

EXECUTIVE PRIVILEGE, THE CONGRESS AND THE COURTS

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INTRODUCTION

On April 22, 1948, a debate was in progress in the House of Representatives concerning a report of the House Un-American Activities Committee questioning the loyalty of a prominent government scientist. Dur-

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ing the debate, which centered on the refusal of President Truman to release the full text of an F.B.I. memorandum about the accused scientist, Congressman Richard Nixon, a member of the Committee, rose in the chamber and said:

I am now going to address myself to a second issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Myers 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.¹

I. EXECUTIVE PRIVILEGE AND GOVERNMENT SECRECY

A. *Widespread Use of Executive Privilege*

The Executive's claimed privilege to withhold information from Congress is often clouded by political controversy. Perhaps this is so because the issue has developed as a byproduct of the often turbulent relationship between the two "political" branches of the government, and so far has eluded resolution by the Supreme Court.

Executive privilege has proliferated over the decades very much as executive power itself has grown. Early presidents asserted the privilege infrequently and in narrow circumstances. Often the doctrine was formulated in a manner which implied that the Executive could withhold information only with the consent of Congress. Modern presidential government, on the other hand, is symbolized by the frequency with which information is withheld from Congress at the sole discretion of the Executive. The Library of Congress reported in March 1973 that executive privilege had been asserted 49 times since 1952—more than twice the number of all prior claims.² The Nixon Administration, while professing that it had done more than its predecessors to regularize the flow of information to Congress, had in fact broken all records by formal-

¹ 94 CONG. REC. 4783 (1948).

² THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE" (a study prepared by the Government and General Research Division of the Library of Congress), CONG. REC. H2243-46 (daily ed. March 28, 1973). Since March of 1973 the Nixon Administration has asserted executive privilege two additional times.

ly denying information or witnesses to Congress at least twenty times in four years.³

An indication that executive privilege is a vital pressure point in the struggle between Congress and the President is the regularity with which the doctrine is used to cut off congressional inquiry into the very issues over which Congress and the President are most sharply divided. Not surprisingly, many observers have concluded that the Executive often balks at requests for information merely to prevent certain controversial subjects from being further explored by a hostile Congress.⁴ By withholding crucial information or witnesses modern presidents have discovered that they can exercise an effective veto over attempts by Congress to act in certain areas, particularly foreign affairs.⁵

B. *Government Secrecy*

Secrecy in government has taken different forms from one administration to the next, but its consistent premise has been an assumed right of the President acting in the public interest to withhold certain information which he has acquired in the course of executing the laws. This premise is most clearly reflected in formal claims of executive privilege, but it also may be found in a wide variety of other practices of secrecy behind which the executive branch attempts to conduct its operations without interference from the coordinate branches of government or from the public.

The institutional patterns of executive secrecy are perhaps best revealed in matters of foreign affairs. Whenever the Departments of State

³ *Id.* On five of these occasions the President himself claimed executive privilege; cabinet members and agency heads have done so 15 times on his behalf.

⁴ Indeed, General Maxwell Taylor, Chairman of the Joint Chiefs of Staff in the Kennedy Administration, candidly admitted as much when he declined an invitation to testify about the Bay of Pigs invasion by stating that his appearance would only "result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." 109 CONG. REC. 5817 (1963) (quoted in remarks of Congressman Ford).

⁵ It should have come as no surprise, for example, that General Taylor declined to appear before the House Subcommittee on Defense Appropriations in April 1963 to discuss the Bay of Pigs invasion; that Treasury Secretary Connally declined to testify before the Joint Economic Committee in April 1972 on the refusal of his subordinates to supply records to the General Accounting Office on the government's loan to the Lockheed Aircraft Corporation; or that the Department of Defense refused in December 1972 to supply documents requested by the House Armed Services Committee during its hearings on the firing of General John D. Lavelle, who reportedly conducted unauthorized raids over North Vietnam. CONG. REC. H2245 (daily ed. March 28, 1973).

After President Nixon had effectively vetoed an inquiry by the Senate Foreign Relations Committee into grants of foreign military aid by claiming executive privilege over certain Defense Department documents, Senator Fulbright tersely pointed out that the President's action makes it most difficult "to legislate in the area of foreign military assistance." N.Y. Times, Sept. 1, 1971 at 1, Col. 4.

or Defense are compelled to articulate in court why foreign affairs must not be conducted openly, they resort to the sweeping language of the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,⁶ language which has often been cited as the basis for executive secrecy in other areas as well:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President has the power to speak or listen as a representative of the nation.⁷

. . . .
 . . . He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.⁸

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic.⁹

When the Executive acts in areas touching upon foreign affairs, it is protected by a variety of shields, some of which are sanctioned by Congress, some by the courts, and some by both. It need not, for example, engage in public rule-making, since the procedural requirements of the Administrative Procedure Act do not apply "to the extent that there is involved . . . a military or foreign affairs function of the United States. . . ." ¹⁰ This statutory exemption means that an agency is not required to give notice through the Federal Register or otherwise of rules or other decisions it is considering promulgating; to describe a proposed rule or decision and its underlying authority; to give interested persons an opportunity to participate through submission of written views; nor to render decisions supported by a record stating the basis and purpose of the decision. Since these administrative formalities are dispensed with when the Executive acts in foreign affairs, secrecy in this area is not difficult to enforce.

