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EXECUTIVE PRIVILEGE

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From the presidency of George Washington until the recent unanimous decision in *United States v. Nixon*¹ there was uncertainty about the nature and extent of the duty of the Executive Branch to furnish information to the Congress on the one hand and to the courts on the other. Occasionally Presidents asserted a right to withhold information either for themselves or on behalf of their subordinates, and the claim came to be known as "executive privilege." During the past two years the problem has been dramatized by controversies growing out of demands upon President Nixon by the Watergate Special Prosecutor, the Senate Select (Ervin) Committee on Presidential

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This article is an elaboration and updating of the tenth annual Owen J. Roberts Lecture, delivered at the University of Pennsylvania on March 26, 1974. The substantive revisions take account of the supervening decision of the Supreme Court of the United States in *United States v. Nixon*, 94 S. Ct. 3090 (1974).

The author acknowledges the assistance of Miss Kendra E. Heymann in research for the Roberts Lecture. Also, he wishes to remind the reader that his views may be colored by past advocacy despite an effort to achieve detachment; he obtained the initial subpoena for Watergate tapes and filed briefs and presented argument for enforcement in two courts.

¹ 94 S. Ct. 3090 (1974).

Campaign Activities, and the House Committee on the Judiciary in the consideration of resolutions calling for impeachment.

United States v. Nixon puts some questions to rest. The decision establishes the legal duty of even a President to furnish evidence of what was said in conversations with his closest aides when relevant to the trial of a criminal cause. The decision also helps by analogy to define the proper method of dealing with claims of executive privilege in other judicial proceedings. It may profoundly influence the development of legislative and executive practice when a congressional body seeks information which the Executive would prefer to withhold.

Even though *United States v. Nixon* will henceforth supply the premises for most discussions of executive privilege, the issues are best understood and the decision put in perspective by starting from the beginning, as if the slate were clean.²

I. THE PROBLEM OF EXECUTIVE PRIVILEGE

The Constitution says nothing about the right of either the courts or the Congress to obtain documents, inter- or intra-departmental memoranda, or testimony about oral communications within the Executive Branch. Nor does the Constitution speak directly or indirectly about a privilege to withhold. The controversy over executive privilege arises from our constitutional separation of government into coordinate legislative, executive and judicial branches.

Consider first the Judicial Branch. Charged with adjudicating cases and controversies and with supervising grand jury investigations, the Judicial Branch has obvious need of evidence and therefore the implied authority to issue compulsory legal process for securing it. The need may occasionally ex-

² The disputes, practices and judicial decisions prior to March 6, 1958, are collected in a memorandum submitted by Attorney General Rogers in *Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., at 33-146 (1958) [hereinafter cited as *Senate Hearing*]; see note 54 *infra*. A devastating critique of the statement is Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1 & 2), 12 U.C.L.A.L. REV. 1044, 1288 (1965) [hereinafter cited as Berger]. These articles were recently revised and brought up to date. See R. BERGER, *EXECUTIVE PRIVILEGE* (1974) [hereinafter cited as BERGER]. See also, Wiggins, *Government Operations and the Public's Right to Know*, 19 FED. B.J. 62 (1959). Executive practice and the resulting questions of policy during the Eisenhower administration are reviewed in Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1 & 2), 29 GEO. WASH. L. REV. 623, 827 (1961). For a recent discussion, see Dorson & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974).

tend to evidence in the possession of the President or his subordinates in the Executive Branch. The best opinion at Anglo-American law has always been that no man except the King is wholly free from the testimonial duty to give evidence required in the administration of justice.³ In the treason case against Aaron Burr, Chief Justice Marshall ruled that this obligation extends to the President.⁴ On this theory, the federal district court would seem to have had legal power to require President Nixon's testimony concerning relevant and unprivileged matters within his knowledge, although the Special Prosecutor chose not to press the issue. The public interest in a President's attention to other duties would doubtless make it appropriate to excuse him in instances in which his testimony was unessential and otherwise to take it by deposition. Various privileges to withhold evidence might or might not be applicable. The important point is that the powers vested in the Judicial Branch under article III of the Constitution logically extend to issuing orders for the production of material evidence by the President and other officers in the Executive Branch.

The Legislative Branch—the Senate and the House of Representatives—also requires information, in order to enact laws and appropriate funds for the conduct of the government. Article I's grant of power to legislate is therefore held to carry implied authority to summon witnesses and to compel the production of evidence.⁵ Since much of the evidence must come from the Executive Branch, especially when its activities are under scrutiny, the implied power of Congress under article I logically

³ Jeremy Bentham gave this vivid illustration:

Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, or what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny-worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

⁴ THE WORKS OF JEREMY BENTHAM 320-21 (J. Bowring ed. 1962); see *United States v. Nixon*, 94 S. Ct. 3090, 3107-10 (1974); *Branzburg v. Hayes*, 408 U.S. 655, 688 (1972); 8 J. WIGMORE, EVIDENCE §§ 2192, 2369-70 (McNaughton rev. 1961).

⁵ *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807).

⁶ *Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); cf. *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

extends to requiring the production of evidence by executive officials.

The Executive Branch, on the other hand, has an undeniably legitimate interest, at least under some circumstances, in preserving the confidentiality of internal communications in order to perform its duties under article II. Revealing specifications for, or locations of strategic military weapons could hazard national security. Disclosing diplomatic secrets might endanger negotiations vitally affecting national interests. Confidentiality also may be important to effective consultation. In 1955 President Eisenhower said:

But when it comes to the conversations that take place between any responsible official and his advisers . . . expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.⁶

The claim was made in very general terms applicable not only to presidential conversations and papers but also to papers and conversations throughout the Executive Branch.⁷ And from the need for confidentiality as an encouragement of candor it is argued that "[t]he same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when the use of the power is necessary to exercise his Executive functions effectively"⁸

Standing by itself each inference seems not only logical but necessary. The Judicial Branch, when it needs evidence, should have the power to obtain it. The Legislative Branch, when it

⁶ PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER (1955), at 674.

⁷ *Senate Hearing, supra* note 2, at 271-77.

⁸ *Kramer & Marcuse, supra* note 2, at 899.

needs information in order to perform its duties, should also have power to obtain it. Yet the Executive, when disclosure of information will impede the performance of its duties, should have power to withhold it. The third inference cuts across the first and second. In any given situation either the first or second, or the third, must yield. The questions are: (1) who, if any one, shall decide which shall yield and when it shall yield; and (2) on what basis shall the decision, if any, be rendered.

II. SEPARATION OF POWERS

Prior to the decision in *United States v. Nixon*, it was possible to argue that the Chief Executive had absolute power to decide for himself and his subordinates what information should be withheld from the Legislative or Judicial Branch. The argument usually took as its premise some carefully selected definition of the theory of the separation of powers from which the conclusion of an executive privilege to withhold documents could be extrapolated. For example, Judge Wilkey, dissenting in *Nixon v. Sirica*,⁹ chose a passage from the opinion of Justice Sutherland in *Humphrey's Executor v. United States*:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.¹⁰

"If the Chief Executive can be 'coerced' by the Judicial Branch into furnishing records," the argument ran, "then the Chief Executive is no longer 'master in his own house,'" and this is contrary to the stated constitutional postulate.¹¹

The reasoning seems unpersuasive for two reasons:

(1) The premise assumes the conclusion. One can just as well say that the Judiciary will not be master in its house and the

⁹ 487 F.2d 700, 762, 769 (D.C. Cir. 1973). This decision was entered upon appeal of an order enforcing the first subpoena for Watergate tapes, which was issued during the grand jury investigation. President Nixon did not seek certiorari. The Supreme Court decision, *United States v. Nixon*, 94 S. Ct. 3090 (1974), was upon the validity of a subsequent subpoena seeking additional tapes for use upon trial of the indictment.

¹⁰ 295 U.S. 602, 629-30 (1935).

¹¹ *Nixon v. Sirica*, 487 F.2d 700, 769 (D.C. Cir. 1973) (Wilkey, J., dissenting).

Congress not master in its house if the President can decide what evidence is available in judicial or legislative proceedings. Montesquieu and Locke argued that power should be divided, but in making this central point against the monolithic government of Louis XIV they had no need to concern themselves with problems involving two or more branches that required exact definition of the boundaries of each.¹²

(2) Interaction, not independence, has historically been characteristic of the operation of the three branches of our government.¹³ The enactments of the Legislative Branch, unless unconstitutional, bind the Judiciary not only in the decision of particular cases and controversies but also in the very procedure through which the Judiciary transacts its business.¹⁴ The Legislature regularly imposes legal duties upon the Executive.¹⁵ The Judiciary gives effect to executive orders.¹⁶ The Judiciary can check unconstitutional action by either the Executive or Legislative Branch.¹⁷

For much the same reason there was nothing persuasive in the assertion of counsel to President Nixon that "a holding that the President is personally subject to the orders of a court would effectively destroy the status of the Executive Branch as an equal and coordinate element of government."¹⁸

From the earliest days of the Republic the courts have issued orders addressed to high executive officials requiring them to comply with the Constitution and laws as judicially interpreted, even when their wrongful acts are done by explicit

¹² See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-30 (1965).

¹³ The opinion of the Court, 94 S. Ct. at 3107, quotes Justice Jackson's earlier observation that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁴ See, e.g., 18 U.S.C. §§ 2519, 3006A, 3331(a), 6003(a), 6005(a) (1970); 28 *id.* §§ 2, 44(c), 45, 47, 48, 134(b), 144, 331-33, 455, 1731-45, 1826(b), 1863, 2102, 2254(b), 2284(4), 2403.

¹⁵ Article II, section 3 of the Constitution makes it the duty of the President to "take Care that the Laws be faithfully executed." Congress makes the laws. U.S. CONST. art. I, § 1.

¹⁶ See, e.g., *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 94 S. Ct. 2770 (1974); *EPA v. Mink*, 410 U.S. 73 (1973).

¹⁷ See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁸ Brief in Opposition at 3, *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

presidential command.¹⁹ The most dramatic example is the Steel Seizure case of 1952, in which the Judicial Branch required Secretary of Commerce Sawyer to return to the private owners the steel mills he had seized upon President Truman's direction in order to terminate a labor dispute in time of war.²⁰ No one doubted that it was the President whose legal duties were being determined, or that he was bound by the adjudication. To recognize presidential power to defeat the legal process merely by substituting the President's person for the person of the customary subordinate would not only exalt form over substance but also confer a king-like prerogative to set aside the laws according to the Executive's will—whether actuated by wise judgment, whim or self-interest.²¹ It seems hardly surpris-

¹⁹ *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Land v. Dollar*, 190 F.2d 623 (D.C. Cir. 1951), *vacated as moot*, 344 U.S. 806 (1952). *See also*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹ The opposing view was seriously pressed by Attorney General Stanbery in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), a suit by the state of Mississippi to enjoin execution of various reconstruction acts imposing military government upon the defeated confederate states. In order to make the point that the President is "above the process of any court," Stanbery was forced to claim for the President a royal prerogative:

. . . I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world.

Id. at 484. Because the Court dismissed the bill without reaching the merits, some writers have concluded that the President is as immune from the process as the Attorney General claimed. *See, e.g.*, C. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* § 50, at 125-27 (1922); 3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* §§ 979-80, at 1497-1500 (2d ed. 1929). The opinion of the Court, however, carefully disclaimed decision upon the assertion of total presidential immunity from process. 71 U.S. (4 Wall.) at 498. The Court held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties," *id.* at 501, distinguishing the power of the courts to require the President to perform a single ministerial act from power to control the exercise of his broad constitutional discretion.

Subsequently, the Court declined jurisdiction of similar bills naming the Secretary of War or a military commander as respondent. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867). Their disposition is further proof that it was the character of the question presented and not the identity of the respondent that determined the issue in *Mississippi v. Johnson*. Because this analysis is scarcely consistent with the modern view that an unconstitutional course of conduct may be enjoined because the officer is in that event exceeding the scope of this office, later cases in which the Supreme Court has recognized explicitly that the *Johnson* decision did not turn on the fact that the respondent was the President, treat the ruling as an early expression of the nonjusticiability of "political questions." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971); *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Louisiana v.*

ing that counsel's argument that the President is not subject to legal process was rejected initially by both Judge Sirica and the Court of Appeals²² and ultimately by the Supreme Court.²³

Nor does it seem important that the court lacks physical power to coerce the President. Our constitutional tradition rightly relies upon the moral and political force of law. Throughout our history the courts have issued decrees against states,²⁴ the employees of Congress,²⁵ federal executive officials,²⁶ and the United States,²⁷ all of which the judiciary lacked physical power to enforce. Long ago the Supreme Court observed that, when confronted with a judicial question, "we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment"²⁸ The essential soundness of that position is demonstrated by the "firestorm"—to borrow a phrase from General Haig—which blew up over the weekend of October 20-21, 1973, and which forced President Nixon to reverse his announced decision to disobey the initial order for production of Watergate tapes.

We should note finally the relatively modest argument once offered by Chief Justice Taft. From the very fact of the tripartite separation of powers, he said, it is to be inferred "that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be

McAdoo, 234 U.S. 627, 633-34 (1914); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 296 (1888). Recent cases in the lower courts indicate that the President can be named a defendant in an action when that course would be necessary to the granting of effective relief. See *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Atlee v. Nixon*, 336 F. Supp. (E.D. Pa. 1972); *FED. R. CIV. P. 19(a)*.

The opinion in *United States v. Nixon*, 94 S. Ct. at 3106-07, does not deal with the question explicitly, probably because the Supreme Court briefs for President Nixon avoided any sweeping claim of presidential immunity from judicial process.

²² *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973), *aff'd as modified*, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

²³ *United States v. Nixon*, 94 S. Ct. 3090 (1974).

²⁴ *E.g.*, *South Dakota v. North Carolina*, 192 U.S. 286, 318-21 (1904).

²⁵ *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969).

