctrine's scope is *United States v. Lovett*.[42] The suit was prompted by a statute terminating salary appropriations for certain named federal employees accused of harboring subversive beliefs and associations. The Government contended that the law was merely an appropriations measure over which Congress under the Constitution has complete control. Therefore, it was argued, a challenge to the measure's constitutionality was a political issue over which Congress had final say.[43] Unpersuaded, the Supreme Court observed: "Were this case to be not justiciable, congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court."[44] The Court went on to invalidate the measure as violative of the prohibition against bills of attainder and ex post facto laws.

To be contrasted with *Lovett* is *Massachusetts v. Mellon*,[45] an

39. Of course, *individual* interests may be violated at the same time. While everyone in society suffers from increased insecurity during a crime wave, the particular incidents making up that trend are invasions of the personal security of individuals.

40. Justice Harlan, in his dissent in Flast v. Cohen, 392 U.S. 83 (1968), discussed the distinction between the two categories of interests:

> I have here employed the phrases "Hohfeldian" and "non-Hohfeldian" plaintiffs to mark the distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a public action. I am aware that we are confronted here by a spectrum of interests of varying intensities, but the distinction is sufficiently accurate, and convenient, to warrant its use at least for purposes of discussion.

Id. at 119 n.5.

> Surely it is plain that the rights and interests of taxapyers who contest the constitutionality of public expenditures are markedly different from those of "Hohfeldian" plaintiffs, including those taxpayer-plaintiffs who challenge the validity of their own tax liabilities. We must recognize that these non-Hohfeldian plaintiffs complain . . . not as taxpayers, but as "private attorneys-general." The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population . . . . These are and must be . . . "public actions" brought to vindicate public rights.

Id. at 119-20 (footnotes omitted).

41. *Id.* at 119 n.5.

42. 328 U.S. 303 (1946).

43. *Id.* at 313.

44. *Id.* at 314.

45. 262 U.S. 447 (1923).

earlier case challenging on tenth amendment grounds the constitutionality of the *Maternity Act of 1921*.[46] Massachusetts contended that the legislation was beyond congressional powers and an encroachment on local powers exclusively reserved to the states. Massachusetts' status vis-à-vis the Act was indistinguishable from any other state; hence Massachusetts was asserting the collective interest in local autonomy embodied in the tenth amendment against those collective interests in the welfare of mothers and infants sought to be furthered by the act. The Supreme Court observed that Massachusetts merely sought to challenge an enactment within the purview of congressional power[47] —the argument later pressed unsuccessfully in *Lovett*. Deeming the issues raised political, the Court went on to observe that it was "called upon to adjudicate . . . abstract questions of political power, of sovereignty, of government. No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute . . . ."[48] Where individual interests intervened in *Lovett* to preclude a finding that a political issue was presented, their absence in *Mellon* shielded the issues with the cloak of the political question doctrine. Viewing *Mellon* in retrospect, Justice Frankfurter observed in *Baker* that "[t]he crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."[49]

The influence of individual interests has been apparent in other areas. For example, *Luther v. Borden*[50] held that application of the guaranty clause was a political question because that application was beyond the competence of the judiciary. Thus, while the guaranty

46. Act of Nov. 23, 1921, Pub. L. No. 67-97, 42 Stat. 224 (providing for funds to be apportioned among states complying with the Act's provisions for the purpose of protecting the health of mothers and infants).

47. 262 U.S. at 483.

48. *Id.* at 484-85.

49. 369 U.S. at 287 (Frankfurter, J., dissenting).

The comparison between *Lovett* and *Mellon* provides insight as to why, unlike other protections in the Bill of Rights, the tenth amendment has not operated as an effective judicially imposed limitation on congressional power. Unlike other Bill of Rights protections of essentially individual interests, the tenth amendment concerns collective interests, interests whose vindication is best left to the elective branches of government. *See* text accompanying notes 62-65 *infra*. By refusing to impose tenth amendment limitations on congressional action, the judiciary has left it to the electoral process to determine the appropriate reach of congressional power vis-à-vis state power. Consequently the collective interests at stake must be vindicated politically rather than judicially. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *Compare* United States v. Butler, 297 U.S. 1 (1936) *and* Hammer v. Dagenhart, 247 U.S. 257 (1918), *with* United States v. Darby, 312 U.S. 100 (1941) (overruling Hammer v. Dagenhart).

50. 48 U.S. (7 How.) 1 (1849).

clause may have been viewed initially as a source of protection for individual interests, the holding in *Luther* denied the clause the eminence later enjoyed by the due process clause of the fourteenth amendment as a protection of those interests. As the Supreme Court later observed, however, the case did not deny the clause effectiveness as an outside limit on the form of government which may be imposed on a state's residents[51] and therefore on the extent to which government may infringe on individual interests. When despotism may be consequent upon the structure of some state government, it is likely that the doctrinal scope of political questions would be contracted to allow judicial intervention.[52]

The shift in the political question doctrine's boundary from that emphasized, though not established, in *Colegrove v. Green*[53] to that in *Baker* furnishes further illustration of the influence of individual and collective interests. *Colegrove* involved a challenge to population apportionment in Illinois congressional districts. Focusing on the collective interest in the free functioning of party politics which would be impaired by judicial cognizance of the challenge, the Supreme Court characterized the matter as nonjusticiable. On balance, the individual interest in equal voting representation did not prevail. Persistent legislative failure to vindicate the individual interest, however, shifted the Court's focus to this interest in *Baker*, where challenges to apportionment on the basis of the equal protection clause were held not to be political questions.[54] The *Colegrove* rationale favoring the

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51. Baker v. Carr, 369 U.S. 186, 222 n.48 (1962).

52. It is conceivable that intervention would occur under the guise of some label other than a denial of a "Republican Form of Government," U.S. CONST. art. IV, § 4, such as denial of due process.

53. 328 U.S. 549 (1946). The vote in *Colegrove* split 3-1-3, with the swing vote disallowing the challenge on grounds other than justiciability.

54. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 195-96 (1962).

The different results in *Colegrove* and *Baker* may be more accurately explained in terms of the Court's perception of the nature of the interest in equal voting representation. Although Justice Frankfurter in *Colegrove* did emphasize the collective interest in the free functioning of party politics, *see* 328 U.S. at 553-54, he seems also to have perceived the interest in equal voting rights as collective in nature. *See id.* at 552. Accordingly, as in *Mellon*, where only collective interests contended, the issue of reapportionment was deemed a political question. In *Baker*, however, Justice Brennan seemed to perceive the interest as individual in nature. *See* 369 U.S. at 229-32. As in *Lovett*, the issue of reapportionment was not deemed a political question.

The difficulty in categorization of the interest stems from the fact that it lies somewhere in between those interests that are clearly individual and those that are clearly collective. When the interest in equal voting rights is infringed, large numbers of individuals are injured in the same manner, hence the collective character of the interest. Yet, compared to that indeterminate group of individuals offended by an encroachment of federal government on local government as in *Mellon*, the group injured in a gerrymandered district is quite determinate and limited. And that group's and its constituent individuals' isolation in terms of being able to effect their desires through the political process goes even further toward identifying the interest as individual. *See* text accompanying notes 62-65 *infra*. Moreover, the right to equal protection of the laws is focused on the individual.

collective interest in the functioning of party politics free from judicial interference was also advanced by the defendant in *Gomillion v. Lightfoot*,[55] a challenge to racial gerrymandering in the Alabama legislature. In holding the gerrymander violated the fifteenth amendment by depriving the Negroes affected of their individual interests in the right to vote, the Court observed:

> In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely for colored citizens. Apart from all else, these considerations lift this controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.[56]

Further exemplary of the effect of individual interests is the radical departure in *Powell v. McCormack* from the previous scope of the political question doctrine. There the policy oriented approach was abandoned for the narrower classical formulation of the doctrine.[57] The abbreviation of the doctrine's reach in that case tends to confirm a deep concern on the part of the Court for protection of the electoral process and individual interests, in this case, the interest of Representative Powell's constituency in their electoral choice.[58] To be contrasted with *Powell*, which involved judicial intervention in an exercise of authority by the House of Representatives, is *Mississippi v. Johnson*.[59] That case involved an action to enjoin President Andrew Johnson from executing certain reconstruction acts in Mississippi and Arkansas. The Court recognized that presidential compliance with such an injunction (by refusing to execute the acts) might lead to impeachment. In that eventuality, the Court suggested, it could not interfere in exercises of authority by the House or Senate in impeachment proceedings.[60] In the situation contemplated by the Court, the executive's refusal to enforce embodies recognition of collective interests disfavoring the legislation in controversy. Opposing these are collective interests favoring the legislation which are in effect brought to bear in the effort to impeach for refusing to enforce. As with *Mellon*, the absence of individual interests would insulate legislative action from judicial scrutiny.[61]

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55. 364 U.S. 339 (1960).
56. *Id.* at 346-47.
57. *See* text accompanying notes 20-24 *supra*.
58. *See* Powell v. McCormack, 395 U.S. 486, 547-48 (1969); Note, *supra* note 21, at 70-75.
59. 71 U.S. (4 Wall.) 475 (1866).
60. *Id.* at 501.
61. *Cf.* Laird v. Tatum, 408 U.S. 1 (1972). *Compare* Fairchild v. Hughes, 258 U.S. 126 (1922) (challenge to nineteenth amendment on grounds of invalid state ratifi-

The influence of individual and collective interests exemplified in these cases may be explained and justified by examining the nature of the institutions charged with the reconciliation of these interests when they come into conflict. The process of reconciliation involves three actors—the legislature, the executive and the judiciary. Each actor, by the nature of its constitution, is responsible for the vindication of certain interests. The courts are best equipped to protect individual interests since the nature of their proceedings, unlike the political process, allows for the isolated assertion and consideration of individual interests, unsubmerged in contemporaneous demands for attention by innumerable other interests, individual and collective alike.[62] Early in its history the Supreme Court recognized as its function that of providing a forum for the assertion and vindication of individual interests:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[63]

This role has received continued and recent recognition.[64]

On the other hand, when a collective interest is advanced or retarded, large indeterminate segments of society are favorably or disfavorably affected. The consequent competing claims of these segments are best reconciled through the political process since that process is responsive to efforts to vanquish or vindicate collective interests. Individual interests generally do not enjoy this responsiveness since when they are infringed usually only a few individuals or isolated segments of society are injured. Thus, the legislature and the executive, being immediately responsible through the electoral process to the nation as a whole and thereby responsive to a broad range of national desires, are almost by definition the primary guardians of collective interests.[65]

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cations precluded by want of standing due to lack of individual interests), *with* Leser v. Garnett, 258 U.S. 130 (1922) (challenge to nineteenth amendment on grounds of invalid state ratifications held a political question), both of which are discussed in text accompanying notes 116-17, 127-29 *infra*. *Fairchild* involved solely the conflict of collective interests, but resolution of one issue in the case was avoided on grounds of standing. In *Leser*, resolution of the same issue was avoided on political question grounds.

62. *See* S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 106-33 (1965). To be sure, the influence of collective interests is felt in judicial proceedings since they are not beyond the minds of judges and juries or the policies underlying the laws applied in those proceedings. The focus, nevertheless, is on the claims of the litigant seeking protection of individual interests.

63. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

64. *See* Baker v. Carr, 369 U.S. 186, 215 n.43 (1962); United States v. Carolene Products Co. 304 U.S. 144, 152-53 n.4 (1938).

65. *See* Younger, *supra* note 5, at 776. That is not to say that the legislature and executive are without any role in the protection of individual interests. *See* Jones v.