A second shield behind which the Executive can act in secret—even

⁶ 299 U.S. 304 (1936).

It is worth noting that the *Curtiss-Wright* decision has recently been reexamined from an historical perspective, and has been rejected as a relatively weak basis for judicial recognition of claims of inherent executive power in the conduct of foreign affairs. See Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1 (1973).

⁷ 299 U.S. 304, 319 (1936).

⁸ *Id.* at 320.

⁹ *Id.* at 320-21 quoting 1 Messages and Papers of the Presidents 194 (Pres. Washington).

¹⁰ 5 U.S.C. § 553 (1970).

outside the area of foreign affairs—is, ironically, the Freedom of Information Act.¹¹ Although the purpose of the Act is to establish the general rule that government agencies should make information available to the public upon demand, the rule does not apply to nine enumerated categories of information, chief of which are foreign affairs, internal agency memoranda, investigative files compiled for law enforcement purposes, and information the disclosure of which would constitute an unwarranted invasion of personal privacy.¹²

It is apparent from the provisions of both the Freedom of Information Act and the Administrative Procedure Act that Congress itself has recognized at least the occasional necessity of executive secrecy. Congress expressly provided, however, that the exemptions from the Freedom of Information Act do not justify the withholding of information from Congress itself.¹³ Nonetheless, the only instance in which members of Congress have sought to use the affirmative provisions of the Act to compel the production of documents from an executive agency resulted in a decision by the Supreme Court sustaining the agency's refusal to disclose, on the ground that the documents were covered by the foreign affairs exemption.¹⁴ That decision rested on the language of the Act and did not purport to speak to the broader question of the constitutional boundaries of executive privilege. Individual members of Congress were suing in their private capacities; the power of Congress to override a mode of secrecy which it had itself created was not at issue, nor did the executive agency claim a privilege to override Congress.

Each of the last three presidents has made a formal commitment to Congress not to invoke executive privilege without specific presidential approval.¹⁵ Most observers agree, however, that this commitment has been reduced to a nullity by the simple bureaucratic expedient of evading requests for information without resorting to claims of executive privilege. So common are these tactics, Senator Fulbright recently pointed out, that "[a]s matters now stand, that commitment has been reduced to a meaningless technicality; only the President may invoke executive privilege but just about any of his subordinates may exercise it—they

¹¹ 5 U.S.C. §552 (1970).

¹² 5 U.S.C. § 552(b)(1), (5), (6), and (7) (1970).

¹³ 5 U.S.C. § 552(c) (1970) provides as follows: "This section does not authorize withholding of information or limit the authority of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

¹⁴ *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). See text accompanying notes 49-51 *infra*.

¹⁵ *Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, concerning Executive Privilege: The Withholding of Information by the Executive*, 93rd Cong., 1st Sess., vol. 1, at 2-3 (1971) [hereinafter cited as 1971 *Hearings*].

withhold information as they see fit but they do not employ the forbidden words."¹⁶

Information is withheld from Congress on at least three levels. At the highest level are the few instances in which the President himself personally directs a subordinate not to comply with a congressional request. More frequent are occasions when executive departments formally decline on their own initiative to cooperate with congressional inquiries, and the President does not direct them to do otherwise.¹⁷ The third and most frequent way in which information is withheld are the countless struggles between congressional staffs and the lower levels of the federal bureaucracy over information to which no colorable claim of privilege could attach, but which is nevertheless withheld because of the general climate of secrecy and self-protection in which the executive branch operates in its relations with Congress.¹⁸

¹⁶ *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923 and S. 2073 Before a Subcomm. of the Senate Comm. on Government Operations and Subcomms. of the Senate Comm. on the Judiciary, concerning Executive Privilege, Secrecy in Government, Freedom of Information, 93rd Cong., 1st Sess., vol. 1, at 74 (1973) [hereinafter cited as 1973 Hearings].*

¹⁷ In March 1970, for example, the Senate Constitutional Rights Subcommittee began a two year probe of the Army's surveillance of domestic politics. In the ensuing war of attrition which was waged by the Pentagon, three generals, the Secretary of the Army, its general counsel and several of their subordinates declined to testify or respond in writing to questions about the scope and basis of the Army's surveillance activities. At the same time they delayed for more than three months in complying with a request from the subcommittee for certain documents and computerized surveillance records compiled by the Army and disseminated widely to other agencies of the government.

The Army's excuses for not complying with these requests were an awesome display of the arsenal of executive secrecy. Documents and witnesses were withheld for fear of prejudicing current departmental investigations into the very subject of the congressional probe. The generals were shielded at first because they were stationed overseas, and later because the Secretary of Defense determined they were not the proper persons to speak for the Department on the "broader issues" facing the subcommittee, notwithstanding their personal knowledge and direction of the Army's surveillance operations. A further reason for not producing the generals was the Army's assertion that it is the policy of the executive branch not to present intelligence personnel before congressional subcommittees.