²⁶ *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁷ *E.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962); *United States v. Lee*, 106 U.S. 196 (1882). A portion of the opinion in *Mississippi v. Johnson* seems to suggest that the bill was beyond the Court's jurisdiction because the Court could not, in the final analysis, enforce its will against the President. 71 U.S. (4 Wall.) at 500-01. Those passages should be read as part of the explanation of the impossibility of dictating to the President how he was to perform a wide range of discretionary functions; otherwise, they run contrary to this entire tradition in our constitutional law.

²⁸ *McPherson v. Blackber*, 146 U.S. 1, 24 (1892).

expounded to blend them no more than it affirmatively requires."²⁹ Chief Justice Taft does not say why this inference is warranted. In the case of the Executive the presumption runs contrary to the basic reason for the separation of powers:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.³⁰

But this too is a selected quotation not wholly demonstrable as historical truth.

In sum, if one selects with care an authoritative generalization about the separation of powers, he can extrapolate any desired conclusion concerning executive privilege. If one has no predisposition, theorizing about the separation of powers provides no reliable guide upon the exact point. Taken more broadly, constitutional tradition plainly sustains judicial rulings upon the legality of acts of the Executive.

III. HISTORIC PRACTICE

Although history clarifies some aspects of the problem, it ultimately does little more than political theory to resolve the controversy over executive privilege. The very few directly pertinent statements by members of the Constitutional Convention assert the absence of any presidential privilege. James Wilson, for example, told the Pennsylvania Ratification Convention:

The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character³¹

Yet Jefferson's memoirs record that after the ill-fated St. Clair expedition, Washington and his cabinet agreed that the

²⁹ *Myers v. United States*, 272 U.S. 52, 116 (1926).

³⁰ *Id.* at 293 (Brandeis, J., dissenting).

³¹ 2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPT-*

Chief Executive had discretion to withhold papers from Congress when he believed it to be in the public interest. Whether their agreement is significant is open to dispute; in fact, Washington did supply all the papers requested.³²

In examining later events it is convenient to separate judicial from legislative proceedings. It is also necessary to consider the relation first of the Judiciary and then of the Congress to each of the other two branches, because in *Nixon v. Sirica* Judges MacKinnon and Wilkey, dissenting, argued that each branch had historically asserted that the doctrine of the separation of powers gave it the right to keep its proceedings confidential from the others.³³

A. *Judicial Proceedings*

1. Executive Privilege

From the beginning the courts have exercised the right to decide what papers they should require from the Executive Branch for use in the administration of justice. The Executive has sometimes denied the right, but it has always acquiesced in judicial orders. In the *Burr* case Chief Justice Marshall ruled very clearly that there is judicial power to require the President to produce evidence, although he hedged a bit upon what he would do if the President asserted that the public interest required him to hold the matter confidential.³⁴ President Jefferson denied the court's power but he "voluntarily" sent the document along to the U.S. Attorney, who turned over less than Burr desired but enough to dissuade him from pressing the issue so far as to require further rulings or orders.³⁵ In 1818 Pres-

TION OF THE FEDERAL CONSTITUTION 480 (2d ed. 1836). Charles Pinckney stated in the Senate on March 5, 1800:

[The framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here

. . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature.

3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 385 (1911).

³² BERGER, *supra* note 2, at 168; Berger, *supra* note 2, at 1080.

³³ 487 F.2d at 730-42 (MacKinnon, J., dissenting); *id.* at 768-73 (Wilkey, J., dissenting).

³⁴ *United States v. Burr*, 25 F. Cas. 30, 34-35 (No. 14,692d) (C.C.D. Va. 1807).

³⁵ *Id.* (No. 14,694) at 190-93. See *Nixon v. Sirica*, 487 F.2d 700, 785 & n.120, 787 & n.128 (Wilkey, J., dissenting); Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1115-19 (1974).

ident Monroe was subpoenaed to testify in a military court and gave evidence by written answers to interrogatories.³⁶

Those are the only occasions prior to Watergate on which the question arose with respect to the President,³⁷ but even before *Nixon v. Sirica* and *United States v. Nixon* there was a substantial body of law holding that the courts would require the production of departmental records and papers under appropriate circumstances, including a recent Supreme Court decision covering copies of documents prepared for the President.³⁸ The decisions asserted the power to enforce the rulings by legal process.³⁹ The executive officials complied. Insofar as presidential claims of executive privilege rest upon the tripartite separation of powers, there is no basis for distinguishing presidential papers from other papers in the Executive Branch.

2. Legislative Privilege

The Senate and the House of Representatives have asserted the privilege of deciding for themselves when to supply evidence in a judicial proceeding, but the fourteen instances most often cited throw no significant light upon either the separation of powers or executive privilege.⁴⁰ Five of the fourteen grew out of summonses to individual Congressmen to appear

³⁶ In January, 1818, President Monroe was summoned to appear as a defense witness in the court martial of Dr. William Burton. Attorney General's Papers: Letters Received from State Department, Record Group 60, National Archives Building; Records of the Office of Judge Advocate General (Navy), Record Group 125 (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building. These documents are cited in 487 F.2d at 710 n.42.

³⁷ Associate Justice Chase refused a subpoena to obtain President Adams' testimony during the trial of Thomas Cooper for libel, *United States v. Cooper*, 25 F. Cas. 631 (No. 14,865) (C.C.D. Pa. 1800), not because the President is immune from process (which Justice Chase denied) but because Cooper was not allowed to prove the truth of the alleged libel by the testimony of the President, the victim. T. COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER, OF NORTHUMBERLAND; ON A CHARGE OF LIBEL AGAINST THE PRESIDENT OF THE UNITED STATES 10 (1800).

³⁸ *EPA v. Mink*, 410 U.S. 73 (1973). See also cases cited *id.* at 88 & nn.14-15.

³⁹ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 465-66 (1951); *id.* at 472 (Frankfurter, J., concurring); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019, at 171-72 (1970).

⁴⁰ The 14 instances canvassed are taken from 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2660-64, 2666, at 1110-1115, 1116 (1907) [hereinafter cited as HINDS' PRECEDENTS] and from the dissenting opinions in *Nixon v. Sirica*, 487 F.2d 700, 738-40, 772-73 (D.C. Cir. 1973).

and testify. The right to refuse was not asserted upon the basis of the separation of powers but as a privilege of freedom from coerced attendance at another place while Congress is in session.⁴¹ This constitutional ground was also taken in a sixth instance when the House directed the members of the House committee that recommended the impeachment of Secretary of War Belknap not to comply with subpoenas *duces tecum* requiring the production of documentary evidence for use in a bribery prosecution. The practical ground of opposition to compliance was that release of the evidence would interfere with the integrity of the impeachment proceedings.⁴²

Seven more cases involved documents rather than attendance. Typically the House or Senate, as the case might be, espoused two propositions: (a) no employee may produce the records of either house without its consent—a rule paralleling the settled principle that the head of an executive department may forbid subordinates to open departmental files without his permission;⁴³ (b) each house has the exclusive right to determine when it will permit use of its papers as evidence.⁴⁴ In one early case the papers were furnished.⁴⁵ In four cases copies were ten-

⁴¹ The earliest instance appears to have arisen during the trial of Thomas Cooper for seditious libel in 1800. Members of Congress were subpoenaed and testified under a waiver of privilege. *United States v. Cooper*, 25 F. Cas. 631, 633-34 (No. 14,865) (C.C.D. Pa. 1800). In 1846 the House of Representatives rejected a resolution that would have authorized members to waive the privilege individually but voted to give a subpoenaed member permission to respond to a subpoena in a criminal proceeding. CONG. GLOBE, 29th Cong., 1st Sess. 767-69 (1846). The House took similar action on March 21, 1876. 4 CONG. REC. (1876); 3 HINDS' PRECEDENTS, *supra* note 40, § 2662, at 1112. In later cases Senator Blease and Representative LaGuardia disregarded subpoena in the absence of authorizing resolutions. 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 586, at 825 (1936) [hereinafter cited as CANNON'S PRECEDENTS]; 72 CONG. REC. 109 (1929).

⁴² 4 CONG. REC. 1525, 1539 (1876). Representative Cox, for example, described the privilege in these words:

What is the reason for this rule of our action? Simply this: that a Representative who represents a large body of people, or a Senator who represents a State, should not be called by the courts at their pleasure to leave their seats. He holds superior allegiance. . . . The object of a privilege of this kind is that the public business shall go on. Public duty is paramount to all your police courts and with all their attachments and subpoenas *duces tecum*.

Id. 1530.

⁴³ The leading case sustaining a departmental regulation is *Boske v. Comingore*, 177 U.S. 459 (1900). Recognition of the power of a cabinet officer to reserve decision unto himself does not imply that the papers are privileged. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 465-66 (1951); *id.* at 472 (Frankfurter, J., concurring).

⁴⁴ *See, e.g.*, 17 CONG. REC. 1295 (1886); 9 *id.* 680-81 (1879).

⁴⁵ CONG. GLOBE, 27th Cong., 3d Sess. 89 (1842).

dered.⁴⁶ In two cases the originals were refused without more, but there is every reason to suppose that copies would have been supplied if requested.⁴⁷

The fourteenth and last instance grew out of the attempt of Lieutenant Calley to subpoena secret testimony given during an investigation by the House Armed Services Committee which preceded the court martial. Article I, section 5 gives each house an express privilege to keep secret the journal of its proceedings. The military court ruled that this privilege covers the proceedings of congressional committees. Production of the testimony was refused.⁴⁸

It seems apparent that none of these refusals throws light upon executive privilege. Neither the express privilege to keep the journal secret, nor the express grant of immunity from arrest,⁴⁹ nor the ancient parliamentary privilege to be in attendance during sessions⁵⁰ applies to the President. If any inference is to be drawn, it is that the contrasts between article II and article III show that the President is to have no privilege. Neither the House nor the Senate has ever persisted, upon the basis of the separation of powers, in a refusal of evidence needed in a judicial proceeding.

B. *Legislative Proceedings*

1. Executive Privilege

Senate and House Committees and less often the Senate and House themselves have been demanding information from

⁴⁶ 61 CONG. REC. 5572-73 (1921); 17 *id.* 1295 (1886); 9 *id.* 680 (1879).

⁴⁷ 108 CONG. REC. 3626-27 (1962); 68 *id.* 4031-34 (1927). The former instance grew out of a prosecution of James R. Hoffa.

⁴⁸ 116 CONG. REC. 37,652-53 (1970).

⁴⁹ U.S. CONST. art. I, § 6. The privilege of nonattendance at court while Congress is in session has sometimes been traced to this provision. For example, in 1929 Judge Gordon addressed a grand jury upon Senator Blease's failure to respond to a subpoena in these terms:

The Congress of the United States is now in session. . . .

Section 6, Article I of the Constitution of the United States, gives immunity to arrest to the Members of Congress while that body is in session. It does not say that they are privileged from subpoena, but if they do not obey, the only step the court could take would be to issue an attachment for their arrest. Since the Constitution provides immunity from arrest, in my opinion they are not subject to such action.

6 CANNON'S PRECEDENTS, *supra* note 41, § 588, at 828.

⁵⁰ Since the seventeenth century the House of Commons has claimed immunity for its members from attendance in court during sessions of Parliament. In modern

the Executive Branch since the administration of George Washington. Nearly always the requests were satisfied, but one finds interspersed through history occasions on which Presidents declined to comply with congressional requests. Some of the refusals were accompanied by messages asserting a very broad presidential discretion to withhold any papers or other material the President thinks it in the public interest to withhold. Some Attorneys General gave opinions supporting the claim.⁵¹ Some Senators and Representatives and some committee reports acquiesced in the claim. Others resisted it. One of the attacks upon executive privilege is worth quoting:

That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.

- Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits.⁵²

The words were spoken by the then-Congressman Richard M. Nixon.

Historians, judges and lawyers differ over the proper description and analysis of these incidents. All ended inconclusively because there was not in the past and may not be today any method of resolving the conflict short of impeachment.⁵³ One gets a useful picture of the kinds of occasions on which information has been withheld by Chief Executives, however, by classifying each of the twenty-seven occasions listed in a purportedly complete compilation of prior claims of executive priv-

times, the parliamentary privilege has been invoked by a Member of Parliament who went on to become Prime Minister—Harold Wilson. In 1953, when Mr. Wilson was subpoenaed to attend and testify in High Court, he called upon the Speaker of the House for assistance. The Speaker addressed a letter to the judge in the case, requesting that he set aside the subpoena, in order to "obviate the necessity for this House to take the formal and more cumbersome step of refusing leave of absence from the House for the Right Hon. Gentleman to attend the court that day, in view of the fact that Members of both Houses are, by law and custom of Parliament, exempted from attendance as witnesses during the sessions of Parliament." P. PACHAURI, *THE LAW OF PARLIAMENTARY PRIVILEGES IN U.K. AND IN INDIA* 193 (1971).

⁵¹ 40 *OP. ATT'Y GEN.* 45 (1941); 11 *id.* 137, 142-43 (1865); *cf.* 25 *id.* 326 (1905).

⁵² 94 *CONG. REC.* 4783 (1948).

⁵³ See part V, *infra*.

ilege made by the Department of Justice under President Eisenhower, not by what was said, but by what was done.⁵⁴

At the very outset four of the seventeen Presidents and five of the twenty-seven instances compiled must be stricken from the list upon the ground that the congressional request explicitly stated that the President should decide whether furnishing the papers would be in the public interest.⁵⁵ In these instances there was no need for a claim of constitutional right because there was no resistance to a congressional demand. President Jefferson, for example, is often said to have claimed executive privilege in withholding from the House information regarding the Burr conspiracy. The House request shows on its face that the House asked for information "except such as [the President] may deem the public welfare to require not to be disclosed."⁵⁶

⁵⁴ Memorandum submitted in 1958 by Attorney General William Rogers, *Senate Hearing, supra* note 2, at 63-146. The memorandum is only a slight revision, without updating, of an unofficial memo prepared by Justice Department attorney Herman Wolkinson in 1947, and published as Wolkinson, *Demands of Congressional Committees for Executive Papers*, (parts 1 & 2), 10 FED. B.J. 103, 223 (1949). See *Senate Hearing, supra* note 2, at 32-33. The Wolkinson material also became a major source document for the statement of the Justice Department accompanying President Eisenhower's letter to the Secretary of Defense of May 17, 1954. See Brownell, *Memorandum on Separation of Powers*, 14 FED. B.J. 73 (1954). Judge MacKinnon relied upon these documents, apparently without further check, for his dissenting opinion in *Nixon v. Sirica*, 487 F.2d 700, 732 n.9 (1973).