Political Questions as a Function of Interests

The peculiarities of individual and collective interests to the competencies of the three branches of government provide the insight necessary to ascertain whether executive secrecy is a political question and thus nonjusticiable. Much of the operation of the doctrine is a function of the nature of the interests contending on either side of an issue and the judiciary's perceived responsibility for vindicating those interests.[66] When a court is faced with having to determine whether an issue is a political question, the inquiry in the first instance should be whether any of the claims presented represent individual interests. If parties presenting essentially individual interests are present, the case should be considered prima facie justiciable. In the absence of such parties, the judiciary is faced with making a choice between collective interests, unless that choice may fairly be said to have been previously determined by statutory or constitutional provisions. Where such a choice is necessary, the case should be considered prima facie nonjusticiable. These conclusions follow from two principles.

First, the courts, because of their special competence with respect to individual interests, are under an obligation to give special attention to those interests.[67] The obligation is only prima facie, however, since the courts, in balancing the claims of individual interests against the claims of collective interests, may decide that a specific individual interest must in all circumstances yield to legislative or executive discretion. "The existence of [legislative or executive] discretion may be considered, not generally, but with particular relation to the interest of a particular complainant, which it is to override."[68] Priority in certain foreign affairs questions, for example, has been unyieldingly committed by the courts to executive and legislative discretion despite the gravity of other interests pressing the courts for recognition.[69] "Polit-

Alfred H. Mayer Co., 392 U.S. 409 (1968); Katzenbach v. Morgan, 384 U.S. 641 (1966); E. BARRETT, P. BRUTON & J. HONNOLD, CONSTITUTIONAL LAW 1068-73 (3d ed. 1968); R. SCIGLIANO, *supra* note 8, at 197-204. But their effectiveness in this regard is diminished by John Stuart Mill's "tyranny of the majority," the strong susceptibility of elective institutions to the will of the majority. *See* Mill, *On Liberty*, in SOCIAL AND POLITICAL PHILOSOPHY 302, 302-10 (J. Somervile & R. Santoni eds. 1963). The *Federal Tort Claims Act*, 28 U.S.C. §§ 2671-80 (1970), exemplifies Congress' recognition of its limited ability to effectively consider individual claims pressed before it. *See* Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325, 1328-42 (1954). It is significant that the internal procedures and standards established by Congress in considering individual claims have been judicial in nature. *Id.*

66. *See* Scharpf, *supra* note 15, at 583-84. *See generally* A. BICKEL, *supra* note 54, at 183-89.

67. *See* text accompanying notes 62-65 *supra*.

68. A. BICKEL, *supra* note 54, at 186; *see* Scharpf, *supra* note 15, at 584.

69. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945) (immunity of vessels of foreign government from seizure ultimately decision of executive branch); United States v. Berrigan, 283 F. Supp. 336, 342 (D. Md. 1968), *aff'd sub*

ical question" thus becomes a label for a conclusion that on balance an individual interest must yield. In some instances the balance will be struck for or against an individual interest by the constitutional text itself, but only where the language is so specific that no other interpretation is plausible. In other cases (*Powell*, for example), the argument from the text—the classical approach—is merely a shibboleth masking some deeper reason for reaching or not reaching resolution of the question presented.[70]

The second principle holds that since the executive and the legislature are more responsible and responsive to collective interests, the courts should stay their hand when the absence of individual interests leaves them with a choice solely between collective interests.[71] In this situation the only interests at stake are those of the people as a whole, and the people through their representive institutions—the executive and the legislature—should be allowed to choose among the claims for ascendancy. The judiciary, being nonmajoritarian in nature, should eschew making the choice when that choice may not fairly be said to have been previously determined by statutory or constitutional provisions.[72] The legislature's request for information from the ex-

nom. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970) (alleged illegality of use of armed forces in Viet Nam no defense to attack on selective service office since recognition of belligerency abroad is uniquely an executive and legislative responsibility); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 147, 215 A.2d 864, 869-70 (1966) (determination of executive branch that foreign nation entitled to sovereign immunity conclusive on courts no matter how unfair or unjust to injured American citizens). *See also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544).

70. *See* text accompanying notes 42-61 *supra.*

71. That a case in substance presses only collective interests for vindication in the courts is not to say that the case *necessarily* presents a political question. No political question is presented where the choice between competing interests has already been made for the courts. In Sierra Club v. Morton, 405 U.S. 727 (1972), for example, the Supreme Court, though confronted by essentially collective interests, did not have to choose whether or not to recognize the collective claims presented by the environmentalists as opposed to those collective claims voiced in the challenged decision by the Secretary of the Interior. The choice had already been made in the form of various statutory requirements with which the Sierra Club attempted to challenge the Secretary's decision. *Id.* at 730 n.2; *accord*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

72. The existence of a predetermined choice provides an explanation for Flast v. Cohen, 392 U.S. 83 (1968). Since the injury suffered by the plaintiff-taxpayer in that first amendment challenge to congressional spending authority was indistinguishable both monetarily and ideologically from that suffered by any other citizen, the controversy essentially involved a clash of collective interests. *See* Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438, 449 (1968). The constitutional supremacy of the establishment clause in the first amendment may be viewed as providing the predetermined choice to the extent it may fairly be said that the congressional spending in aid of parochial schools was repugnant to the clause. Here, of course, is where this analysis falters.