A copy of the computer printouts which formed the bulk of the surveillance product was withheld from the subcommittee long after the Army claimed that it had ordered the destruction of the printouts and discontinued collection of most of the information. Among the reasons given were that release of the documents would violate the privacy of persons whose names appeared on them, although the subcommittee had guaranteed that names would be eliminated prior to publication. When part of the printout was finally released after eighteen months of tactical maneuvering by both sides, the Army classified it confidential, and at first applied the same classification to the subcommittee's reports, so that it was not published until more than two and one-half years after the investigation began. See Testimony of Hon. Sam J. Ervin, Jr. and Hon. John V. Tunney, 1971 *Hearings* 381-420.

¹⁸ A startling example of the obstacles encountered at this third level of informal "privilege" was the experience of a bipartisan group of 130 Congressmen in attempting between 1966 and 1968 to compile an exhaustive list of federal assistance programs. The resistance of the administering agencies was often bizarre: the telephone directory of the Office of Economic Opportunity was at first withheld because it was classified "confidential;" and

Executive privilege is at once the most refined form of government secrecy and the most direct executive challenge to Congress. Not only does executive privilege often interfere with the legislative work of Congress, but it has increasingly come to symbolize the troubled relations between Congress and the President and to identify their points of sharpest conflict.

C. *Congress and the White House Tapes*

On July 23, 1973, the Senate Select Committee on Presidential Campaign Activities took the extraordinary step of directing a subpoena *duces tecum* to the President. At issue were the tapes of certain conversations between President Nixon and his former top aides, purportedly about the Watergate case.

None of Richard Nixon's thirty-six predecessors in office ever faced such a dramatic confrontation with Congress, short of an impeachment proceeding. Furthermore, the President also faced a subpoena from former Special Prosecutor Archibald Cox, whose request for the tapes "as material and important evidence" in forthcoming criminal proceedings had also been denied.¹⁹ Since these subpoenas were issued in the wake of an emphatic refusal by the President to surrender the tapes on the ground of executive privilege, a constitutional crisis loomed in the court tests ahead.

In both cases the President declined to comply with the subpoenas, initially on identical grounds which he set forth succinctly in a letter to the District Court:

I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the Courts.²⁰

Thereafter, the Senate Committee voted unanimously to apply for an order requiring production of the tapes, and the grand jury hearing evidence in the Watergate cases instructed the Special Prosecutor to do like-

current eligibility requirements for certain programs were withheld because, in the words of one particularly stubborn bureaucrat, "the programs and their personnel change so rapidly." See Testimony of Hon. William V. Roth, Jr., 1971 *Hearings* 227-40.

¹⁹ In the exchange of public statements which preceded the subpoenas, the parties staked out virtually irreconcilable positions. The President in a letter to Senator Ervin claimed that the tapes "contain comments that persons with different perspectives and motivations would inevitably interpret in different ways," asserting that "[t]hey are the clearest possible example of why Presidential documents must be kept confidential." Senator Ervin, in response, honed in on what he saw as a fatal inconsistency in the President's position: "If you will notice, the President says he has heard the tapes, or some of them, and they sustain his position. But he says he's not going to let anybody else hear them for fear they might draw a different conclusion." *New York Times*, July 24, 1973, at 19, col. 1.

²⁰ *In re* Grand Jury Subpoena *Duces Tecum* to Nixon, 360 F. Supp. 1, 3 (D.D.C. 1973).

wise. In the ensuing litigation the Special Prosecutor prevailed on the merits, but the Senate Committee failed to establish a jurisdictional basis for its suit and was forced to return to Congress to obtain express statutory authority to enforce its subpoenas.²¹

Despite these different results, the Committee's claim was at least as strong on its merits as the Special Prosecutor's. The Congress is exercising an implied constitutional power when it seeks information from the Executive.²² A prosecutor, however, is an executive official whose functioning is subject to the ultimate discretion of the President.²³ Although the President may argue that the separation of powers insulates the Executive from incursions by the legislative and judicial branches, we shall see that such insulation is at best severely limited by "[t]he power of the Congress to conduct investigations [which] is inherent in the legislative process."²⁴ Furthermore, the denial of information to Congress must, finally, be regarded as a more serious threat to the balance of government than the denial of evidence to a prosecutor, because the Congress can neither legislate, nor investigate, nor impeach, if it lacks information to determine when to exercise these political powers, which ultimately are the only effective checks on a runaway Executive.

II. THE CLAIM OF A DISCRETIONARY EXECUTIVE PRIVILEGE TO WITHHOLD INFORMATION FROM CONGRESS

A claim of absolute presidential discretion to withhold information was forcefully advanced in the briefs submitted by the President's counsel in the White House Tapes Case. Counsel offered three interrelated argu-

²¹ Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

The Committee relied on 28 U.S.C. §§ 1331, 1345 and 1361, and 5 U.S.C. §§ 701-06 to establish jurisdiction, but the District Court rejected each as a statutory basis, on the grounds that (1) \$10,000 was not at issue; (2) the suit could not be brought under the name of the United States unless authorized by an act of Congress; (3) the duty to give information is not a ministerial duty of the President, and therefore 28 U.S.C. § 1361 did not apply; and (4) the President is not an "agency" within the meaning of 5 U.S.C. § 701 (Administrative Procedure Act).