⁵⁵ The instances which should be stricken upon this ground involved Presidents Thomas Jefferson, James Monroe, Millard Fillmore, Abraham Lincoln, and Herbert Hoover:

(1) The incident involving Jefferson is described in the text.

(2) In January 1825 James Monroe was asked by the House for information about the misconduct of naval officers. The resolution is not reported in the *Annals of Congress*, but the wording of Monroe's reply indicates that the House requested the information only "if such a communication might now be made consistently with the public interest or with justice to the parties concerned." 2 MESSAGES AND PAPERS OF THE PRESIDENTS 278 (J. Richardson ed. 1898) [hereinafter cited as RICHARDSON]. If Monroe's paraphrase of the request is inaccurate or if I misread it, still the incident would fall into the category of withholding investigative files relating to wrongdoing or loyalty and security. See text accompanying notes 61-67 *infra*.

(3) In 1852, Millard Fillmore was requested to inform the Senate about a proposed transfer of the Sandwich Islands, "if not incompatible with the public interests." 5 *id.* 139-40.

(4) In March 1861 Congress formally petitioned President Lincoln for the dispatches of Major Robert Anderson to the War Department during his command of Fort Sumter, "if in his opinion not incompatible with the public interest." CONG. GLOBE, 36th Cong., 2d Sess. 1498 (1861).

(5) A resolution of May 1932 requiring Herbert Hoover to furnish information on the importation of ammonium sulphate was amended to contain the phrase, "if not incompatible with the public interest." 75 CONG. REC. 10,207 (1932).

⁵⁶ 16 ANNALS OF CONG. 336 (1806-07) (discussed in Berger, *supra* note 2, at 1093 & Wolkinson, *supra* note 54, at 110-11).

In a sixth instance the request was by the House for information which a statute explicitly authorized the President to keep secret.⁵⁷ In a seventh the information was actually shown to any Senator who would give a pledge of secrecy.⁵⁸ Neither situation required assertion of a constitutional privilege to withhold relevant information.

A number of Presidents withheld information from the Senate or House as a method of challenging the power of the particular body to deal with the subject matter upon which the information was said to bear. Analytically, these cases have no bearing upon any possible privilege of executive secrecy with respect to matters admittedly within the jurisdiction of the House making the demand. The most notable example is George Washington's firm declination in 1796 to deliver to the House of Representatives documents pertaining to the negotiation of the Jay Treaty. Washington relied in his rebuff of the House, not upon the need for secrecy but upon the principle that the Constitution assigns no role to the House in relation to treaties. All the papers requested by the House were "in fact . . . laid before the Senate," to aid that body in the performance of its legitimate role in the treaty-making function.⁵⁹

Into this category also fall the controversies precipitated by the several refusals of Presidents Jackson, Tyler, Hayes and

⁵⁷ In 1846 President James K. Polk was asked by House resolution for the details of foreign payments that had been made by the preceding administration. Polk pointed out that a specific statute, the Act of Congress of May 1, 1810, expressly authorized the President to withhold information about these payments. "While this law exists in full force," he replied, "I feel bound by a high sense of public policy and duty to observe its provisions and the uniform practice of my predecessors under it." 4 RICHARDSON, *supra* note 55, at 435. See also, A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 47-49 (1973); J. WIGGINS, *FREEDOM OR SECRECY* 265 (rev. ed. 1964).

⁵⁸ In 1930 when the Senate requested to see information pertaining to a naval treaty, President Hoover wrote: "No Senator has been refused an opportunity to see the confidential material referred to, provided only he will agree to receive and hold the same in the confidence in which it has been received and held by the Executive." H. HOOVER, *REDUCTION AND LIMITATION OF NAVAL ARMAMENT*, S. DOC. NO. 216, 71st Cong., Special Sess. 2 (1930). President Hoover's manner of transmitting the information was similar to that of President John Adams in April 1798 when he responded to a House request for dispatches from the American envoys to France by furnishing the papers along with a "request that they may be considered in confidence until the members of Congress are fully possessed of their contents, and shall have had the opportunity to deliberate on the consequences of their publication; after which time I submit to them your wisdom." The House then considered the papers in secret session. 3 HINDS' PRECEDENTS, *supra* note 40, § 1898, at 194.

⁵⁹ Washington disavowed any disposition to withhold any information which could be required of him "by either House of Congress as a right," but he added:

It does not occur that the inspection of the papers asked for can be relative to

Cleveland to produce information in connection with either Senate inquiries into the dismissal of executive officers or House inquiries into appointments and dismissals. For example, in 1842 President Tyler reminded the House: "The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone."⁶⁰

any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed. . . .

....

. . . [I]t is perfectly clear . . . that the assent of the House of Representatives is not necessary to the validity of a treaty

1 RICHARDSON, *supra* note 55, at 194-96; 5 ANNALS OF CONG. 760-61 (1796). See also Wiggins, *supra* note 2, at 77-79; Wolkinson, *supra* note 54, at 107-09.

⁶⁰ 4 RICHARDSON, *supra* note 55, at 106. President Tyler added:

I can not perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment.

Id.

Other incidents referred to in the text may be briefly sketched:

(1) *Jackson*: In 1835 the Senate requested information relating to the dismissal of an executive official. Jackson replied that since the Senate did not legitimately participate in such removals from office, it was not entitled to information concerning them. 3 RICHARDSON, *supra* note 55, at 132-34.

In 1837 a House Select Committee demanded that President Jackson and heads of the executive departments furnish a wide range of information concerning all officers employed during a certain period in the executive branch. Rejecting compliance with their overbroad and vague commands, President Jackson protested that no specific charges had been made against these officers. Significantly, he expressed a willingness to comply with any specific request supported by a showing of reason to suspect wrongdoing. See text accompanying note 75 *infra*. 13 CONG. DEB., App. at 201-02 (1837).

(2) *Hayes*: President Hayes clashed with Congress in 1877 when the Senate Committee on Commerce asked for information with respect to the removal of Chester Arthur from the office of the Collector of the Port of New York. President Hayes refused on the ground of the exclusive power of the President to remove such executive officers. 17 CONG. REC. 2332, 2618 (1886).

(3) *Cleveland*: When the Senate in 1886 commanded President Cleveland to disclose the reasons for the suspension from office of the U.S. District Attorney for Alabama, the President directed attention to the April 5, 1869 amendment to the Tenure of Office Act, allowing the President to suspend such officers "in his discretion." President Cleveland declined to deliver the papers

having reference to the performance of a duty exclusively mine. . . .

....

. . . I am also led unequivocally to dispute the right of the Senate by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials.

8 RICHARDSON, *supra* note 55, at 378-79. The prolonged controversy between Presi-

President Tyler on one occasion,⁶¹ President Franklin D. Roosevelt on perhaps six occasions⁶² and President Truman

dent Cleveland and the Senate, which included the formal censure by that body of the Attorney General for withholding documents, was mooted when President Cleveland pointed out that the suspended attorney's term had expired. Eventually, Congress confirmed the appointment of his successor. See 1 R. McELROY, GROVER CLEVELAND, THE MAN AND THE STATESMAN 171-83 (1923).

⁶¹ In 1843 President Tyler responded to a request by the House of Representatives for reports made to the Department of War by Lieutenant Colonel Hitchcock, who had been designated to investigate the affairs of the Cherokee Indians. Though he sent the House the desired information, President Tyler appended to it a statement of principle which carefully delineated certain circumstances in which the confidentiality of investigations should be protected. 3 HINDS' PRECEDENTS, *supra* note 40, § 1885, at 181-82; 4 RICHARDSON, *supra* note 55, at 222-25. Of investigations, President Tyler said in part:

To be effective these inquiries must often be confidential. . . . To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated or in respect to the character of the information obtained would deprive him at once of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage and the officers whose conduct demanded investigation may be enabled to elude or defeat it. . . .

. . . . The officer charged with a confidential inquiry, and who reports its result under the pledge of confidence which his appointment implies, ought not to be exposed individually to the resentment of those whose conduct may be impugned by the information he collects. The knowledge that such is to be the consequence will inevitably prevent the performance of duties of that character, and thus the Government will be deprived of an important means of investigating the conduct of its agents.

Id. 222-23.

⁶² The incidents involving President Franklin D. Roosevelt were as follows:

(1) In 1941 the House Committee on Naval Affairs demanded to see certain FBI reports pertaining to investigations of labor disputes in industrial establishments with naval contracts. Roosevelt bolstered his refusal to furnish the reports with an opinion by Attorney General Robert H. Jackson. Jackson wrote that if disclosure were permitted, the national defense would be jeopardized and the FBI crippled through its inability to retain the trust of its confidential informants. 40 OP. ATT'Y GEN. 45 (1941).

Incidents 2 through 6, though listed separately, all relate to the wartime hearings held by the House Select Committee to Investigate the Federal Communications Commission:

(2) In 1943, the Committee subpoenaed Harold D. Smith, Director of the Bureau of the Budget, to appear and produce files and correspondence relating to the proposed transfer of the Radio Intelligence Division from the FCC to the military departments. Instructions from President Roosevelt and Attorney General Jackson's Opinion of 1941 were relied upon in refusing to comply with the subpoena. *Hearings Before the House Select Committee to Investigate the Federal Communications Commission*, 1st Sess., pt. 1, at 34-39 (1943-44).

(3) A subpoena was issued by the Committee to the Chairman of the FCC (who was also the Chairman of the Board of War Communications). He declined to supply the documents demanded by the Committee, because he felt bound by the decision of the Board of War Communications not to deliver the documents. *Id.* 46, 51-53.

(4) The General Counsel of the FCC declined to comply with a subpoena because of the decision of the Board of War Communications not to make the documents which were subpoenaed available to the committee. *Id.* 53-54.

twice⁶³ withheld investigative files relating to wrongdoing or loyalty and security. All nine instances can honestly be described as assertions of the confidentiality of papers in the Executive Branch, but it is equally plain that the claim was not based upon an undifferentiated interest in preserving confidentiality among executive officials. Much that was in the files would not have been competent evidence in a court. Much would have been privileged in a court under particular rules having nothing to do with a generalized claim of confidentiality: as state secrets,⁶⁴ under the informer's privilege,⁶⁵ or as work products.⁶⁶ The chief purpose of the withholding was to

(5) The Acting Secretary of War and the Acting Secretary of the Navy also refused, on the direction of the President, to allow documents to be delivered or officers to testify before the Committee. *Id.* 67-68.

(6) The Director of the Federal Bureau of Investigation also declined to answer certain questions propounded to him by the committee, a number of which related to FBI investigations. *Id.*, pt. 2, at 2337-39.

⁶³ President Truman, in 1945, repeatedly directed executive departments and officers to disclose information to the Joint Congressional Committee investigation of the attack on Pearl Harbor. While files and documents were made available to the Joint Committee, a minority report complained that the President's orders did not include release to individual members. REPORT OF THE JOINT COMM. ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, S. DOC. NO. 244, 79th Cong., 2d Sess., 498-502 (minority report). President Truman otherwise provided for complete access, and the majority expressed the belief that they had received the "fullest cooperation" from the President and the Executive Branch. *Id.* xiv, 283-87 (majority report); see Wolkinson, *supra* note 54, at 145.

(2) Although we have followed the Department of Justice in counting as a separate incident the supposed refusal of President Truman in 1947 to furnish Civil Service Commission records concerning applicants for positions, our research has not disclosed such a refusal. H.R.J. Res. 289, 80th Cong., 2d Sess., 94 CONG. REC. 38 (1948), referred to in the Wolkinson article as "the unsuccessful attempt of the House of Representatives to force President Truman to produce civil service records," was "neither reported out of Committee nor put to a vote of the House." Wolkinson, *supra* note 54, at 149 n.*, 256-57 & n.109.

A substitute candidate for Truman's second withholding of information is his directive to the Executive Branch of March 13, 1948, in which he expressed his concern for the confidentiality of results of loyalty investigations of federal employees. The directive required that all records relative to the Federal Employee Loyalty Program (which provided for a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch) "be preserved in strict confidence."

This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases.

13 Fed. Reg. 1359 (1948); 94 CONG. REC. 2929, 4777 (1948).

⁶⁴ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁶⁵ *Roviaro v. United States*, 353 U.S. 53 (1957).

⁶⁶ *Hickman v. Taylor*, 329 U.S. 495 (1947).

protect possibly innocent persons (latterly those holding unconventional political opinions) against disclosure of the rumors and loose allegations often found in investigative reports. Attorney General Robert H. Jackson's opinion supporting President Roosevelt's refusal wisely began by limiting the discussion to investigative files but spoiled the effect by citing precedents excluding executive papers from evidence upon a wide variety of grounds.⁶⁷ His bad example set a course for his successors, especially Attorney General Rogers, and for counsel to President Nixon who jumbled up executive refusals of all kinds. If it is not too late for historical accuracy and differentiation in terms of the applicable policies, the investigative files belong in a separate class. The names of three more Presidents and nine more incidents should thus be stricken from the list.