Congressional or executive action, much to the chagrin of the classical theory of judicial review, is not always clearly repugnant to the Constitution. A case may arise which, like *Flast*, presents a clash of collective interests implicating ideologically some constitutional provision, but which, perhaps unlike *Flast*, does not involve a clear con-

ecutive, for example, may trench upon the effectiveness of criminal investigation and prosecution, giving rise to a conflict between the collective interests in government secrecy and enforcement of the law. Indeed, in requiring either the disclosure of government-held information possibly useful for the impeachment of a witness or the dismissal of the prosecution, the Supreme Court has held: "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the public disclosure of state secrets and other confidential information in the Government's possession."[73]

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stitutional mandate under the facts presented. In such circumstances the judiciary should withhold judgment on the ground that the issues raised are political. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); text accompanying notes 42-49 & note 49 *supra*; *cf.* Laird v. Tatum, 408 U.S. 1 (1972) (class action on behalf of all American citizens alleging chilling effect on first amendment rights due to Army surveillance does "not [present] a case for resolution by the courts," *id.* at 15). Courts are, however, wont to indulge the classical theory. *See* A. BICKEL, *supra* note 54, at 73-75. In the final analysis, this may explain cases like *Flast* as it does tenth amendment cases like United States v. Butler, 297 U.S. 1 (1936) ("[T]he judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." *Id.* at 62) and Hammer v. Dagenhart, 247 U.S. 251 (1918). *See* A. BICKEL, *supra*. The Supreme Court's requirement in *Flast* of "specific constitutional limitations," 392 U.S. at 103, is exemplary. *See also* Jaffe, *supra* note 38, at 1042-43 (offering establishment clause cases to disprove the proposition that clashes solely between collective interests raise political questions).

73. Jencks v. United States, 353 U.S. 657, 672 (1957).

This analysis calls into question the decisions by the court of appeals in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), *aff'g In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973) (requiring the *in camera* production of executive materials subpoenaed by the Watergate special prosecutor), and the district court in Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 15 Cr. L.R. 2199 (D.C. Cir. May 23, 1974).

The two primary issues in *Nixon v. Sirica* were whether the courts had the power to compel the President to disclose the requested materials and whether the President, despite the courts' power, enjoyed an evidentiary privilege not to disclose. Since the courts are best suited to determine the extent of their own powers, the first issue would not raise a political question. The non-political nature of the second issue is not so clear.

Unlike situations in which a party presenting individual interests is seeking information from the Government, *e.g.*, Jencks v. United States, 353 U.S. 657 (1957); United States v. Reynolds, 345 U.S. 1 (1953); United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951), the clash in *Nixon v. Sirica* was in reality an internal dispute between two factions of the executive branch. As such, that dispute involved a clash solely between collective interests. Indeed, the court of appeals held that the outcome depended "on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." 487 F.2d at 716. This is essentially the burden which the Supreme Court refused to assume in *Jencks*. Hence it is arguable that the dispute, involving an internal matter of the executive branch, ultimately raised a political question.

Further, since the dispute was purely an internal matter, it may be contended that resolution should ultimately have rested with the chief executive. Here, of course, is the rub. Given the inherent conflict of interest and consequent impossibility of a disinterested appraisal of the competing collective concerns, a decision by the chief executive, while perhaps beyond legal question, would have been singularly inappropriate. The judicial branch became the appropriate forum by necessity. Fortunately, balancing collective interests is, if not a desirable judicial function, at least a function within the realm of judicial competence. *See* note 86 *infra*. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Alternatively, it may be argued against nonjusticiability that the dispute was one between the executive and the judiciary, in particular, the grand jury and the Watergate

In operation, these two principles may in some circumstances impinge on one another. Resolving a dispute involving individual interests may ultimately require a choice between collective interests. The Supreme Court has occasionally been faced with just this task; cases coming before it involving individual interest have also raised questions concerning the allocation of power between the executive and legislative branches, questions necessarily involving a choice between competing collective interests. And nonjusticiability has not always been the result. In some instances the Court has avoided making an overt allocation of power by viewing congressional acquiescence in the face of years of executive practice as consent to and implied authorization of the executive action taken,[74] by finding executive action consistent with congressional policy manifested by various statutes[75] or by finding a subsequent legislative ratification of the executive action.[76] In other instances, where allocation has been unavoidable, the Court

special prosecutor *qua* officer of the court. In deciding the issue, the court may be viewed as guarding its own interests, a task to which the judiciary is certainly competent. More particularly, it may be argued that determination of evidentiary privileges in the courts is appropriately within the judiciary's province. *See* Nixon v. Sirica, 487 F.2d 700, 712-15 (D.C. Cir. 1973). This point of view may obscure the basic nature of the controversy, but it does recognize the judiciary's own interest in protecting its functions by ensuring that all competent and probative evidence is brought before it.

Congress', and in particular the Senate Select Committee's, interest in obtaining evidence is distinct from that of the judiciary. Accordingly, there is no "protective jurisdiction" justification for the district court's decision on the merits as to the issue of executive secrecy in Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 15 Cr. L.R. 2199 (D.C. Cir. May 23, 1974). Indeed, viewed with respect to the interest oriented approach to the political question doctrine, Judge Gesell's disposition on the merits was improper. In essence, the court held that the public interest demanded resolution of the charges and countercharges surrounding "Watergate" in the judicial forum. The unarticulated assumption was that the judiciary was competent in the first instance to render a decision balancing this collective interest against the collective interests expressed by the congressional desire for information. This function belonged to the legislative-executive decision structure. See text accompanying notes 79-80 *infra*. The issue was political.

It is no answer to say that the judicary's interest in the orderly decision of controversies presented to it justifies decision of the executive secrecy issue. If this alone were sufficient to justify decision on the merits, every case presented to the judiciary would be justiciable. In point of fact, certain considerations militate against this result. In particular, the judiciary's inherent inadequacy in balancing collective interests should have prevented a decision on the merits of executive secrecy. In view of the complexity and apparent enormity of "Watergate," Judge Gesell's decision in *Senate Select Committee* may have been, in fact, the result which would have been reached by the legislative-executive decision structure. But a right decision wrongly reached is a shoddy guarantee of a right decision under different facts at a future time.

74. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915) (inference from congressional acquiescence of presidential power to withdraw from private entry or location public lands which otherwise would have been available for such purposes by statute).

75. *See In re* Debs, 158 U.S. 564 (1895) (authority of Attorney General to seek injunction in railroad labor dispute sustained on basis of manifestations of congressional policy expressed in various statutes relating to interstate commerce and the mails).

76. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (presidential action establishing blockade of Southern ports during Civil War subsequently ratified by Congress).

has either provided a very narrow resolution of the power issue[77] or has splintered in attempting to provide a more comprehensive statement of power.[78]

Deference to the roles of the legislature and the executive in choosing between collective interests throws reconciliation of such conflicts into the political arena. Required is a practical "adjudication" of power through political confrontation. Each side must assess the importance of its own position relative to that of the other side and determine to acquiesce or to stand its ground. At this point the political decisionmaking process comes into play.[79] This includes formal and informal communication between the actors and ultimately such sanctions as rest in the veto power, the power to make laws, the privilege of withholding execution of laws, advice and consent of the Senate, the power of the purse, the power to investigate, impeachment, and the ability to marshall public opinion.[80] The result is a practical ordering of priorities among collective interests by the institutions best suited to that task.

Like its obligation to intervene where individual interests are present, the judiciary's obligation to defer in the absence of such interests is not absolute. The Supreme Court has recognized that "[t]he political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder."[81] Thus, should the political decisionmaking structure prove incapable of resolving the dispute, judicial intervention will be warranted.[82]

77. *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (presidential power to remove officers appointed by President and performing essentially *legislative* or *judicial* functions subject to congressional limitation), *with* Meyers v. United States, 272 U.S. 52 (1926) (presidential power to remove *administrative* officers not subject to congressional limitation). *See also* Kramer & Marcuse, *supra* note 7, at 903-04.

78. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (power of President to seize private steel mills in wartime subordinate to legislative provision for meeting exigency), *discussed in* Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 162-78 (1952). The disunity among the justices in this case is reflected in the four distinct points of view expressed in the Court's opinions. *See id.* at 177.

79. For a fuller discussion of the application of the notion of decision structures to the problem of political questions see Tollett, *supra* note 25.

80. *See* Hurst, *Review and the Distribution of National Power*, in SUPREME COURT AND SUPREME LAW 140, 163 (E. Cahn ed. 1954); Ervin, *Executive Privilege: The Need for Congressional Action*, 62 ILL. B.J. 66, 69, 72 (1973); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 572 (1953); Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. LEGIS. 621, 622 (1973).

81. Baker v. Carr, 369 U.S. 186, 215 (1962).

82. *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 236 (2d ed. 1973); Tollett, *supra* note 25, at 464.

Whether a threat of impeachment would per se constitute a breakdown is arguable. To be sure, potentially great turmoil resides in the context of impeachment. Given, however, the orderliness of the impeachment process and the difficulty of engaging this procedure, if the choice to impeach is in fact made, the political decision structure, rather than having collapsed, will have rendered its most solemn judgment. Accordingly, interference by the courts with a choice of impeachment by declaring constitu-

The courts' pretended ability to divine the limits of power through constitutional interpretation offers a ready vehicle for intervention. Notwithstanding the availability of a means for intervention, two difficulties would still confront the courts: (1) ascertaining precisely when intervention is warranted, and (2) preserving the option to intervene when faced with a premature request for involvement. The latter difficulty arises because a determination that the questions presented are political would tend to foreclose subsequent judicial consideration of the issue held political.[83] Given an issue which in the first instance should be left to the legislative-executive decision structure to decide, judicial intervention at a later stage will be warranted when, first, the issue is in need of decision[84] and, second, the structure manifests a refusal or inability to decide the issue or an inability to decide without intolerable cost to the effective functioning of either or both branches of government.[85] Because of its nonmajoritarian nature, the decision upon intervention should be as narrow as possible. Neither of the two conditions is capable of quantification; each case must ultimately rest on the considered assessment by the judiciary of "how importunately the occasion demands an answer."[86]

The occasion may be such that political resolution of the issue is still feasible. Under this circumstance, when a case raising the issue

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tional the challenged acts would be ill-advised. Indeed, the Supreme Court has strongly suggested its reluctance to interfere with the impeachment process. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866). Moreover, intervention by the Court could have the effect of isolating the executive from impeachment for an act which the Court has previously judged constitutional, *see id.*, thereby depriving the legislature of one option available to it in dealing with the executive.

83. *See* Scharpf, *supra* note 15, at 536-38.

84. Note that in the presidential tapes controversy, the need for decision in the presidential-congressional dispute was mitigated by the President's decision to release the tapes to the district court for the purpose of screening before presentation to the grand jury. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 15 Cr. L.R. 2199 (D.C. Cir. May 23, 1974).

85. The Supreme Court has recognized this wait-and-see approach with regard to foreign relations questions. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) ("Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches . . . ."). *See also* A. BICKEL, *supra* note 54, at 195-96.

86. Hand, *When a Court Should Intervene*, in THE SUPREME COURT IN AMERICAN POLITICS 18, 20 (D. Forte ed. 1972).

Tollett, *supra* note 25, offers an illuminating example of when intervention may be warranted—the reapportionment cases:

> It has been universally conceded that something needed to be done about legislative and congressional apportionment. The state and national structures for solving this problem were obviously deficient. The vitality and responsiveness of our state and, to a lesser extent, national governments were becoming cumulatively deficient. There was a persistent refusal to deal with this problem on both the state and federal levels.

Id. at 464. A caveat is in order. Colegrove v. Green, 328 U.S. 549 (1946), the decision which initially left reapportionment to the state and federal decision structures, did not involve a clash solely between collective interests. Rather, the Supreme Court paid deference to the collective interest in the free functioning of party politics and left it to that political process to satisfy the individual interests in equal voting rights also presented in the case. Beside being consequent upon the importance placed in the

is brought before the courts, it will be desirable to dispose of the case while preserving the option to intervene at a later point in the particular controversy or in some subsequent controversy raising the same issue. In achieving this end, the courts have several alternatives. They may stay their hand and request an attempt to compromise by the litigants.[87] Jurisdiction of the controversy may be resisted by strict construction of statutory jurisdictional provisions.[88] The controversy may be viewed as unripe for decision, a highly discretionary determination that the circumstances of the case make decision unpropitious.[89] In

collective interest in the free functioning of party politics, the decision to defer to that collective interest was also due in part to the Court's apparent perception of the conflicting interest in equal voting representation as collective in nature. See discussion note 54 *supra*. Accordingly, it appeared appropriate in *Colegrove* to consign solution of the apportionment problem to the political process. As Tollett observed, the breakdown of the process relied on in *Colegrove* ultimately eventuated in Baker v. Carr, 369 U.S. 186 (1962), and the subsequent reapportionment cases. *E.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Lucas v. 44th Gen. Assem., 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964). The persistent inability of the interest in equal voting representation to achieve satisfaction in the political process made apparent the individual nature of the interest and, consequently, the prima facie justiciability of the reapportionment problem. The sequence of cases from *Colegrove* to *Avery* is therefore illustrative of the type of breakdown in a political decision structure warranting judicial intervention.