But see Pub. L. No. 93-190, *infra*, text accompanying notes 118-19.

²² *See* *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain v. Dougherty*, 273 U.S. 133, 175 (1927). *See infra*, text accompanying notes 65-67.

²³ This was dramatically illustrated by the firing of Special Prosecutor Archibald Cox on Saturday, October 28, 1973. Although this presidential action was accomplished at the cost of the resignation of Attorney General Elliot Richardson and the firing of his deputy, William Ruckelshaus, and was subsequently held to have been in violation of the Justice Department Regulations governing the Special Prosecutor's office, *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), Cox's discharge took place in the absence of any legislation creating an independent prosecutor and was therefore arguably within the constitutional authority of the President.

²⁴ *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See infra*, text accompanying notes 65-67.

ments: (1) the nature of the presidency—as chief of state, the President is a symbol of the nation, and the criminal law cannot reach the individual serving as President until after he has been impeached by the House and convicted by the Senate; (2) the need for confidentiality—the President's effectiveness in office depends in part upon the candor of his advisors, who act as his "eyes, ears, mouth, and arms," and confidentiality is required to generate candor; and (3) separation of powers—the branches of government are coequal and the President must control his own house.²⁵

These arguments were a refinement of the Nixon Administration's earlier position on executive privilege. Former Attorney General Richard Kleindienst, speaking for the Administration in April 1973, asserted that the Congress had no power to order an employee of the executive branch to supply information if the President barred his testimony. Kleindienst claimed that the President's judgment on whether or not to produce documents or witnesses for the Congress was final, that the decision was his alone to make, and that neither the Congress nor the courts had constitutional authority to interfere.²⁶

It was not always so. Even while the executive branch during previous administrations was asserting a broad privilege, there were many attempts to define its limits and a hesitancy to proclaim an unreviewable presidential discretion. The first major assertion of executive privilege during the modern era came in 1941 when Attorney General Robert Jackson declined to comply with a request by the House Committee on Naval Affairs to inspect F.B.I. reports on the strikes and labor disputes then plaguing defense industries and jeopardizing the war effort. In a letter to the Committee chairman, Jackson observed that the documents "can be of little if any value in connection with the framing of legislation or the performance of any other constitutional duty of Congress,"²⁷

²⁵ Brief of Petitioner at 10-53, *Nixon v. Sirica*, 42 U.S.L.W. 2211 (D.C. Cir. Oct. 12, 1973).

²⁶ Statement of Richard G. Kleindienst, 1973 *Hearings* 24-26.

The Kleindienst position was enunciated just before the main Watergate disclosures began to occur, and it had the effect of temporarily insulating the President's White House advisors from Senator Ervin's Committee. One month later, however, after the resignations of the principal White House advisors and the Attorney General, and in face of growing pressures from Congress and the press for more information from the White House, a more modest position on executive privilege was announced by Leonard Garment, the new Counsel to the President. The new policy permitted the testimony by any executive department employee, including past and present members of the President's staff, but it prevented disclosure to Congress or the courts of any conversations with the President, documents received or produced by the President or any member of the White House staff in connection with his duties, and classified information. Any exercise of the privilege would continue to be at the President's unreviewable discretion. See 1973 *Hearings* 276-77.

²⁷ *Position of the Executive Department Regarding Investigative Reports*, 40 OP. ATT'Y GEN. 45 (1941). See also 1971 *Hearings* 576.

but he did not assert an unreviewable executive power to withhold information from Congress. That claim was reserved for a later day.

On May 17, 1954, President Eisenhower sent a letter to Defense Secretary Charles Wilson, with an accompanying memorandum from Attorney General Herbert Brownell, directing the Secretary to order his subordinates not to testify before Senator Joseph McCarthy's subcommittee.²⁸ However laudable its purpose, the Brownell memorandum had a negative impact on the doctrinal development of executive privilege.²⁹ According to Attorney General William Rogers, Brownell's successor, heads of departments

. . . have frequently obeyed congressional demands . . . and have furnished papers and information to congressional committees, [but] they have done so only in a spirit of comity and good-will, and not because there has been an effective legal means to compel them to do so.³⁰

Perhaps because the presidency and the Congress were controlled by the same political party, the issue lay largely dormant during the Kennedy and Johnson Administrations, although President Kennedy in his own name once exercised the privilege, and executive departments and agencies did so three times during each of the Democratic administrations.