Three Presidents found congressional demands for information so motivated by political spite as to refuse compliance: Buchanan, Grant and Coolidge. President Buchanan sent two messages protesting a House resolution setting up a committee to inquire into whether the President or any other officer of the government had sought by improper means to influence the action of Congress on laws relating to the rights of states and territories. They gave a modicum of historical support to President Nixon's position that the House Judiciary Committee should have first framed specific charges and then held hearings at which he would have a right of cross-examination, but there is nothing in the Buchanan messages claiming an executive privilege of secrecy.⁶⁸ Nor were Grant⁶⁹ and

⁶⁷ 40 OP. ATT'Y GEN. 45 (1941).

⁶⁸ President Buchanan denounced the House investigations as irregular impeachment proceedings, and in his Second Message of Protest, June 22, 1860, he wrote: I protested against this [resolution] because it was destitute of any specification; because it referred to no particular act to enable the President to prepare for his defense; because it deprived him of the constitutional guards which, in common with every citizen of the United States, he possesses for his protection, and because it assailed his constitutional independence as a coordinate branch of the Government.

CONG. GLOBE, 36th Cong., 1st Sess. 3299 (1860). But the resolution of the House also contained a subsequent section asking for information on alleged abuses in post offices, navy yards, and other public works of the United States. President Buchanan considered these requests for information "highly proper in themselves," and wrote the House that over such resolutions "their authority as a legislative body is fully and cheerfully admitted." 5 RICHARDSON, *supra* note 55, at 614-15; CONG. GLOBE 36th Cong., 1st Sess. 1434 (1860).

⁶⁹ In 1876, Congress called upon President Grant for information as to which executive acts had been performed at a distance from the seat of government established by law for a period of seven years. It is clear that the purpose of the request was to

Coolidge⁷⁰ standing upon the latter ground.

Two incidents involving two Presidents remain on the list. In refusing to send to the Senate a paper which he purportedly had read to the Cabinet, concerning the removal of funds from the Bank of the United States, President Jackson wrote:

. . . I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.⁷¹

In order to keep them from the Senate, President Theodore Roosevelt took into his own possession papers pertaining to his personal decision not to use the Sherman Act in an effort to block the United States Steel Corporation's acquisition of the Tennessee Coal and Iron Company, but he made no formal exposition of the grounds for his action.⁷²

embarrass Grant for having absented himself from Washington during the hot summers. William Howard Taft recounts:

In the last days of Grant's administration, when the House was Democratic, and when President Grant was being criticized for spending some of the hot months at Long Branch, the House of Representatives sent him a resolution asking for information as to how many Executive acts were performed at other places than the seat of government. The inquiry evidently aroused the General, for his declination to furnish the information is quite spirited. He declined to admit that under the Constitution he was obliged to perform official acts at the seat of government, and proceeded to show by historical reference that many such acts by former Presidents had been performed at other places in the United States.

W.H. TAFT, *THE PRESIDENT AND HIS POWERS* 130 (1916) (formerly titled *OUR CHIEF MAGISTRATE AND HIS POWERS*). In his reply to the House, Grant emphasized that, "What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment." 7 RICHARDSON, *supra* note 55, at 362.

⁷⁰ In 1924 Coolidge protested a Senate committee inquiry into the Bureau of Internal Revenue, when it appeared that the investigation was serving as a vehicle for venting the personal grievances of Senator Couzens against Secretary of the Treasury Andrew Mellon. Although Coolidge announced his intention to provide no further Executive Branch cooperation, it is not clear whether anything was actually withheld from the Committee. Secretary Mellon himself claimed that he had gone so far as to obtain waivers of privacy of tax returns from the companies in which he was interested, so that the committee could determine whether the companies had received favored treatment. 65 CONG. REC. 6087, 6106, 6109 (1924). 6106, 6109 (1924).

⁷¹ 3 RICHARDSON, *supra* note 55, at 36.

⁷² Although Roosevelt delivered to the Senate a detailed letter describing the circumstances surrounding his approval of the merger, 43 CONG. REC. 527-28 (1909),

If this reading of history is fair, four conclusions follow:

(1) Over a period of a century and a half thirteen Presidents found a total of twenty occasions on which to refuse to turn over information demanded by an arm of Congress. Sometimes Presidents bespoke a broad discretion. Attorneys General wrote broad opinions to support them.⁷³ Commentators often accepted their views.⁷⁴

(2) If one looks at what was done and confines the words to the events, nothing appears which even approaches a solid historical practice of recognizing claims of executive privilege based upon an undifferentiated need for preserving the secrecy of internal communications within the Executive Branch. Only two Presidents, Andrew Jackson and Theodore Roosevelt, can

he apparently blocked a Senate move to obtain information from the head of the Bureau of Corporations, Herbert Knox Smith. Roosevelt reportedly described his actions to an aide:

The Senate called for certain papers in the Bureau of Corporations this week and on Thursday ordered Herbert Knox Smith to transmit all papers on a certain subject in his office. He came to see me and to tell me that most of the papers were given in a confidential way; that if they were made public no end of trouble would ensue. I ordered Smith to get a decision from the Attorney-General that these papers should not be made public, and yesterday the Committee on Judiciary of the Senate summoned Herbert Knox Smith before it and informed him that if he did not at once transmit these papers the Senate would order his imprisonment at once or the committee would. As soon as he reported this to me I ordered him in writing to turn over to me all the papers in the case, so that I could assist the Senate in the prosecution of its investigation.

I have those papers in my possession, and last night I informed Senator Clark of the Judiciary Committee what I had done. I told him also that the Senate should not have those papers and that Herbert Knox Smith had turned them over to me. The only way the Senate or the committee can get those papers now is through my impeachment, and I so informed Senator Clark last night.

. . . I will retain those papers until the 3d of March [the expiration of Roosevelt's term of office] at least. Some of these facts which they want, for what purposes I hardly know, were given to the Government under the seal of secrecy and cannot be divulged, and I will see to it that the word of this Government to the individual is kept sacred.

THE LETTERS OF ARCHIE BUTT, PERSONAL AIDE TO PRESIDENT ROOSEVELT 305-06 (L. Abbot ed. 1924).

After his term had expired, Roosevelt was less reticent. He testified before a congressional committee and published defenses of his decision. See G. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* 190-91 (1946); H. PRINGLE, *THEODORE ROOSEVELT, A BIOGRAPHY* 441-45 (1931); *THEODORE ROOSEVELT, AN AUTOBIOGRAPHY* 438-43, 560-73 (1920).

⁷³ See note 51 *supra*.

⁷⁴ E. EBERLING, *CONGRESSIONAL INVESTIGATIONS* 282 (1928); WILLOUGHBY, *supra* note 21, § 968, at 1488; MASON, *Congressional Demands Upon the Executive for Information*, 5 *PAPERS OF AM. HISTORICAL ASS'N* 367, 374 (1891).

be said to have withheld information under circumstances in which the withholding could not easily be justified upon some other, specialized ground.

(3) So far as one can judge from the history of past occasions for claiming power to withhold, President Nixon would have not done the slightest damage to the Presidency by an immediate, full disclosure. President Jackson, surely a strong Chief Executive, wrote that if the Congress could

point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose.⁷⁵

(4) There is no settled executive practice of giving Congress whatever it wishes from the Executive Branch.

2. Judicial Privilege

In his dissenting opinion in *Nixon v. Sirica* Judge MacKinnon asserted that the "judicial branch of our government claims a similar privilege [not to respond to congressional subpoenas], grounded on an assertion of independence from the other branches."⁷⁶ There is no published record of any such assertion. The materials cited by Judge MacKinnon are: (i) a newspaper report indicating that some Justices of the Supreme Court are opposed to the imposition of ethical standards for judges in place of individual discretion;⁷⁷ (ii) general statements about the need for secrecy that envelops judicial work⁷⁸ and the power to initiate security measures;⁷⁹ (iii) a letter from the Chief Judge of a Court of Appeals declining to furnish to an individual United States Senator information confirming or denying reports concerning the disqualification of certain judges while a case was under advisement, upon the ground that reply

⁷⁵ 13 CONG. DEB., App. 202 (1837).

⁷⁶ 487 F.2d at 740. See also *id.* at 772-73 (Wilkey, J., dissenting).

⁷⁷ N.Y. Times, May 18, 1969, at 1, col. 3.

⁷⁸ E.g., Brennan, *Working at Justice*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 300 (A. Westin ed. 1963); Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955).

⁷⁹ *New York Times Co. v. United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

“would not be appropriate”;⁸⁰ (iv) a letter from Justice Tom C. Clark declining to testify before the House Un-American Activities Committee about events which occurred while he was Attorney General because the “complete independence of the judiciary is necessary to the proper administration of justice”;⁸¹ and (v) a statement signed by the judges of a federal district court expressing unwillingness that “a Judge of this Court . . . testify with respect to any Judicial proceedings” before a House sub-committee investigating the Department of Justice.⁸² The first two items show only how far afield it was necessary to go in order to find any “support” for the supposed privilege. The third claim does not involve a legal privilege. The fourth, Justice Clark’s letter, seems to go far beyond any legally sustainable claim; surely no judicial privilege or immunity excuses a judge from giving testimony about his prior, nonjudicial activities. The statement of the District Judges probably did assert a formal privilege, but it gives no reliable indication of what evidence the congressional committee desired.⁸³

Undoubtedly, some kind of privilege of confidentiality protects judicial deliberations, including communications between judge and law clerk or secretary, but there has never been occasion in the federal courts to decide whether the supposed privilege is grounded in the common law or the Constitution,⁸⁴ whether it is a qualified, or an absolute privilege; or who rules upon whether the privilege is applicable when it is claimed. Canvassing these issues of judicial confidentiality adds perspective, but so long as they go unanswered themselves the analogy gives no reliable guide to the parallel issues of executive privilege.

In the absence of express constitutional command, settled constitutional tradition, or binding precedent, one had to ask, prior to *United States v. Nixon*, what rule of executive privilege would work best. In the first case involving Watergate tapes, counsel to President Nixon asserted: “Were it to be held . . . that

⁸⁰ The incident is described in *Nixon v. Sirica*, 487 F.2d at 742.

⁸¹ N.Y. Times, Nov. 14, 1953, at 9, cols. 5-6.

⁸² Statement of the Judges of the District Court for the Northern District of California, 14 F.R.D. 335 (1953). In fact Judge Goodman did testify. *Senate Hearing, supra* note 2, at 482-83.

⁸³ A second statement accompanying the first suggests that the committee may have been seeking to pierce the secrecy of grand jury proceedings. 14 F.R.D. at 336.

⁸⁴ The closest analogy is the defeasible common law privilege that attached to the deliberations of a trial jury. *See, e.g., Clark v. United States*, 289 U.S. 1 (1933).

there is any circumstance under which the President can be compelled to produce recordings or notes of his private conversations, from that moment on it would be simply impossible for any President of the United States to function."⁸⁵

The supporting argument followed the line sketched by Professor Charles Black in a letter to the *New York Times*:

It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken.⁸⁶

No one would deny the potentiality of injury if *any* word spoken or written in the Executive Offices upon *any* occasion should be available upon *any* demand by *any* prosecutor or *any* congressional committee at *any* time without *any* further showing of need. But to demonstrate that the President should not be under an absolute duty to provide any and all information upon any and all occasions falls far short of making out the claim of President Nixon's attorneys that the President must have an absolute privilege upon any and all occasions to withhold whatever he wills. Both law and constitutional practice ought to be capable of recognizing, and making a more delicate adjustment in, the middle ground. At the threshold, questions concerning the relationship between the President and Congress should be separated from questions concerning his duty to the courts.

IV. EXECUTIVE PRIVILEGE IN THE COURTS

Executive privilege may be claimed in several different kinds of judicial proceedings, ranging from criminal prosecutions to actions brought under the Freedom of Information Act solely to obtain access to executive files. The differences have enough potential importance to warrant separate discussion of the principal categories.

⁸⁵ Brief in Opposition at 33, *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

⁸⁶ *N.Y. Times*, Aug. 3, 1973, at 31, cols. 1-2.

A. *Criminal Cases*

The decision in *United States v. Nixon*⁸⁷ required President Nixon to turn tape recordings of private conversations with his aides over to a district court for examination *in camera* in order that irrelevant portions may be excised and relevant portions be admitted as evidence at the trial of some of the aides upon an indictment charging conspiracy to obstruct justice. The unanimous opinion delivered by Chief Justice Burger puts four propositions beyond dispute:

(1) It is for the courts to determine the extent of the duty of the President and other executive officials to produce evidence, and conversely the extent of any executive privilege.⁸⁸

(2) The Executive has a constitutional privilege, albeit defeasible, to maintain the confidentiality of internal communications, based upon the public interest in securing personal privacy and encouraging open and candid discussion of executive business.⁸⁹

(3) This generalized privilege of confidentiality must yield where either the prosecution or defense has need for evidence of internal communications which is otherwise admissible upon trial of an indictment. "To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III."⁹⁰

(4) Where there is a preliminary showing that the subpoenaed material is likely to contain conversations relevant to the charge, the district judge should receive and examine it *in camera*, separate the parts which are relevant and otherwise admissible, and return the rest under seal.⁹¹

There is nothing startling or even very novel in these propositions, apart from the personal involvement of President Nixon and the chance that the production of the evidence would prove his complicity in the crime.

⁸⁷ 94 S. Ct. 3090 (1974).

⁸⁸ *Id.* at 3105-06.

⁸⁹ *Id.* at 3106.

⁹⁰ *Id.* at 3107.

⁹¹ *Id.* at 3110.

The first proposition merely applies to the production of evidence the long-settled principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁹² The courts have authoritatively defined the scope of analogous privileges such as the immunity conferred upon Senators and Representatives by the Speech or Debate Clause.⁹³ The general principle seems applicable to the new instance. Courts are accustomed to weighing the need for particular evidence in a specific judicial proceeding against the public interest in preserving the confidentiality of particular relationships and the governmental interest in secrecy. Earlier lower federal courts⁹⁴ and courts in other countries adhering to the English common law tradition⁹⁵ had rather consistently held that the courts must rule on claims of executive or crown privilege. The precedents are not numerous. Except for *Nixon v. Sirica*,⁹⁶ they did not arise out of criminal cases. Nor did they involve conversations with the President himself, except for the rulings on the first subpoena for Watergate tapes by Judge Sirica and the Court of Appeals. Still, the underlying reasoning is applicable. As stated by Professor Wigmore:

A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege.⁹⁷

Even if by an extraordinary act of conscience and detachment a President could judge impartially the relative public

⁹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See also text accompanying notes 19-23 *supra*.