The situation in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), discussed *supra* note 73, provides another useful illustration. There the public interest in executive disclosure, competing with the public interest in secrecy, was effectively denied fair consideration in the executive decision structure due to the chief executive's conflict of interest. The judicial cognizance of the case provides a foundation for the principle that when a significant collective interest is effectively foreclosed from consideration in a political decision structure, judicial intervention will be warranted. *See* H.M. HART & H. WECHSLER, *supra* note 82, at 236 (suggesting that judicial intervention will be warranted when Congress is not in a position, institutionally, to protect its own position vis-à-vis the President). It is worthy of note that it is the inherently effective exclusion of individual interests from consideration in the political decision structure which renders cases raising such interests prima facie justiciable. *See* text accompanying notes 62-65 *supra*.

87. This was the initial approach of the court of appeals in the effort by the Watergate special prosecutor to obtain the presidential tapes. Nixon v. Sirica, 487 F.2d 700, 723 (D.C. Cir. 1973) (appendix).

88. This was the approach of the district court in the first effort by the Senate Select Committee to obtain the presidential tapes. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). Of particular significance is the district court's treatment of the Committee's jurisdictional attempts under 28 U.S.C. § 1331 (1970). The court held that federal question jurisdiction did not exist because the amount in controversy did not satisfy the jurisdictional requirements—in particular because the value of the rights asserted by the Committee fell short of $10,000. Yet in other cases, the courts in valuing rights have with little discussion found that the jurisdictional amount was satisfied. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972); Quinault Tribe v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968); *cf.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969) (suggesting that the jurisdictional requirement would be invalid if it foreclosed review of important constitutional claims). The district court's disposition had the attributes of allowing additional opportunity for compromise between the executive and legislative, and moreover, preserved the opportunity for future judicial intervention contingent on subsequent legislation conferring the requisite jurisdiction. Congress has since enacted legislation conferring jurisdiction on the district courts to hear and enforce subpoena actions by the Senate Select Committee against the executive branch. Pub. L. No. 93-190 (Dec. 18, 1973).

89. *See* A. BICKEL, *supra* note 54, at 143-56; M. SHAPIRO, THE SUPREME COURT

executive secrecy controversies of significant moment, to assure that the decisions to withhold or require information are truly majoritarian in foundation, the courts may require that the decisions be made by legislative resolution or the chief executive himself. This may be achieved by holding that certain decisions to withhold information or require disclosure are nondelegable or by finding a purported delegation of authority void for vagueness.[90] This finding embodies the determination that the standards which have been established as guides for decision by subordinate officials are impermissibly vague. It thereby requires the promulgation of more refined standards and hence further upper level decisions. Finally, the political question doctrine itself, because of its flexible nature, is a ready appliance for avoidance. As noted, however, invocation of the doctrine in a given controversy forecloses further judicial consideration in that controversy of the issue held a political question—at least according to traditional theories.[91] Nevertheless, with judicial craftsmanship, such a determination would not necessarily preclude intervention in some future controversy.[92] In the interim, the executive and legislative branches are given the opportunity to find an acceptable resolution.

The Interest Dimension of Political Questions and the Problem of Executive Secrecy.

When the interest oriented perspective developed in this analysis is applied to the political question doctrine, executive secrecy is clearly perceived as a political question best left to the executive and legislative branches to resolve. The problem essentially involves several competing collective interests.[93] Weighing on the side of secrecy are such considerations as effective enforcement of the laws through avoiding premature disclosure of investigative techniques, information sources, the status of an investigation in progress and the strength of the government's evidence;[94] effective governmental operation on the international level promoted by maintaining secrecy of negotiations and agreements;[95] and ultimately the independence and efficiency of

AND ADMINISTRATIVE AGENCIES 116-21 (1968). Indeed, the very fact that the political institutions have not had an opportunity to deal with an issue may render a particular controversy unripe for decision. *See* A. BICKEL, *supra.*

90. *See* A. BICKEL, *supra* note 54, at 56-69.

91. *See* text accompanying notes 82-86 *supra.*

92. *Compare* Colegrove v. Green, 328 U.S. 549 (1946), *with* Baker v. Carr, 369 U.S. 186 (1962). *But see* Scharpf, *supra* note 15, at 536-38 (assuming the classical approach to the political question doctrine).

93. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd,* 15 Cr. L.R. 2199 (D.C. Cir. May 23, 1974), discussed in note 73 *supra.*

94. *See* Kramer & Marcuse, *supra* note 7, at 664, 883-91; Younger, *supra* note 5, at 766-67.

95. *See* Kramer & Marcuse, *supra* note 7, at 636.

the executive branch through the protection of frank and open internal communications, freedom from overzealous legislative investigation[96] and effective internal supervision and control.[97] Considerations militating against secrecy and in favor of legislative investigation include the public's interest in knowing the activities of its government,[98] effective and intelligent legislation through adequate information[99] and effective supervision of the executive branch to the end that the laws be properly executed.[100] That these interests may conflict is apparent. What Congress sees as prophylactic supervision may be condemned by the executive as unnecessary interference. Intelligent military and foreign aid appropriations legislation requires military and foreign intelligence. Inquiry into effective law enforcement may jeopardize existing investigation and litigation. All are problems which are best solved in the first instance in the legislative-executive decision structure.