The subject matters that have been included in executive privilege as it has been broadly asserted during the last two decades have not varied much since the Eisenhower Administration. In a memorandum frequently cited by succeeding Attorneys General, Attorney General Rogers in 1958 identified at least five categories of executive information privileged from disclosure to Congress:

1. military and diplomatic secrets and foreign affairs;
2. information made confidential by statute;
3. investigations relating to pending litigation, and investigative files and reports;
4. information relating to internal government affairs privileged from disclosure in the public interest; and
5. records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates and informal working papers.³¹

²⁸ *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn and Francis P. Carr, Hearings before Special Subcomm. on Investigations, Sen. Comm. on Gov't. Operations, 83rd Cong., 2d Sess. at 1169-72 (1954).*

²⁹ Indeed, it became the basis for an unprecedented 34 claims of privilege during the remaining five years of the Eisenhower Administration. CONG. REC. H2244 (daily ed. Mar. 28, 1973).

³⁰ Memorandum of Atty. Gen. Rogers submitted to *Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 85th Cong., 2nd Sess. at 6 (1958), reprinted in Rogers, *Constitutional Law: the Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958).

³¹ *Id.*

In the remainder of this article we shall first express our reasons for concluding that the assertion of a discretionary executive privilege by the President is without basis in historical or judicial precedent. We shall also discuss the extent to which a president may claim confidentiality. Two of the three principal categories of privilege³²—foreign and military affairs and investigatory files and litigation materials—while raising issues about the propriety and scope of executive secrecy, can be explained and defined wholly apart from a constitutional privilege. A third category—internal advice within the executive branch—raises more difficult problems. While there may be a necessity for executive secrecy in this area, it is based on the same limited constitutional premise that justifies secrecy among members of Congress and judges as well as executive officials: each branch of government has an implied power to protect its legitimate decision-making processes from scrutiny by other branches. We shall see that this does not mean the Executive (or the other branches) can keep secret its actual decisions or the facts underlying them, as distinguished from “advice,” nor can it shield criminal wrongdoing by its officials or employees.

III. THE UNTENABILITY OF A DISCRETIONARY EXECUTIVE PRIVILEGE

It is essential to emphasize the precise question before us, which is *not* whether there are certain types of information that the Executive needs to keep secret in order to function properly. This can be readily conceded. Nor is the question whether the Congress generally requires access to information in the hands of the Executive in order to legislate properly. Again, this proposition is self-evident. The issue is whether the President has the implied authority under the Constitution to withhold data from the Congress *solely in his discretion*, or whether his decision to do so is subject to constitutional limitation and judicial review.

A. *The Practice of Early Presidents*

The issue of executive privilege was raised in a tentative way during the first presidency. President Washington at least once questioned the

³²Dean Roger Cramton, Former Assistant Attorney General in the Nixon Administration, has asserted that executive privilege is most frequently and justifiably exercised in only three areas: (1) military and foreign affairs; (2) investigatory files of law enforcement agencies; and (3) testimony of presidential advisors. Dean Cramton's one deviation from the position of Attorneys General Roger and Brownell was his limitation of the privilege to *advisors to the President*. See *Congress and the President: Executive Privilege in Past and Present*, Speech by Roger C. Cramton, Dean-Elect, Cornell Law School and former Assistant Attorney General, Office of Legal Counsel, Department of Justice, at Cornell Law School (March 14, 1973).

authority of Congress to demand documents, but Washington eventually complied with the requests of Congress and never directly confronted the legislature with a refusal to disclose.³³

It was not until the presidency of Jackson—a full 46 years after the formation of the Republic and the enactment of the initial statute authorizing congressional inquiries into the workings of the executive branch—that there was an unequivocal assertion of discretionary power to withhold information from the Congress. In 1835 Jackson rejected a request for information, made during a hearing to confirm one of his nominees, regarding “frauds in the sale of public lands” because he said (1) the information was to be used by Congress in secret session and thereby would deprive a citizen of the “basic right” of a public investigation, and (2) the inquiry was not “indispensable to the proper exercise of Congress’ powers.” The first point related not to presidential prerogatives but to the separate question of the rights of individuals. The second point at most assumes a limited sphere of executive privilege, particularly when considered in the context of a statement made by Jackson one year earlier:

Cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it [Congress] should *inquire* or decide upon *the conduct* of its President or other public officers, and in *every* case its constitutional right to do so is cheerfully conceded.³⁴

During this same period a congressional practice developed of extending to the President a privilege or discretion to withhold certain investigative reports and state secrets from public disclosure. In the instances where the offer extended by Congress was actually accepted by the President and documents were withheld, the congressional power to compel

³³ The one denial of a request for information by President Washington—a request from the House of Representatives for all papers related to the negotiation of the Jay Treaty—was based on Washington’s belief that the House lacked the power under the Constitution to demand documents related to the treaty-making power. The President conceded that the Senate could receive the documents. Both Washington, and later Adams, freely communicated to the House all information, on external relations, including instructions to envoys negotiating treaties when such information might be relevant to Congress’ war-making powers. See Berger, *Executive Privilege v. Congressional Inquiry*, (pt. 1), 12 U.C.L.A. L. REV. 1043, 1079-80, 1085-93 (1965) [hereinafter cited as Berger].

³⁴ *Id.* at 1095. Moreover, Jackson’s nominee was not confirmed.