⁹³ U.S. CONST. art. I, § 6; see *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972).

⁹⁴ See cases cited notes 111, 125-26, *infra*.

⁹⁵ In *Conway v. Rimmer*, [1968] A.C. 910, the House of Lords explicitly reversed its long held view as expressed in *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, that executive privilege to determine if it is in the public interest that evidence be withheld is absolute. See also *Robinson v. South Australia* (No. 2), [1931] A.C. 704 (P.C.S. Austl.); *Gagnon v. Quebec Sec. Comm'n*, 50 D.L.R. 2d 329 (1964); *Bruce v. Waldron*, [1963] Vict. 3; *Corbett v. Social Security Comm'n* [1962] N.Z.L.R. 878; *Amar Chand Butail v. Union of India*, [1965] 1 India S. Ct. 243.

⁹⁶ 487 F.2d 700 (D.C. Cir. 1973).

⁹⁷ 8 J. WIGMORE, EVIDENCE § 2379, at 809-10 (McNaughton rev. 1961).

advantages of secrecy and disclosure without regard to the consequences for himself or his associates, confidence in the Presidency as well as in the integrity and impartiality of the legal system as between the high and the lowly is nonetheless impaired by the violation of the ancient precept that no man shall be judge of his own cause. For both reasons the courts must make the final determination whether executive papers and conversations are protected by an executive privilege in any given criminal case.

Recognition of a defeasible or "presumptive" privilege of confidentiality for executive communications is also sustained by reason and authority.⁹⁸ Laying to one side the narrow categories of military and diplomatic secrets,⁹⁹ reports from confidential informants,¹⁰⁰ and investigative files,¹⁰¹ there are two reasons for preserving the confidentiality of intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising parts of the process by which governmental decisions and policies are formulated: (1) to encourage aides and colleagues to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals; (2) to give the President or other officer the freedom "to think out loud," which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion.¹⁰² Usually, the information is sought with respect to past decisions; the need is even stronger if the demand comes while policy is still being developed. These are bona fide considerations, important enough to give rise to a right to confidentiality except as weightier public interests argue for disclosure. To these the Supreme Court added an interest in privacy—a concern never thought to lessen the duty of an ordinary citizen.¹⁰³

The decisions in the lower federal courts had usually assumed that the interests secured by protecting the confidential-

⁹⁸ See cases cited notes 102, 111 & 125-26, *infra*.

⁹⁹ See, e.g., *United States v. Reynolds*, 345 U.S. 1 (1953).

¹⁰⁰ *Roviaro v. United States*, 353 U.S. 53 (1957).

¹⁰¹ See text accompanying notes 61-67 *supra*.

¹⁰² *International Paper Co. v. FPC*, 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-26 (D.D.C. 1966), *aff'd mem. sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

¹⁰³ 94 S. Ct. at 3107.

ity of executive communications might be outweighed by the need for the evidence in a particular case,¹⁰⁴ but prior to Watergate the question never arose in a criminal case. The opinion of the Supreme Court appears to hold that the public interest in the production of all evidence needed for the fair trial of a criminal indictment outweighs the interests secured by confidentiality.¹⁰⁵ Regardless of whether the rule is as broad as stated or is to be confined to facts like the Watergate coverup, the inherent probabilities confine the inroads upon executive confidentiality so narrowly as to minimize possible injury to the Presidency.

Executive communications are likely to be required upon trial of an information or indictment only in three rather limited situations: (i) where the crime was mishandling the communication; (ii) where a government official whose conduct has led to criminal charges seeks to prove justification or lack of criminal intent by introducing into evidence the instructions of higher authority (as might have occurred in the prosecution of John Ehrlichman and others for conspiring to steal the psychoanalytic files of Daniel Ellsberg); and (iii) where the communication itself contains evidence tending to prove or disprove crime in the conduct of his office by an official who was privy to its preparation or receipt (as in the Watergate coverup case).¹⁰⁶

In the first two situations the question of privilege will rarely come to issue, for even if the communication were privileged, the Executive would have to choose between dropping the prosecution and disclosure.¹⁰⁷

In the third situation, where the charge is one of wrongdoing in the Executive Branch, a President can often maintain control of the prosecution through the Attorney General, but there are legal as well as political limits to his power. A grand jury may persist in pressing the investigation into alleged executive wrongdoing despite the opposition of the U.S. Attorney,¹⁰⁸ even though an indictment would be invalid unless he signed

¹⁰⁴ See cases cited notes 111, 125-126, *infra*.

¹⁰⁵ 94 S. Ct. at 3102-03, 3110.

¹⁰⁶ If the official is not privy, the communication would ordinarily be inadmissible hearsay.

Presumably, discussions involving matters unrelated to the conduct of office, such as purely electoral politics, are not protected by even defeasible privilege. In practice, counsel to President Nixon conceded this point on several occasions.

¹⁰⁷ See *Jencks v. United States*, 353 U.S. 657, 671-72 (1957), and cases cited therein.

¹⁰⁸ *In re Miller*, 17 F. Cas. 295 (No. 9,552) (C.C.D. Ind. 1878), illustrates the principle. There the President instructed the United States Attorney not to investigate an

it.¹⁰⁹ Or the President, afraid of the political reaction if he requires the Attorney General or the latter's delegate to cease the pursuit of the evidence, may stand instead upon a claim of constitutional or evidentiary privilege (as President Nixon sought to do in all but one instance).¹¹⁰

Where the prosecution involves crime in the conduct of high government office (as it usually will if the presumptive privilege can be invoked), the public has more than usual interest in the full and fair investigation of the issue. Public confidence in the integrity of the very processes of government can be secured only by proof that there is capability to discover and punish wrongdoing even at the highest levels in the Executive Branch. Confidence in the evenhanded administration of criminal justice requires proof that the law is enforced against the highest officials in the same manner as against the lowliest citizen.

alleged embezzlement. The grand jury asked the court for instructions. The court replied:

If you believe the president's instructions to the district attorney were intended to prevent you from making the fullest investigation into the matter now before you, and from returning an indictment against the accused if the evidence should warrant it, you should be inspired with additional determination to do your duty. The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone.

See also *In re Grand Jury* 1969 Term, 315 F. Supp. 662, 675-79 (D. Md. 1970); *United States v. Smyth*, 104 F. Supp. 283, 291-92, 294-96 (N.D. Cal. 1952). Nor may government counsel "dictate to the grand jury." *United States v. United States District Court*, 238 F.2d 713, 720 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957). As an officer of the court, *United States v. Smyth*, 104 F. Supp. at 291-92, the attorney for the government may be required to prepare an indictment for the grand jury. In *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), Judge Wisdom, although recognizing that "[t]he prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General," nevertheless stressed the grand jury's "plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment." *Id.* 189-90 (concurring opinion). See also *Gaither v. United States*, 413 F.2d 1061, 1065 n.1, 1069 n.19 (D.C. Cir. 1969).

¹⁰⁹ See, e.g., *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury* 1969 Term, 315 F. Supp. 662, 674 (D. Md. 1970); cf. *Smith v. United States*, 375 F.2d 243, 246-47 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (both recognizing the absolute discretion of the Attorney General in choosing whether to initiate or abandon a prosecution).

¹¹⁰ *United States v. Nixon* holds that where the Attorney General has the statutory responsibility for the conduct of litigation and he has delegated full responsibility to a Special Prosecutor in a particular area by an unrevoked departmental regulation, the Special Prosecutor exercises the sovereign power of the United States. 94 S. Ct. at 3100, 3102.

The holding that the privilege based upon the interest in encouraging candid executive discussion must yield under the foregoing circumstances is unlikely to affect appreciably the spontaneity or candor of formal or informal communications with the President or elsewhere in the Executive Branch. Surely honest executive aides and officials can have confidence that there will be only very rare occasions, if any, on which their conversations or written communications will be both relevant and otherwise admissible in a criminal trial. If this judgment is too optimistic, as counsel to President Nixon argued on the first subpoena, then the need is not for more privilege with which the better to hide wrongdoing but for a rule enabling the people the better to cleanse the Executive Branch.

Precedential support for this aspect of *United States v. Nixon* can be found in two lower court decisions¹¹¹ and in an analogous ruling upon the privilege that shrouds the deliberations of a jury. What is said in the jury room is normally excluded from evidence in order to encourage frankness in discussion. In *Clark v. United States*¹¹² the Supreme Court held that upon the "showing of a prima facie case" that the deliberations of a par-

¹¹¹ In *Rosee v. Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965), an action for conspiracy wrongfully to deprive the plaintiff of Board of Trade membership, the court held the normal executive privilege inapplicable to communications from government employees to their superiors where there was evidence of their participation in wrongdoing. In *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960) the issue was whether the Department of Justice had used a grand jury for the purpose of obtaining evidence for a civil action. Procter & Gamble sought to obtain internal communications of the Department of Justice with which to prove abuse of the grand jury. The United States claimed executive privilege. The court recognized that the papers would normally be privileged but held that the privilege was inapplicable by analogy to *Clark v. United States*, 289 U.S. 1 (1933):

So here, if there has been a subversion by the use of Grand Jury procedure for civil purposes only, as condemned by our highest Court, not only the decision to do so, but also evidence material to that decision, are not the subject of the privilege, but are subject to disclosure. It also follows that evidence material to showing that no such violation of law occurred is also material to counteract possible proof to the contrary. To the above extent, the normal executive privilege of the Government to keep secret its full, free advices and discussion with its agents and attorneys is delimited, where the "circumstances are appropriate". . . . It is therefore only evidence pro and con that particular decision and intent that is admissible. But if such evidence exists, it and it alone should be produced, despite the fact that it may be intermingled in a communication which otherwise might fall within the normal executive privilege as to discussions and deliberations of governmental agents and attorneys. The evidence in that regard must therefore be produced.

25 F.R.D. at 490-91.

¹¹² 289 U.S. 1 (1933).

ticular jury were tainted by crime, the interest in confidentiality is outweighed by "the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption."¹¹³ In that event the privilege evaporates, the Court ruled, and "the debates and ballots in the jury room" become admissible evidence.¹¹⁴

The opinion in *United States v. Nixon* deals only with claims of a privilege based upon an unfocused executive need to preserve the confidentiality of communications also required in the trial of a criminal indictment. Cases may arise in which this defeasible privilege would yield but in which the Executive can invoke the higher claim that disclosure would endanger "military, diplomatic or sensitive national security secrets."¹¹⁵ The law of evidence has long recognized some such privilege although there have been few occasions for invoking it. Probably, the Court conceived this privilege quite narrowly. The language at this and other points in the opinion is likely to cause grave concern in some quarters, however, because of the breadth of the national security claims made by President Nixon to cloak highly questionable executive conduct.

The opinion is also imprecise with respect to the showing which the party seeking the evidence must make before production will be required. Sometimes the Chief Justice spoke of "the admissibility and relevance."¹¹⁶ At other points he used different phrases such as "essential to the enforcement of criminal statutes,"¹¹⁷ "demonstrably relevant,"¹¹⁸ "needed either by the prosecution or by the defense,"¹¹⁹ and "some bearing on the pending criminal cases."¹²⁰ Judges feel the same stylistic distaste as other authors for continual repetition of the same phrase. The critical test is probably relevance and admissibility under the rules of evidence, quite apart from the claim of defeasible privilege. The alternative phrases should be read as efforts to avoid excessive repetition having the same meaning as the critical terms.

This interpretation may seem at first blush to indicate that

¹¹³ *Id.* at 14, 16.

¹¹⁴ *Id.* at 14.

¹¹⁵ 94 S. Ct. at 3107, 3108-09.

¹¹⁶ *Id.* at 3110.

¹¹⁷ *Id.* at 3107.

¹¹⁸ *Id.* at 3110.

¹¹⁹ *Id.* at 3108.

¹²⁰ *Id.* at 3110.

despite the talk about a defeasible privilege the duty to produce evidence of confidential communications between a President and his aides actually depends upon the same rules of competency, relevancy and materiality that govern the testimony of any private person when proper objection is made. Two important additional requirements are implicit in the case, however.

First, the case involved serious criminal charges against high government officials. The public interest in having all competent, relevant and material evidence available in such a case is higher than in any other kind.

Second, because the subpoena sought evidence for use upon trial of an indictment, there was already an implicit determination, based upon evidence *aliunde*, of probable cause to believe that the officials named as defendants had committed serious crimes. In the initial litigation over the grand jury subpoena for Watergate tapes, counsel to President Nixon argued that it would be intolerable to have a rule allowing any federal prosecutor or any grand jury in any of the many hundred state or federal courts to defeat executive privilege merely by showing that the grand jury was investigating allegations of official criminality. The Special Prosecutor, believing that previously published testimony satisfied the kind of showing required in *Clark v. United States*,¹²¹ preferred not to join issue upon this point. Instead, he conceded that the privilege could be defeated only if other evidence already made a prima facie showing (or if it gave "probable cause to believe") that such crimes had been committed; and he argued that the published evidence met that requirement. The indictment of President Nixon's aides provided the equivalent of a prima facie showing in the Supreme Court case, and it seems likely that where a subpoena is issued in aid of grand jury proceedings the defeasible privilege will be a bar to an order of production unless the evidence sought is relevant to the guilt or innocence of persons under investigation for what other evidence shows prima facie to be a criminal offence.¹²²

In the earlier litigation counsel to President Nixon also argued that even if all the major issues went against him, the subpoena should not be enforced because there was and could be

¹²¹ 289 U.S. 1 (1933). See text accompanying notes 112-14, *supra*.