This approach to decisions regarding requests for information possessed by the executive has been criticized as inefficient and unreliable, with consequent impairment of the legislative function.[101] Of course, "the vast bulk of congressional requests for information have met with compliance."[102] Even in hard-fought instances involving initial noncompliance with requests in an effort to conceal suspected misconduct, the legislature often prevails.[103] Moreover, it has been observed that "[t]here is little reason to believe that, in practice, the lack of an absolute power to compel the executive to produce information appreciably handicaps Congress in the exercise of its legislative function,"[104] (or, for that matter, that a broad congressional power to investigate will impair the functioning of the executive).[105]

Further criticism of the view that executive secrecy is nonjusticiable is based on the "classical" or "textual" approach to that issue.[106] Under this approach, executive secrecy is merely a problem in interpreting the Constitution to ascertain the limits of the pertinent legislative and executive powers—a duty charged to the judiciary. The flaw lies in the assumption that within the Constitution, as expounded

96. *See id.* at 669-82, 899; Younger, *supra* note 5, at 781-83.
97. *See* Kramer & Marcuse, *supra* note 7, at 915; Younger, *supra* note 5, at 764.
98. *See* Younger, *supra* note 5, at 781-83.
99. Berger, *supra* note 7, at 1312, 1315-16.
100. *Id.* at 1099, 1308, 1315-16.
101. *See* Berger, *supra* note 7, at 1044; Note, *supra* note 80, at 642, 647-54.
102. Berger, *supra* note 7, at 1320; Kramer & Marcruse, *supra* note 7, at 627, 898.
103. Consider the Dixon-Yates and Sherman Adams affairs discussed in Berger, *supra* note 7, at 1315.
104. Bishop, *supra* note 7, at 486.
105. *See* Berger, *supra* note 7, at 1100-01.
106. *See id.* at 1349-60; Note, *supra* note 80, at 665-71. One authority, however, has reached the result of nonjusticiability on the basis of the classical approach. *See* Kramer & Marcuse, *supra* note 7, 909-10.

by the courts, may be found the appropriate allocation of power among the three federal branches. It is just as arguable that beyond a certain point the constitutional scheme was never intended to fix neatly the allocation of power in precise and mutually exclusive categories; once this point is passed, the argument runs, the allocation was to be a dynamic one, pragmatically responsive and not dictated by nice judicial discursion.[107] Adoption of the classical approach begs the question in favor of justiciability. Ultimately, the issue is whether the allocation of power with respect to executive secrecy should be defined by judicial adjudication or in the context of the working delimitation provided by the formal and informal political interplay of the executive and legislative branches. An allocation by the courts is in effect a relatively enduring choice between collective interests.[108] That choice, because of the nature of its subject matter, should instead be responsive to the fluid disposition and needs of the nation. Interjecting the principled decisions of the courts into the process would tend to prejudice future choices between given collective interests when the options of the majoritarian branches should remain unimpaired.

> The Court and all other political institutions are never static, with their powers and relationships defined once and for all; they are more accurately seen as evolving and changing over time in response to altered social conditions and shifts in social values and to public demands that accompany these changes.[109]

Recognizing this, resolution of the problem of executive secrecy should be achieved "at the bar of politics."[110]

STANDING AND THE INCREASED SIGNIFICANCE OF THE INTEREST DIMENSION OF POLITICAL QUESTIONS

The utility of the interest oriented approach to the political ques-

107. See A. BICKEL, *supra* note 54, at 73-74. As Justice Jackson observed:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (concurring opinion). Justice Jackson recognized the need for a practical "adjudication" of the allocation of power. And while he further recognized—as did the consensus in the *Youngstown* case—that the President's powers were subordinate to those of Congress, Kauper, *supra* note 78, at 174-75, it may still be questioned whether, pressed by a weightier exigency, the outcome as to the definition of executive power would have been the same. *Compare* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (power of the President to resist attack without need for legislative authorization), *with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential power to control labor strike in industry important to war effort subordinate to Congress).

108. *See* A. BICKEL, *supra* note 54, at 129; Hurst, *supra* note 78, at 150.

109. Beany, *The Supreme Court: The Perspective of Political Science*, in PERSPECTIVES ON THE COURT 31, 35 (1967).

110. A. BICKEL, *supra* note 54, at title page.

tion doctrine extends beyond the assistance it provides in ascertaining the political nature of the problem of executive secrecy. The approach embodies a rationale for allocating competency among the three branches of government, individual and collective interests being the operative determinants. The approach may be viewed, therefore, as contributing to the doctrine's efforts to achieve and preserve the proper allocation of competency. Recent developments in the law of standing have the potential for expanding the judiciary's governmental purview. This will increase the significance of the interest oriented approach to the political question doctrine as a controlling factor in maintaining a proper allocation.

As the Supreme Court observed in *Flast v. Cohen*,[111] standing is one aspect of the cases and controversies doctrine which, like the political question doctrine, "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[112] Traditionally, standing was limited to those litigants presenting individual interests to the courts for vindication.[113] Recently, however, the Supreme Court has demonstrated increased recognition of the need for allowing individual parties to vindicate statutorily or constitutionally protected collective interests in the judicial forum.[114] This has resulted in expansion of the range of circumstances in which the courts may act and thereby in a potential for expansion of judicial power.[115]

Exemplifying the Court's early attitude toward standing, *Fairchild v. Hughes*[116] involved an action by a private litigant against the Secretary of State and Attorney General seeking a declaration that the nineteenth amendment was void because of the invalidity of ratification by various states. Finding no standing to bring the action, the Court stated that "[p]laintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys not be wasted."[117]

To be compared with *Fairchild* is *United States v. Students*

111. 392 U.S. 83 (1968).
112. *Id.* at 95.
113. *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952); *Ex parte* Levitt, 302 U.S. 633 (1938) (per curiam); Fairchild v. Huges, 258 U.S. 126 (1922).
114. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968).
115. *See* Jaffe, *supra* note 38, at 1038.
116. 258 U.S. 126 (1922).
117. *Id.* at 129. *See also Ex parte* Levitt, 302 U.S. 633, 634 (1938) (challenge to appointment and confirmation of Justice Black barred on grounds of standing since plaintiff had "merely a general interest common to all members of the public").