A similar incident involving President Tyler about a decade later is also indecisive. In 1843 Tyler questioned the right of Congress to certain reports relating to alleged fraud on the Cherokee Indians, asserting in a memorandum to Congress that there was a narrow area of information, of the type private litigants could withhold, that the Executive was not compelled to disclose. He disavowed—albeit in ambiguous language—an absolute discretion in complying with congressional requests. In fact, Tyler eventually made available all investigative reports on the incidents except the purely advisory opinions of his investigation of the Cherokee delegates. *Id.* at 1096-98.

their release was explicitly recognized by both parties. When Jefferson declined, for example, to produce certain information on the Burr conspiracy in 1807, he was acting upon a House request that excepted "such [information] as he may deem the public welfare to require not to be disclosed. . . ."³⁵

The historical record is less than conclusive, and is subject, of course, to different interpretations.³⁶ Nonetheless, an investigation of presidential statements and actions in the seventy-five years following the ratification of the Constitution does not support an inference that the early Presidents or their subordinates believed they possessed a discretionary power to withhold information from Congress. In virtually every incident involving executive privilege prior to the Civil War, presidents complied substantially with congressional requests, withholding information only if explicitly authorized to do so by the Congress.

B. *Judicial Precedent*

The judicial record is equally barren of authority sustaining broad claims of the Executive.³⁷ President Nixon's brief to the Court of Appeals contesting the Special Prosecutor's right to demand Watergate related tapes cites only two Supreme Court cases in support of a discretionary executive privilege.³⁸ The first of these, *Marbury v. Madison*,³⁹ is inapposite. Admittedly, there is language in Chief Justice Marshall's opinion which indicates that there is an area in which the Executive has considerable discretion.⁴⁰ Marshall, however, expounded the judiciary's authority to review all executive acts not constitutionally committed to executive discretion and to determine which issues are precluded from review. While it is true that investigation of the Executive's act is "peculiarly irksome, as well as delicate," the courts in Marshall's view had

³⁵ Rogers, *supra* note 30, at 944.

³⁶ See, e.g., Nixon v. Sirica, 487 F.2d 700, 709 (D.C. Cir. 1973) and 487 F.2d 700, 775-81 (Wilkey, J., dissenting).

³⁷ Although no Supreme Court case explicitly rejects such a privilege, there are no decisions in this country or in England that recognize it. The Queen's Bench in 1845, for example, established what is still the rule in England today: "the Commons are . . . the general inquisitors of the realm. . . . They may inquire into everything which it concerns the public weal for them to know." Howard v. Gossett, 116 Eng. Rep. 139, 147 (Q.B. 1845).

³⁸ Brief for Petitioner at 25, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

³⁹ 5 U.S. (1 Cranch) 137 (1803).

⁴⁰ "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his own country in his political character, and to his own conscience." *Id.* at 165-66.

the authority and indeed the duty to undertake such investigation.⁴¹ The second case cited in the President's brief, *Kendall v. United States ex rel. Stokes*,⁴² contains dicta⁴³ about the discretionary powers of the President, but the Court's holding that a mandamus could issue to a presidentially appointed executive official to compel him to perform a ministerial act lends no support to a claim of executive privilege.

The most comprehensive attempt to muster judicial authority on behalf of executive privilege, prior to the White House Tapes Case, had been made by Attorney General Robert Jackson in his 1941 letter to the House Committee on Naval Affairs.⁴⁴ While some of the cases cited by Mr. Jackson might support a limited power to withhold national security data and confidential informers' communications from the courts, none lends credence to a discretionary privilege of the kind recently urged by the executive branch.⁴⁵ As stated by the Court of Appeals in the Tapes Case:

We of course acknowledge the long-standing judicial recognition of Executive privilege However, counsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.⁴⁶

⁴¹ *Id.* at 169-70.

⁴² 37 U.S. (12 Pet.) 524 (1838).

⁴³ "The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power." *Id.* at 610.

⁴⁴ 40 OP. ATT'Y GEN. 45 (1941). See text accompanying note 27, *supra*. Also quoted in 1971 *Hearings* 573.

⁴⁵ The first case cited, *Marbury v. Madison*, it has been seen, does not support the claims of an unreviewable executive discretion. The second case, *Totten v. United States*, 92 U.S. 105 (1875), did not involve executive privilege at all, but rather a secret contract between President Lincoln and a spy. The court refused to permit a suit based on the contract because acknowledgement of the contract was in itself a breach of its terms.

In the Aaron Burr case, President Jefferson eventually complied with a subpoena to produce a letter sent to him and left it to the court to suppress those parts of the letter not material to Burr's defense. In his opinion in the Burr case Chief Justice Marshall recognized a limited state secrets privilege, but he emphasized that the court must be satisfied that the need for secrecy outweighs the accused's interest in having access to the document. *United States v. Burr*, 25 F. Cas. 30, 37 (1807).

Of the remaining federal cases cited in the Jackson letter, all but one involved either the Government's right to protect the identity of informers and their confidential communications, or the right of government employees to refuse to disclose information pursuant to a regulation specifically authorized by Congress.