¹²² The decision in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), only partially supports the text, for although a grand jury subpoena was at issue, the court relied upon a "uniquely powerful", *id.* at 717, showing of need, including declarations and conduct held to constitute a partial waiver of the privilege.

no showing that the President was a party to a crime.¹²³ The Special Prosecutor, at that time, replied that no showing of the President's personal complicity was required. This argument was available in the Supreme Court case, but by that time the grand jury's naming of President Nixon as a co-conspirator arguably established the equivalent of a prima facie showing of his personal criminality unless the finding were set aside. The dismissal of the cross-petition for certiorari seeking to invalidate this finding¹²⁴ and the reasoning of the Court in the principal case both indicate that the Court held, as a matter of law, that no showing of the complicity of the person claiming executive privilege is required.

B. *Civil Actions*

Most of the reported federal decisions ruling upon claims of executive privilege arose out of civil suits either against the United States¹²⁵ or between private parties.¹²⁶ All recognize a qualified privilege applicable to internal recommendations, opinion and advice as distinguished from facts; this privilege is probably based upon the law of evidence rather than the Constitution. All the cases that face the question treat the privilege as incomplete. All of the cases hold or assume that the court should decide in each particular case whether the need for the evidence in the administration of justice outweighs the value of confidentiality as an encouragement to candor.¹²⁷ Generally speaking, the decisions distinguish between statements of fact, which are held not to be privileged, and advice, opinions and

¹²³ Brief of Petitioner at 70-71, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

¹²⁴ 94 S. Ct. at 3097 n.2.

¹²⁵ *E.g.*, *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788 (D.C. Cir. 1971); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960); *E.W. Bliss Co. v. United States*, 203 F. Supp. 175 (N.D. Ohio 1961); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

¹²⁶ *E.g.*, *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd mem. sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 99 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Clark v. Pearson*, 238 F. Supp. 495 (D.D.C. 1965).

¹²⁷ *E.g.*, *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 794 (D.C. Cir. 1971); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd mem. sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

recommendations, the production of which has not been required.¹²⁸ There appear to be no decided civil cases, other than suits to review agency action, in which production of evidence containing opinion or recommendations was required. Investigative files are normally held privileged.¹²⁹

United States v. Nixon may encourage some litigants to seek broader disclosure, but the current of judicial opinion in civil cases seems unlikely to change. The case for disclosure in the investigation and prosecution of crimes by high government officials is much stronger than a civil litigant can make.

C. Review of Agency Decisions

When a private litigant seeks to review the action of an administrative agency, the usual privilege pertaining to internal communications once was fortified by the rule announced in the fourth *Morgan* case, which seemed to bar probing the mental processes of the decisionmaker.¹³⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*¹³¹ qualifies that earlier rule:

[W]here there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behaviour before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.¹³²

In either event internal agency communications would be the best evidence unless access can be barred by executive privilege. In the unreported case of *Nader v. Butz* the district judge ordered President Nixon to turn over for *in camera* inspection certain records pertaining to an order raising milk prices but the litigation on this issue appears to have ended without appel-

¹²⁸ See *EPA v. Mink*, 410 U.S. 73, 87-89 (1973), in addition to the cases cited at notes 125-27, *supra*.

¹²⁹ *Clark v. Pearson*, 238 F. Supp. 495, 495-96 (D.D.C. 1965); 8 J. WIGMORE, EVIDENCE § 2378, at 792 (McNaughton rev. 1961).

¹³⁰ *United States v. Morgan*, 313 U.S. 409 (1941); *accord*, *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir. 1971); *North Am. Airlines v. Civil Aeronautics Bd.*, 240 F.2d 867 (D.C. Cir. 1956); *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

¹³¹ 401 U.S. 402 (1971).

¹³² *Id.* at 420.

late review.¹³³ The issue has not been decided elsewhere since the *Overton Park* case.

D. *Freedom of Information Act*

The Freedom of Information Act¹³⁴ requires federal agencies to make a broad spectrum of information available to the public but exempts certain categories. Exemption 5 covers: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in . . . litigation with the agency."¹³⁵ In *Environmental Protection Agency v. Mink*¹³⁶ the Supreme Court held that, except in the case of classified material, the duty of discovery extends in civil litigation and therefore under the Act to "purely factual material appearing . . . in a form that is severable without compromising the private remainder of the documents."¹³⁷

United States v. Nixon is unlikely to affect the interpretation of the Freedom of Information Act. Should the Act be amended to enlarge the right of citizens to information about the internal conduct of governmental affairs, the broader duty of disclosure might be said to conflict with a constitutional privilege of executive confidentiality. *United States v. Nixon* would lend considerable support to the argument; the Chief Justice declared that even the generalized but defeasible privilege of confidentiality, "is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution,"¹³⁸ and later he observed, "to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."¹³⁹

These expressions are the first judicial support for the view that an executive privilege to withhold information is inferable from the Constitution.¹⁴⁰ The future may accept them or discard them as assumptions wholly unnecessary to the decision of

¹³³ Civil No. 148-72 (D.D.C. Aug. 1, 1973). The order is referred to in *Nader v. Butz*, 60 F.R.D. 381 (D.D.C. 1973) (staying the order pending appellate review), and in *Nixon v. Sirica*, 487 F.2d 700, 796 n.176 (D.C. Cir. 1973) (Wilkey, J., dissenting).

¹³⁴ 5 U.S.C. § 552 (1970).

¹³⁵ *Id.* § 552(b)(5).

¹³⁶ 410 U.S. 73 (1973).

¹³⁷ *Id.* at 91.

¹³⁸ 94 S. Ct. 3090, 3107 (1974).

¹³⁹ *Id.* at 3109.

¹⁴⁰ In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court did not reach the question whether executive privilege derives from the Constitution. *Id.* at 6.

the case. Quite possibly the second passage holds the key: communications to and from the President may be constitutionally protected to the extent determined by the Judicial Branch, but since Congress creates the executive departments and agencies it may be empowered to legislate concerning legislative and public access to their internal affairs.¹⁴¹

V. EXECUTIVE PRIVILEGE IN THE CONGRESS

Congress may seek access to internal executive papers and conversations in two very different contexts, both dramatically illustrated by the Watergate affair: (A) in legislative hearings seeking the information necessary to the intelligent formulation and enactments of legislation, and (B) in proceedings looking towards impeachment of the President by the House of Representatives and trial by the Senate. The pre-Eisenhower history of executive refusals in legislative proceedings is summarized above.¹⁴² In impeachment proceedings the claim of executive privilege was first interposed when President Nixon refused to comply with a subpoena issued by the House Committee on the Judiciary.¹⁴³

A. *Legislative Hearings*

When a congressional body seeks information from the Executive Branch to assist in its legislative function and the President refuses, its claimed "right" to the evidence and a presidential "privilege" to withhold are both of an altogether different character than the right and privilege at issue in judicial proceedings. In a judicial proceeding the court rules upon legal obligations which can be embodied in a formal judgment binding on those concerned and normally carrying punitive sanctions. Upon such questions our political and legal traditions give the courts, ultimately the Supreme Court, the final word even to the point of governing both President and Congress. Until very recently no one ever supposed that the issue raised by a congressional demand and presidential refusal raised questions susceptible of adjudication.¹⁴⁴ The debate was often cast in con-

¹⁴¹ Cf. *Meyers v. United States*, 272 U.S. 52, 240-94 (1926) (Brandeis, J., dissenting).

¹⁴² See text accompanying notes 54-75 *supra*.

¹⁴³ Possibly, a third context should be identified: congressional oversight of the conduct of executive departments. Such oversight, however, is usually a step towards legislation.

¹⁴⁴ See authorities cited in notes 153-54 *infra*.

stitutional terms, but the appeal was to political theory, history, and common sense. The distance the contest was pushed depended upon political considerations. The sanctions available to the House or Senate (as the case might be) were wholly political. Their use depended upon public reaction and political power.¹⁴⁵ The controversies have been rather infrequent, and one can discern little tendency to develop anything that could be called settled practice carrying a degree of legitimacy even though without legal sanction.¹⁴⁶

Recent trends in government—the growth of the size and power of the executive establishment and the broadening and increasing frequency of claims of executive privilege in relation to legislative hearings—have raised questions concerning the need for new safeguards of the “right” of Congress to inform itself and the people upon issues appropriate for legislation.¹⁴⁷ The problem is exemplified by the efforts of the House Judiciary Committee and Senate Select Committee to obtain Watergate tapes. President Nixon refused to comply with the subpoena of the House Judiciary Committee and paid heavy political costs but the Committee had no effective response

¹⁴⁵ When President Theodore Roosevelt refused to surrender papers relevant to the decision not to prosecute United States Steel Corporation under the Sherman Act for the acquisition of Tennessee Coal, Iron & Railroad Company, Senator Bacon, one of his critics, offered a general resolution asserting the right of Congress to “any and every public document, paper, or record . . . on the files of any department of the Government, relating to any subject whatever over which Congress has any grant of power . . . under the Constitution. . . .” 43 CONG. REC. 839 (1909). In support of his resolution, Senator Bacon, relying heavily on previous congressional debates on executive privilege, emphasized the Senate’s need to be able to obtain information from the Executive so that it could “perform its legitimate constitutional functions,” and warned that an autocracy would result if the Senate’s demands were not recognized. *Id.* 840. President Roosevelt’s supporters objected that the resolution could settle nothing:

Mr. FULTON. Assuming that either House of Congress has the right, or that the Senate has the right, to demand this information . . . is that a right that can be enforced otherwise than by congressional legislation?

. . . .

Mr. BACON. The question of enforcement is a matter of some difficulty. I will say to the Senator that Senator Logan, in the debate I have been quoting, discussed that very question. He seemed to concede the fact that there was no present or immediate remedy in case the head of a department or the President should refuse.

Mr. FULTON. Exactly.

Mr. BACON. But he seemed to think that the disclosure to the public of their refusal would have its proper rebuke and remedy at the hands of the people.

Id. 849.

¹⁴⁶ See text accompanying notes 73-75 *supra*.

¹⁴⁷ See text following note 152 *infra*.

other than to recommend citing the refusal as ground for impeachment. The obstacles along the road to judicial enforcement were probably insuperable; at best the effort to overcome them would have entailed months or even years of litigation.

Even though the Senate Select Committee was unusually strong in terms of the influence of its senior members in the Senate and its public support, it was powerless to overcome President Nixon's claim of executive privilege by political methods, and therefore chose the unprecedented step of taking the problem to the courts. The suit foundered upon jurisdictional shoals when Judge Sirica ruled that none of the existing statutes authorized a federal court to entertain a Senate committee's action to enforce its subpoena.¹⁴⁸ Congress launched a new vessel by vesting jurisdiction in the District Court for the District of Columbia.¹⁴⁹ This ship too ran aground when District Judge Gesell ruled that enforcement would raise such undue risk of pretrial publicity in the pending Watergate criminal prosecutions as to warrant dismissal without ruling upon the underlying question.¹⁵⁰ The court of appeals affirmed upon the ground that the Senate Select Committee had failed to show that the information was "demonstrably critical to the responsible fulfillment of the Committee's functions."¹⁵¹ The Committee expired without pressing the matter further.

Although the jurisdictional act relied upon by the Senate Select Committee applied only to its own subpoenas, another bill attempts resolution of the ancient political problem by referring it to the courts. The bill provides:

The District Court for the District of Columbia shall have original, exclusive jurisdiction of any civil action brought by either House of Congress, a joint committee of Congress, or any committee of either House of Congress with respect to any claim of executive privilege asserted before either such House or any such joint committee or committee.¹⁵²

The proposal raises two related questions: (1) Is the proposal constitutional? (2) Would its enactment be wise?

¹⁴⁸ Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

¹⁴⁹ Pub. L. No. 93-190 (Dec. 18, 1973), 87 Stat. 736 (to be codified as 28 U.S.C. §1364).

¹⁵⁰ Senate Select Committee v. Nixon, 370 F. Supp. 521 (D.D.C. 1974).

¹⁵¹ Senate Select Committee v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

¹⁵² S. 2073, 93d Cong., 1st Sess. § 1364 (1973).

1. Constitutionality of Vesting the Courts With Jurisdiction to Enforce Legislative Subpoenas Resisted Upon Grounds of Executive Privilege

The principal constitutional question is whether executive resistance to a legislative subpoena gives rise to the kind of "case or controversy" that the federal courts are authorized by article III to adjudicate. As late as 1958 Judge Learned Hand gave this as one of the clearest examples of a nonjusticiable constitutional question.¹⁵³ Recent critics of executive privilege argue that decisions during the 1960's point to the opposite conclusion.¹⁵⁴

Even Judge Learned Hand argues that the Supreme Court properly exercises a major responsibility for the structure of our extraordinarily complex system of government.¹⁵⁵ The Court has often rendered decisions allocating power between the legislative and executive branches, sometimes where there was controversy between them. The "sick chicken" and "hot oil" cases of the New Deal era posed questions concerning the power the Legislative Branch can delegate to the Executive.¹⁵⁶ The Steel Seizure case tested the President's power to operate private steel mills during a labor dispute without the aid of legislation.¹⁵⁷ *Meyers v. United States*¹⁵⁸ and *Humphrey's Executor v. United States*¹⁵⁹ grew out of direct congressional efforts to limit the President's power to remove officers or employees in the Executive Branch. In *United States v. Lovett*¹⁶⁰ the situation was converse: the Executive challenged the power of Congress to force the dismissal of executive employees. Earlier, in *United States v. Klein*¹⁶¹ Congress had vainly attempted to deny effect to a presidential pardon. Recent cases in the lower courts rule upon the legality of the President's impoundment of funds appropriated by Congress.¹⁶²

¹⁵³ L. HAND, *THE BILL OF RIGHTS* 17-18 (1964).

¹⁵⁴ See, e.g., BERGER, *supra* note 2, at 304-41; Dorsen & Shattuck, *supra* note 2, at 33-40.