Challenging Regulatory Agency Procedures [*SCRAP*],[118] the most recent and significant example of the Supreme Court's expansive approach to standing. In that case five law students formed an association to challenge the Interstate Commerce Commission's refusal to suspend a nationwide railroad freight surcharge. The association charged that the Commission failed to accompany its decision with a detailed environment impact statement as required by the *National Environmental Policy Act of 1969*.[119] The association contended that its members would suffer economic, recreational and aesthetic harm if the new rate structure were to cause environmental damage by shifting patterns of commerce. In recognizing the standing of the association and its members the Court observed:

> [A]ll persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged. . . . [But to] deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.[120]

It is possible to reconcile *Fairchild* and *SCRAP* by maintaining that the Supreme Court will not as a matter of policy grant the full range of standing permissible under article III to parties coming before it unless Congress by statute requires standing to be granted beyond judicially self-imposed limits.[121] However, this basis for reconciliation does not explain standing cases like *Flast v. Cohen*[122] where the plaintiff-taxpayer's interest in contesting the expenditure of federal funds was indistinguishable from that of any other citizen taxpayer and where the action was grounded on the first amendment, not some specific statutory authorization. Moreover, the statutory provision under which the parties sought standing in *SCRAP* was susceptible to a much more confining construction than the Court allowed.[123] It is apparent, therefore, that the Court has moved toward an overdue[124] liberalization of its standing requirements.

But this liberalization is a mixed blessing. In light of the increas-

118. 412 U.S. 669 (1973).
119. 42 U.S.C. §§ 4321-47 (1970).
120. 412 U.S. at 687-88.
121. *See* Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).
The action in *SCRAP* was authorized by 5 U.S.C. § 702 (1970) which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The "relevant statute" in this case was 42 U.S.C. § 4332(c) (1970), which requires the environmental impact statement.
122. 392 U.S. 83 (1968).
123. *See* 5 U.S.C. § 702 (1970). It was certainly open to the Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972), to read into the statutory terms "adversely affected or aggrieved" more stringent standards than it did.
124. *See generally* Jaffe, *supra* note 38.

ingly broad issues which may now be presented to the courts, the interest oriented approach to the political question doctrine must take on increased significance. The focus must be shifted from standing and the individual[125] to political questions and the collective interest issues necessarily implicated by admitting to the courts parties seeking to vindicate those interests.[126]

Comparison of *Fairchild* and *Leser v. Garnett*[127] illustrates the type of shift in focus that should occur. As noted, *Fairchild* disallowed a challenge to the nineteenth amendment based on, *inter alia*, questionable state ratifications. The Supreme Court concluded that the challenging party alleged an interest insufficient to confer standing on him. Unlike *Fairchild*, *Leser* originated in the Maryland courts as a suit by voters to require the state to remove the names of women from the register of voters. The suit was grounded on the alleged invalidity of the nineteenth amendment, again based in part on questionable state ratifications. Significantly, the Supreme Court, without mention of standing,[128] disposed of the issue of invalid ratification on political question grounds. Authenticated notice to the Secretary of State by a state legislature of its ratification was held conclusive on the Secretary; his certification of the ratification was ruled similarly conclusive on the courts. Thus *Leser* demonstrates that the political question doctrine was an alternative ground for disposition in *Fairchild*, a case presenting solely collective interests for vindication.[129] More generally, *Leser* demonstrates that the political question doctrine may serve to fill the partial void in limitations on the exercise of judicial power left by expansion of the concept of standing. The standing doctrine's

125. As the Supreme Court observed in *Flast*, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." 392 U.S. at 99.

126. As Justice Frankfurter observed in *Baker v. Carr*:

> The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sovereignty, of government." . . . The "political question" doctrine, in this aspect, reflects the policies underlying the requirement of "standing": that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry.

369 U.S. 186, 286-87 (1962) (Frankfurter, J., dissenting). Although personal and particular interest may no longer be the underlying requirement of standing, limitation on the exercise of judicial jurisdiction survives in the interest oriented approach to the political question doctrine.

127. 258 U.S. 130 (1922).

128. The potential standing issue never came to light probably because the suit was specifically authorized by Maryland law. *See id.* at 135-36. That a party has standing in a state court, however, does not necessarily mean that he would have standing on appeal from state courts to the United States Supreme Court. *See* H.M. HART & H. WECHSLER, *supra* note 82, at 160, 180-81.

129. Also, *compare* Frothingham v. Mellon, 262 U.S. 447 (1923) (federal taxpayer without standing to challenge federal spending program on basis of tenth amendment), *with* Massachusetts v. Mellon, 262 U.S. 447 (1923) (state challenge to federal spending program on basis of tenth amendment a political question).

definition of the nonmajoritarian aspects of the judiciary's role in government may be preserved, even sharpened, under an interest oriented approach to the political question doctrine.

CONCLUSION

The changing contours of the political question doctrine are a function of the judiciary's role as one actor in the process of government. That role changes as the plot changes. Only a broad outline of the drama is possible.

When the scene confronting the courts contains the claims of individual interests, the scope of the doctrine should be contracted or expanded as the balance tips in favor of the individual interests presented or back toward the competing collective interests. When, as with executive secrecy, the setting offers only an undetermined choice between collective interests, deference should be given to the representational decisionmaking process—the political exchange between the President and Congress. Deference, however, should not be at the expense of any deleterious impairment of government. Finally, with the expansion of the concept of standing, the judiciary will find itself increasingly threatened with involvement in settings requiring a selection between collective interests. An interest oriented approach to the political question doctrine should provide the judiciary with guidance in playing its appropriate role in government.