Two of the three state cases cited in the Attorney General's letter refer to an executive discretion to appear or furnish papers to a court. But these same cases explicitly subject this discretion to judicial review and recognize the legislature's power to require executive disclosure.

⁴⁶ *Nixon v. Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973).

On the other hand, there are several decisions which specifically recognize the prerogative of the courts to determine the parameters of executive privilege. In *United States v. Reynolds*,⁴⁷ for example, the widow of a civilian killed in the crash of an Air Force plane testing secret electronic equipment, sought copies of the Air Force investigative reports, which the Secretary of the Air Force claimed were privileged documents. The Supreme Court agreed that the materials were privileged, but expressly stated that it was the responsibility of the court to determine the validity of the claim.⁴⁸

Similarly, in *Environmental Protection Agency v. Mink*,⁴⁹ a suit brought by members of Congress under the Freedom of Information Act⁵⁰ to force disclosure of various documents concerning an underground nuclear test, the Supreme Court held that *in camera* inspection was not justified if the government satisfied the court that the documents were privileged because they were classified.⁵¹

In an apparent effort to reconcile the Supreme Court's interpretation of the Freedom of Information Act in *Mink* with the necessity for

⁴⁷ 345 U.S. 1 (1953).

⁴⁸ The Court offered the following guidelines for the treatment of claims of privilege:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

Id. at 6-11.

⁴⁹ 410 U.S. 73 (1973).

⁵⁰ 5 U.S.C. § 552 (1970).

⁵¹ The Court based its opinion on the express language of subsection (b)(1) of the Act. It also held that documents claimed to be exempt as internal memoranda (under subsection (b)(5)) could be reviewed *in camera*. In an earlier case the Court of Appeals for the District of Columbia Circuit had ordered *in camera* inspection to separate privileged and non-privileged material, based on the following rationale:

The view of this Court is determined by fundamental legal principles, and principally the root conception of the rule of the law in our democratic society. An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.

Of course the court exercises its authority with due deference to the position of the executive. It will take into account all proper considerations, including the importance of maintaining the integrity of executive decision-making processes. But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793-94 (D.C. Cir. 1971).

judicial review of the Executive's use of privilege, a Court of Appeals ordered a two step procedure in *Vaughn v. Rosen*.⁵² The suit arose out of the efforts of a law professor to obtain reports of the Bureau of Personnel Management of the Civil Service Commission. The Commission in a conclusory affidavit declared that the documents were privileged under various exceptions to the Freedom of Information Act, and the district court entered summary judgment for the defendant. The circuit court, however, held that conclusory affidavits were insufficient to sustain the assertion and required that the Commission set forth a separate basis in fact for each claim of privilege. If analysis of the claims of privilege and the materials offered by the government were to become too burdensome, the district court could appoint a special master to assist with the procedure. The *Vaughn* decision reformulated, in the context of the Freedom of Information Act,⁵³ the well settled principle that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."⁵⁴

C. Separation of Powers

Neither historical nor judicial precedent supports a discretionary executive privilege, but it is nonetheless important to confront the argument that such a privilege is necessary to protect the power of the Executive and is therefore mandated by the doctrine of separation of powers. Contrary to the view of some recent Presidents and their legal advisors, our understanding of the scheme and meaning of the Constitution suggests a strict limitation of the privilege. Three distinct facets of the separation of powers are involved, none of which supports executive discretion with respect to Congressional requests for information.

1. Congressional Investigative Power

The first is the power of the Congress under Article I of the Constitution to conduct investigations. Long before 1789 it was perceived that the English Parliament would be a mere appendage of ministerial government if it could not compel executive officers to explain their policies and reveal the facts on which those policies were based. Parliament did not merely seek explanations; it actively inquired, in the words of Pitt the elder, "into every step of public management, either Abroad or

⁵² 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 42 U.S.L.W. 3523 (March 19, 1974).

⁵³ Judge Wilkey who wrote the opinion in *Vaughn* dissented in the tapes decision. According to Wilkey *Mink* and *Vaughn* were merely interpretations of the Freedom of Information Act and did not involve a constitutional privilege. See *Nixon v. Sirica*, 487 F.2d 700, 794 (D.C. Cir. 1973) (Wilkey, J., dissenting).

⁵⁴ *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

at Home, in order to see that nothing has been done amiss."⁵⁵ From the early seventeenth century this investigative power was very broad; in each instance of its use Parliament itself would determine the scope of its inquiry.⁵⁶

Legislative practice in the American colonies followed the parliamentary model.⁵⁷ Most state Constitutions codified the legislative power to investigate in highly specific provisions.⁵⁸ So deeply rooted was this legislative right of access to executive documents that the Continental Congress refused to create a Secretary of Foreign Affairs until a resolution was adopted that "any member of Congress shall have access [to 'all . . . papers of his office']": provided that no copy shall be taken of matters of a secret nature without the special leave of *Congress*.⁵⁹

While there is no express mention in the federal constitution of a congressional power to investigate and gain access to the documents of executive departments, the practice was so well established by 1789 that such a power was assumed to be a fundamental legislative attribute.⁶⁰ In one of its first enactments, on September 2, 1789, Congress spelled out the reach of this implied power over the new Treasury Department by passing a statute which remains on the books today:

[It] shall be the duty of the Secretary of the Treasury . . . to make reports, and give information to either branch of the legislature in person

⁵⁵ Berger, *supra* note 33, at 1058.