¹⁵⁵ L. HAND, *supra* note 153, at 10-15.

¹⁵⁶ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

¹⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁵⁸ 272 U.S. 52 (1926).

¹⁵⁹ 295 U.S. 602 (1935).

¹⁶⁰ 328 U.S. 303 (1946).

¹⁶¹ 80 U.S. (13 Wall.) 128 (1871).

¹⁶² See, e.g., *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973) and authorities cited therein; *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *People ex rel. Bakalis v. Weinburger*, 368 F. Supp. 721 (N.D. Ill. 1973).

Each of the foregoing cases was brought by or against a state or a private person who had a material stake in the outcome. The named parties in an action to enforce a subpoena against a claim of executive privilege might be the Congress or a congressional body and the President.

The difference in named parties is probably irrelevant. In *United States v. Nixon* the Court held that "the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability."¹⁶³ Other cases have been adjudicated in which the named, opposing parties were government agencies.¹⁶⁴

The absence of a material private stake in the outcome may prove more important. In all the interagency cases someone stood to gain or lose some substantial, material interest as a result of challenged agency action. The agencies were both petitioner and respondent in the Supreme Court only because a proceeding against the agency which was the initial tribunal was the prescribed form of judicial review. "[C]ourts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."¹⁶⁵ Two sentences in *United States v. Nixon*, when read in isolation, strongly support the view that a private material interest is not required for a constitutional "case or controversy":

[The evidence] is sought by one official of the Government within the scope of his express authority; it is resisted by the chief executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." *United States v. ICC*, 337 U.S., at 430.¹⁶⁶

But the Chief Justice probably meant to limit these sentences by the preceding sentence which points out that the evidence whose production is sought and resisted is "deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case"¹⁶⁷—an element that satisfied the need for the "kind of

¹⁶³ 94 S. Ct. at 3102.

¹⁶⁴ See, e.g., *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953); *ICC v. Jersey City*, 322 U.S. 503 (1944).

¹⁶⁵ *United States v. ICC*, 337 U.S. 426, 430 (1949).

¹⁶⁶ 94 S. Ct. at 3102.

¹⁶⁷ *Id.* (emphasis added).

controversy courts traditionally resolve."¹⁶⁸

Another quite different line of argument logically goes far to sustain the view that the interest of Congress in obtaining information with which to carry on the processes of government is sufficient to answer the claim that there is no case or controversy because a judicially cognizable interest is not at issue. The Court has sustained the constitutionality of a statute punishing as criminal contempt any refusal to appear in response to a congressional subpoena and any refusal upon appearance "to answer any question pertinent to the question under inquiry."¹⁶⁹ A prosecution under this statute gives rise to a case or controversy. There would seem to be a case or controversy, therefore, if the statute were amended to authorize the district court to entertain an action by the United States as sovereign to enforce the statutory obligation to provide evidence. Such "cases" are common enough under regulatory laws.¹⁷⁰ There is also a case or controversy when an administrative agency seeks judicial assistance to enforce an administrative subpoena.¹⁷¹ If the analogies are compelling up to this point, surely either house of Congress would be a constitutionally appropriate body to act for the sovereign in the specific enforcement of a law designed solely to assist it in deliberating upon proposed legislation.¹⁷²

A more difficult question is whether the issue raised by an assertion of executive privilege to withhold specific internal communications from Congress is nonjusticiable because there are no judicially manageable standards by which the controversy can be adjudicated.¹⁷³ If the question arose in an action to enforce a congressional subpoena, there would be no inconvenience in dismissing the complaint upon this ground and remitting the Executive and Legislature to their political battle.

¹⁶⁸ *Id.*

¹⁶⁹ *In re Chapman* 166 U.S. 661 (1897).

¹⁷⁰ Examples are collected in H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1309-26 (2d ed. 1973).

¹⁷¹ *ICC v. Brimson*, 154 U.S. 447 (1894).

¹⁷² Other commentators have argued that under *Baker v. Carr*, 368 U.S. 186 (1962), the political interest of a congressional committee is sufficient to give standing and supply whatever is necessary in the nature of a legally cognizable interest. *E.g.*, Dorsen & Shattuck, *supra* note 2, at 36. But the Supreme Court seems reluctant to extend legal protection to political interests. *See, e.g.*, *Schlesinger v. Reservists Committee to Stop the War*, 94 S. Ct. 2925 (1974).

¹⁷³ On the importance of judicially discoverable and manageable standards, see *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Baker v. Carr*, 369 U.S. 186, 217, 222 (1962).

Suppose, however, that the President instructs a subordinate to withhold internal communications upon the ground of executive privilege, that the Senate or House finds the subordinate in contempt and that the Sergeant-at-Arms arrests him. Habeas corpus is available to test the legality of the confinement.¹⁷⁴ In such a proceeding the court will normally entertain claims of constitutional privilege, such as the fifth amendment's guaranty against compelled self-incrimination.¹⁷⁵ If a plausible claim of the constitutionally based claim of executive privilege is presented and the court cannot adjudicate it, is the executive subordinate to be discharged from custody or the petition to be dismissed and the confinement continue? Usually the involvement of a nonjusticiable, political question in a larger justiciable controversy does not foreclose all judicial action; the court accepts as the foundation for its action the decision of the political branch.¹⁷⁶ In the supposed case, however, the court would be confronted by the opposing determinations of two branches, each of which is entitled to deference. The court would be under the strongest pressure to resolve the conflict unless it was prepared to discharge the prisoner upon the ground that the political question doctrine made it impossible for the Sergeant-at-Arms to show legal ground for the deprivation of liberty.¹⁷⁷ If the Attorney General allowed the proceeding to go forward, a similar difficulty would be presented by a prosecution for contempt of Congress, albeit eased by the fact that the government, as the moving party, would have the burden of making its case.

Apart from these difficulties there is much to be said for judicial refusal to adjudicate claims of executive privilege vis-à-vis the Legislative Branch. Determining the strictly legal obligations of executive officials is a familiar judicial responsibility.¹⁷⁸ Defining the rights and privileges of the Congress and President *inter sese* in the legislative process has never been a judicial function. Courts are accustomed to weighing the need for specific pieces of evidence in a judicial proceeding against the

¹⁷⁴ *Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

¹⁷⁵ See *Quinn v. United States*, 349 U.S. 155, 161 (1955).

¹⁷⁶ E.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. OF CIN. L. REV. 199, 205-06 (1971).

¹⁷⁷ On factual questions, which provide the only analogy, the petitioner has the burden of persuasion. *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); *Walker v. Johnston*, 312 U.S. 275 (1941).

¹⁷⁸ See text accompanying notes 19-23 *supra*.

public interest in preserving the confidentiality of particular relationships, but they have no experience in weighing the legislative needs of Congress against other public interests. The need for access to executive papers and communications arises too seldom in traditional forms of civil or criminal proceeding for the judicial rulings to have much impact upon the effectiveness of the Presidency, but the occasions upon which Congress may demand information are virtually unlimited. Any binding definition of the power of the Senate or House of Representatives to obtain the internal communications of the Executive Branch and of the President to withhold them might greatly affect the relative political power and effectiveness of the Executive and Legislative Branches. President Nixon would have raised a point deserving of serious consideration if his assertion that attacks on executive privilege weaken the Presidency had been confined to congressional subpoenas in aid of legislation.

Raoul Berger, a close student of executive privilege, suggests that "in almost every category of claimed executive privilege to withhold information there exist judicial precedents formulated in private litigation."¹⁷⁹ I find marked differences between the questions raised by a claim of executive privilege during a judicial proceeding and those presented by an executive refusal of a congressional demand. The differences raise some doubt about the ability of judges to develop workable criteria for adjudicating the controversies between the Legislative and Executive Branches. They raise even more doubt about the wisdom of the effort.

Consider first the case of true military and diplomatic secrets. In the open courtroom the Executive's claim of privilege is uniformly sustained.¹⁸⁰ Should it be sustained against a congressional committee? The key question is the sufficiency of the security measures Congress is willing to adopt. Can a judge inquire into this? Must he assume their sufficiency? Is he to decide just how damaging a leak would be? Or is the whole matter better left to solution by negotiation as the occasions arise—a process in which judgments can be made concerning the trustworthiness of individuals?

Consider next the problem of investigative files. A judicial proceeding is usually adversary. The plaintiff and defendant

¹⁷⁹ Berger, *supra* note 2, at 1355.

¹⁸⁰ *United States v. Reynolds*, 345 U.S. 1 (1953).

may be expected to call for observance of rather strict rules of evidence which would exclude most of the contents of such files as hearsay or otherwise incompetent long before reaching any question of privilege.¹⁸¹ In legislative hearings the committees quite properly refuse to confine themselves to evidence competent in a court. There are no parties. The Executive must therefore take it upon itself to protect individuals against disclosure of untested allegations and reports. It is all too clear that fairness requires some protection for the individual; it is also beyond argument that the interests of efficient administration are thereby served. Men and women will be less willing to take positions in the government if they know that they thereby open themselves to publication of rumors and false allegations. Informants will be less likely to come forward with information. The government may shrink from conducting a thorough investigation knowing the risk of abuse of what it gathers. Few individuals whose files were publicized in congressional hearings conducted by a publicity-seeking Senator or Representative would think themselves protected by the rights to cross-examine and offer opposing testimony.¹⁸² For such reasons few of the present critics of executive privilege found fault with Presidents Roosevelt, Truman and Eisenhower for withholding intelligence or loyalty and security files.

On the other hand, a blanket rule of privilege would seem to carry excessive costs. Should antitrust files in cases closed by consent decree be withheld from the Senate Judiciary Committee while considering proposed legislation, or the nomination to higher office of the Assistant Attorney General in charge of the Anti-Trust Division? Should a legislative committee investigating the need for further legislation against electronic eavesdropping be denied access to the files containing information about the "bugging" of John Sears, William Safire and Morton Halperin?

The problem of investigative files, like the problem of state secrets, lends itself better to solutions negotiated through the political process than to an "either-or" judicial determination. At the hearings on the nomination of Henry Kissinger to be Secretary of State complete disclosure of the initiation, conduct, and results of the "bugging" done in an effort to trace the

¹⁸¹ See note 129 *supra* & accompanying text.

¹⁸² A contrary view is expressed by Dorsen & Shattuck, *supra* note 2, at 28-29.

source of leaks might have been as inappropriate as complete withholding. In the absence of a judicial rule an informal arrangement was worked out giving a few members of the Senate Foreign Relations Committee access to the information, and they made a report.

In many civil cases the rule covering claims of executive privilege has come to be that statements of fact must be disclosed but documents containing opinion, advice or other discussions of policy may be withheld in order to protect the Executive's substantial interest in the freedom of subordinates to give candid advice, and of superior officials to try out ideas on subordinates, without risk of being held up to political reprisals or public scorn. The distinction seems hardly appropriate to legislative hearings. Matters of opinion are rarely germane to civil litigation, nor are the roles played by individual government officials. Congress, on the other hand, is often seeking experienced opinion, and studies of the functioning of executive departments and of the need for remedial legislation often require precise information concerning the allocation of responsibility and the background of decisions.

The point is illustrated by a pending Senate bill to make the Attorney General and Department of Justice independent of the President.¹⁸³ Any Senate subcommittee conducting hearings upon such a bill would be assisted by detailed information about the relationship of the executive offices to departmental decisions upon seeking indictments, instituting civil actions, seeking certiorari, entering into settlements, etc. Should a claim of executive privilege be allowed? I would suppose not, provided that the subcommittee's inquiry were serious, even though expressions of opinions and recommendations were sought and there was neither charge nor showing of criminal wrongdoing. But consider what splendid political ammunition such hearings might provide and how titillating might be the disclosures. Suppose that the motive of the chairman of the subcommittee was to make political capital in an election year. Should confidentiality be breached in the latter instance? Intuition tells me "no," even though I perceive no seemly rule of law by which a court could distinguish a bona fide investigation.

The basic principle applicable to claims of executive privilege in a civil action is that internal communications are pre-

¹⁸³ S. 2803, 93d Cong., 1st Sess. (1973).

sumptively privileged but the generalized interest in confidentiality must yield to a showing of particularized need for the evidence.¹⁸⁴ The need to protect aides and subordinates from reprisals on Capitol Hill and in the media of public debate is a thousand-fold greater in the case of congressional hearings, which are often the preserves of individual Senators and Congressmen not all of whom are invariably characterized by judicious self-restraint. Weighing the need for particular evidence at a trial over which he is presiding is not difficult for a judge, but it would seem both embarrassing and difficult for a court to weigh the need of a congressional committee to see papers against the Executive's need for confidentiality. Is the judge to be limited to asking whether there is some logical connection between the papers and records and some conceivable new law? Normally, a court must presume the existence of a proper basis for congressional action,¹⁸⁵ but that principle may not be applicable in the face of an inconsistent presidential determination. Is the judge to scrutinize what information the committee already has or should be able to obtain from other sources? Should he decide whether the legislative need is real or only professed by Senators or Representatives seeking political advantage in badgering second or third level executive officials? How far is he to appraise such factors as the need for legislation or the likelihood of enactment?¹⁸⁶

The difficulty of finding and articulating rules of decision is concretely illustrated by two claims of executive privilege during the Eisenhower years. One involved Senator Joseph McCarthy's inquiry into the Army's loyalty and security program; the other was concerned with the Dixon-Yates contract for the sale of electric power to the Atomic Energy Commission—an inquiry involving conflicts of interest and White House pressure upon supposedly independent agencies. Both instances involved the internal operations of the Executive Branch. Both inquiries could have been conducted as serious studies of pressing issues. History will record that President Eisenhower's first refusal was morally and politically justified and that the second was wrong, but I can formulate no rule of law not turning upon

¹⁸⁴ See note 127 *supra* & accompanying text.

¹⁸⁵ *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

¹⁸⁶ Cf. *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), where the court evaluated the committee's need for the evidence and held it insufficient to justify the invasion of confidentiality while the evidence was being sought by others.

judgments of motive and political desirability for distinguishing between them.

The purely investigative functions of Congress add an even more puzzling dimension to analysis of the proper treatment of claims of executive confidentiality. In holding that there is "no congressional power to expose for the sake of exposure," the Supreme Court observed, "The public is, of course, entitled to be informed concerning the workings of its government,"¹⁸⁷ and therefore distinguished "the power of Congress to inquire into and publicize corruption, maladministration or inefficiency in the agencies of the Government."¹⁸⁸ How is a court to decide the issue when this congressional power of oversight collides with the interest in encouraging freedom and candor of deliberation in the Executive Branch? In a criminal investigation or prosecution a court will order production on the ground that the evidence is necessary to a fair determination of official wrongdoing if an indictment or other evidence gives cause to believe that a crime has occurred.¹⁸⁹ Must Congress make such a showing to a court? Coming at the principle from the other side, should confidentiality prevail unless the inquiry promises evidence of crime? Should not breach of fiduciary duty, undue White House pressure, incompetence, or mismanagement be sufficient? If so, no privilege of substance is left to secure candor and room for wide-ranging thought in executive deliberations.

Any lawyer with a modicum of imagination can raise hard-to-answer questions whenever it is suggested that a court move into new ground. Usually courts do develop criteria. A judicial robe renders a man no less capable of making up his mind than an executive or legislator. The real concern is that in the absence of more or less objective criteria the political consequences will dictate or at least seem to dictate the decision. And, just as that would be true in individual cases, so perhaps the whole proposal to give the courts jurisdiction should be seen as a legislative effort to involve the Judiciary in a frankly political contest over the balance of power between the Legislative and Executive Branches.

For control over the release of information is a critical factor in the wielding of governmental power. Counsel to the Presi-

¹⁸⁷ *Watkins v. United States*, 354 U.S. 178, 200 (1957).

¹⁸⁸ *Id.* at 200 n.33.

¹⁸⁹ See notes 110-14 *supra* & accompanying text.

dent apparently judged it unwise to make much of the point in the litigation over the Watergate tapes, but there is a hint towards the end of one brief: "The right of Presidential confidentiality is not a mystical prerogative. It is, rather, the raw essence of the Presidential process, the institutionalized recognition of the crucial role played by human personality in the negotiation, manipulation, and disposition of human affairs."¹⁹⁰

The key word is "manipulation." A President's power to bomb a small and distant country is greater if the bombing can be kept secret than if it will be debated in public. If measures calling for price-control and rationing of fuels were before the Congress, an announcement of the Arab oil-producing nations' plan to impose or terminate a boycott could determine the fate of the legislation. Consider a proposed appropriation to enable the military to test guided missiles armed with live nuclear warheads by firing them over the western states into the Pacific Ocean. Public fear and opposition might be quieted if it were announced that each and every government agency affected had determined that the chance of mishap was one in a million. But suppose that it later appeared that a large minority of the scientists and technicians in each agency had estimated the chance of mishaps at one in five. Ability to determine what information is released, even within narrow limits, gives enormous power to influence political affairs.

The history reviewed earlier in this article contains little evidence that the nation has suffered from the want of legal power to compel the President to satisfy the demands of Congress to information in the Executive Branch. Congress has powerful political weapons. The assertion of executive privilege in the Dixon-Yates case led to the defeat of the nomination of Admiral Strauss to be Secretary of Commerce.¹⁹¹ The threat to withhold appropriations produced information concerning mismanagement of foreign aid.¹⁹² President Kennedy profited by President Eisenhower's experience and asserted executive privilege only once; President Johnson allowed it to be invoked twice by members of his administration.¹⁹³ President Nixon paid an enormous political price for withholding information relevant to alleged misconduct in the Executive Branch. Those

¹⁹⁰ Brief for Petitioner at 93, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

¹⁹¹ *Kramer & Marcuse, supra* note 2, at 712-17.

¹⁹² *Id.* 827-60.

¹⁹³ *BERGER, supra* note 2, at 252-53 n.107.

heavy costs, coupled with other vicissitudes, forced even him to modify other claims of prerogative. President Nixon's experience will surely lead his successors to be much more forthcoming. The political power of Congress vis-à-vis the President would be even greater if it would exert more organization and self-discipline.

At this point the constitutional issue tends to blend into the question of policy. Strictly speaking the constitutional issue turns upon whether the framework of legal principle within which the courts would be required to pass particular judgments would be so loose and the political consequences so predominant as to confuse adjudication with political maneuver. But confusion is a matter of degree, and whether some blending is excessive can hardly be decided without asking whether the successful assertion of repeated claims of executive privilege is upsetting the constitutional balance between the Legislative and Executive Branches (which also is often a fuzzy question of degree). In terms of legislative policy the question again boils down to whether the risks and costs of enmeshing the courts in contests for political advantage are outweighed by the benefits of providing a method of final resolution of the merits of claims of executive privilege that would, in at least some cases, strengthen the power of Congress.

Judging solely from the past, I would be content to see the Judicial Branch deny its constitutional power and leave questions of executive privilege vis-à-vis Congress to the ebb and flow of political power.

2. Modern Need to Invest the Courts with Enforcement Jurisdiction

Three relatively recent developments furnish persuasive evidence of a need to increase the power of Congress to compel the President and others in the Executive Branch to produce information.

(1) The power of the Presidency has increased enormously as a result of enduring changes in the conditions that determine political affairs. The complex interdependence of all parts of the economy and the shift to affirmative government requires the formulation of policies and programs far too complex for initiation or implementation by a purely legislative body. The very size of the bureaucracy strengthens the President vis-à-vis the Congress. The influence of mass media, especially televi-

sion, and the President's unique degree of power to focus attention upon his acts and words can seldom be equaled by any Senator or Representative or even by the bodies to which they belong. In the modern world there is little risk of legislative tyranny over the Executive.

(2) Claims of executive privilege have become increasingly frequent. President Eisenhower was the first to claim explicitly an executive privilege based simply upon an undifferentiated interest in preserving the confidentiality of deliberations and advice throughout the Executive Branch. On at least forty-four other occasions between June 1955 and June 1960 executive officials sought to justify withholding matters from Congress on grounds of executive privilege, although the claims were often abandoned. There were only rare claims under Presidents Kennedy and Johnson, but President Nixon began making very extensive use of the claim before the Watergate investigations.¹⁹⁴

If the Executive Branch were left to itself, the practice would surely grow. Secrecy, if sanctified by a plausible claim of constitutional privilege, is the easiest solution to a variety of problems. The claim of privilege is a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress. Ability to control what information to disclose and when to disclose it is a potent political weapon. The evidence finally released by President Nixon just prior to his resignation made it abundantly clear that executive privilege had been used not to protect the Presidency, but to hide the misconduct of the President himself.

(3) In 1791, when the first amendment was adopted, governmental repression posed the chief threat to an alert and informed electorate. Men could be pretty sure of obtaining the facts and of communicating with each other in the ways necessary to self-government, provided that men could speak, write and publish, and associate together without fear of reprisal by rulers or elected representatives. This condition no longer prevails with respect to many activities of the federal government. Because of their scale and complexity, coupled with the interdependence of all aspects of society, government itself is often the chief, if not the only, source of information for the people about the conduct of those who are supposed to be the people's

¹⁹⁴ *Id.*

agents. The central problem today is how to deal with governmental secrecy and—to be blunt—with governmental deception. A congressional power to inquire, freely exercised, could help to provide the necessary information.

These trends probably make it desirable to put the force of law behind some congressional subpoenas addressed to the President, his aides or other executive officials. Ideally, I think, the legislative right should prevail in every case in which either the Senate or House of Representatives votes to override the Executive's objections, provided that the information is relevant to a matter which is under inquiry and within the jurisdiction of the body issuing the subpoena, including its constitutional jurisdiction. A single committee, or subcommittee, because it offers little guaranty of restraint, is the greatest threat to the values of confidentiality and carries the great danger of oppression. The very need for a vote of an entire chamber would not only provide a forum in which the Executive's arguments could be fairly considered, but the uncertainty of the outcome would press all concerned to negotiate a resolution. A vote of the entire Senate or House of Representatives is required to cite a private person for contempt. The requirement has proved useful in the past. If either House did vote to require the information, the President should have no constitutional right to withhold it and the Judiciary should not go behind the voted demand except to decide questions of relevance and jurisdiction. This would avoid the difficulty of developing nonpolitical, judicial standards of decision and thus would meet the chief constitutional objection to other legislative proposals.

There are two putative constitutional obstacles to effectuating this proposal. In *United States v. Nixon* the Supreme Court observed of the privilege of confidentiality that "to the extent that this interest relates to the effective discharge of a President's powers it is constitutionally based."¹⁹⁵ The words can and perhaps should be read as asserting that the privilege is secured by the Constitution. The right to withhold is readily inferred from the duties imposed by article II.¹⁹⁶ If this is the proper meaning, then Congress cannot curtail the privilege and the Judicial Branch must either determine its applicability or stand aside upon the ground that the controversy is not justiciable.

¹⁹⁵ 94 S. Ct. at 3109.

¹⁹⁶ See text accompanying notes 6-8 *supra*.

But the words of article II are not compelling in this respect and even the Supreme Court's language raises questions. Note that the Chief Justice chose the words "constitutionally based," not "constitutionally secured" or "guaranteed by the Constitution." The diction is certainly not haphazard; elsewhere he used the phrase "rooted in the separation of powers under the Constitution."¹⁹⁷ In the former case, moreover, the assertion is limited by the vague qualifier, "to the extent that . . . [it] relates to the effective discharge of a President's powers."¹⁹⁸ Furthermore, there are many cases in which Congress has the constitutional authority to institute measures that interfere with the "effective discharge of a President's powers" either by legislation signed by the President or by enacting a statute over the President's veto; appropriations acts, measures establishing, abolishing or reorganizing executive departments, laws defining the powers of federal agents, and the regulation of administrative procedure will serve as examples. It is entirely possible, therefore, that the Supreme Court, if squarely confronted with the question, might explain away the assertions in *United States v. Nixon* or confine them to situations in which there is no applicable legislation.

It is harder to find an acceptable technique for holding that a statute can impose upon the President a legal obligation to comply with a subpoena voted by either the Senate or the House but cannot give the same force to the subpoena issued by a committee or subcommittee acting pursuant to a delegation of power. Perhaps it might be said that the authority to compel testimony from a coordinate branch of government is "non-delegable." The pronouncement would be a judicial tour de force, but *ipse dixit* are often none the worse for that.

B. *Impeachment*

History gives no affirmative support to presidential claims of privilege to withhold information from the House of Representatives while it is considering impeachment. The clearest statement on the entire subject was made by President Polk:

If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe

¹⁹⁷ 94 S. Ct. at 3107.

¹⁹⁸ *Id.* at 3109.

that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation.¹⁹⁹

President Grant also explicitly acknowledged that the House "may require as a right in its demand upon the Executive" all the information necessary to discharge its powers of impeachment.²⁰⁰ President Washington in refusing information about the Jay Treaty, observed: "It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed."²⁰¹ To read this sentence as an affirmative assertion that the House would have had a right to the papers in the event of impeachment would seem a bit forced, but it is proper to recall President Jackson's statement:

[W]here there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you and every proper facility furnished for this purpose.²⁰²

On principle, the House should have a right to evidence. The House cannot serve as the "grand inquest of the nation," as the Constitution intends, if the very President whose conduct of his official duties is under investigation can balk the inquiry by withholding the recorded evidence of his conduct in the Executive Branch. The general interest in protecting the confidentiality of internal executive discussions as a means of encouraging candor is surely not as great as the interest in examining charges of executive misconduct serious enough to warrant

¹⁹⁹ 4 RICHARDSON, *supra* note 55, at 435.

²⁰⁰ 7 *id.* 362.

²⁰¹ 5 ANNALS OF CONG. 760 (1796).

²⁰² 13 CONG. DEB., App. 202 (1837).

formal consideration of impeachment. The normal reluctance of the House to launch even an inquiry into the existence of grounds for impeachment gives enough protection against talking of impeachment merely as a pretext for obtaining information not otherwise available. Although President Nixon and his counsel have talked vaguely about withholding information from the House Judiciary Committee in order to preserve the Presidency, they have never stated how or why the Presidency would be injured by disclosure in the situation excepted from any claim of confidentiality by Presidents Washington, Polk, Cleveland and Theodore Roosevelt.

United States v. Nixon, by force of analogy, gives strong support to the right of the Congress to the evidence. The decision holds that the public interest in having all relevant and otherwise admissible evidence available at the trial of an indictment outweighs the generalized interest in the confidentiality of presidential conversations. The public interest in having all relevant and otherwise admissible evidence available in determining whether a President should be charged with "treason, bribery, or other high crimes and misdemeanors"²⁰³ should therefore likewise outweigh any generalized interest in confidentiality. For surely the public interest in the fair and thorough investigation of serious wrongs charged against a President himself is at least as important as in the prosecution of his aides.

The only sanction now within legislative control is to assign the President's withholding of material evidence as a ground for impeachment. In the North Carolina convention called to consider ratification of the Constitution, James Iredell, who later became a Supreme Court Justice, argued in a slightly different context that for the President to give false information or to withhold full information from the Congress is ground for impeachment.²⁰⁴ For the House, having authorized a subpoena, to ignore noncompliance would go far to destroy once and for all any congressional "right" to obtain information from a President determined to withhold. There were predictions in early August of this year that the House might not pass the article of impeachment relating to President Nixon's noncompliance with Judiciary Committee subpoenas. The importance of that article

²⁰³ U.S. CONST. art. II, § 4.

²⁰⁴ 4 J. ELLIOT, *supra* note 31, at 127.

is underscored by the fact that President Nixon's resignation was prompted by the release of some of the very tapes which he had refused the Committee. However, the resignation obviated the need for the House to vote on the question, thus postponing indefinitely any resolution of the scope of executive privilege in this context.