⁵⁶ Perhaps the most dramatic example of an early parliamentary investigation was the inquiry into the administration of Robert Walpole during the two decades prior to his fall from power in 1742. The investigation was conducted in a climate of international and domestic crisis hardly conducive to parliamentary initiative. As Raoul Berger has noted in emphasizing the significance of this inquiry as a measure of Parliament's historic power to investigate:

The times were stormy; England was at war with Spain; the opposition rattled the bones of disrupted continental alliances; they raised the dread of civil war and they played a tattoo on the multitudinous dangers that would flow from a parliamentary inquiry. But to no avail. Member after member spoke for the right and the duty to inquire into the conduct of the administration and its ministers "from the lowest to the highest.

Id. at 1057.

⁵⁷ Examples abound of investigations by colonial assemblies "into the conduct of other departments of government." *Id.* at 1058. Typical was a resolution of the Pennsylvania Legislature in 1770 "order[ing] the assessors and collectors of Lancaster County to appear before the audit committee and to bring with them their books and records for the preceding ten years." *Id.* at 1059.

⁵⁸ An example of such provisions is to be found in Article X of the Maryland Constitution of 1776, which gave the legislature authority to "call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs related to the public interest." *Id.* at 1059.

⁵⁹ *Id.*

⁶⁰ The Supreme Court has noted that, "The power of inquiry—with power to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified." *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927).

or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office. . . .⁶¹

This statute was drafted by Treasury Secretary Alexander Hamilton, hardly an advocate of limited executive powers. Whether or not he anticipated that its "sweeping mandate . . . wholly without limitation [would] fasten onto every conceivable activity of the Administration,"⁶² he could not have been blind to the fact that the statute gave the Secretary no discretion to withhold information.

During the first half of the nineteenth century, Congress conducted continuous investigations into the expenditure of public funds in virtually every area of government activity. The authority underlying these investigations was derived both from the appropriations clause in Article I of the Constitution and from Hamilton's Treasury Reporting Act of 1789.⁶³ Congressional inquiries into the Executive were in fact so common during this period that one observer has commented wryly that "Committees instituted inquiries, ran the eye up and down accounts, pointed out little items, snuffed about dark corners, peeped behind curtains and under beds and exploited every cupboard of the Executive household."⁶⁴

An instructive definition of the scope of this investigating power is to be found in *Watkins v. United States*,⁶⁵ where Chief Justice Warren said in 1957:

The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.⁶⁶

⁶¹ Stat. 64-66 (1789), now 5 U.S.C. § 242 (Supp. V. 1959-63).

⁶² Berger, *supra* note 33, at 1060, quoting L. KOENING, *THE INVISIBLE PRESIDENCY* 58 (1960).

⁶³ The range and depth of inquiry during this early congressional period can be illustrated by some random examples of House investigations. During the early nineteenth century, the House conducted broad inquiries into the operations of the Treasury Department (1800 and 1824), the War Department (1809 and 1832), government employees generally (1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J.D. Elliott commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), and the Secretary of the Interior (1850). Berger, *supra* note 33, at 1066, fn. 109.

⁶⁴ Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CALIF. L. REF. 3, 23 (1959).

⁶⁵ 354 U.S. 178 (1957).

⁶⁶ *Id.* at 187.

The *Watkins* case is especially suggestive because it is chiefly remembered, and rightly, as a decision *restricting* the power of Congress, and in particular the House Committee on Un-American Activities. Chief Justice Warren explicitly stated that

[B]road as is this power of [Congressional] inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.⁶⁷

This is the sum total of the limitations expressed by the Chief Justice, and it is apparent that they do not lend support to a discretionary privilege of the kind recently asserted by the Executive. Rather, these limitations are designed to protect the rights of witnesses. It is of course true that *Watkins* dealt with the power of Congress to obtain information from a private individual, and it therefore would be disingenuous to suppose that the Court was thinking of such recondite matters as executive privilege. Nonetheless, the Court's broad appraisal of congressional power is consistent with history and with earlier judicial pronouncements.

2. Presidential Powers

The second aspect of separation of powers concerns the implications of the President's power under Article II to "take care that the laws be faithfully executed." It is this general constitutional provision on which chief executives and their attorneys general have chiefly relied to buttress their claims of unlimited discretionary privilege to withhold executive documents and witnesses from the Congress. Ultimately this is a claim of inherent or implied power, because the language of the Constitution does not explicitly authorize any such broad discretionary withholding.

To the extent that the executive branch has an implied power to maintain confidentiality, it should be identical to the authority of the judicial and legislative branches to protect their internal decisionmaking processes. Certainly no branch of government can perform its assigned constitutional function unless its employees freely voice opinions without fear of external scrutiny. It does not follow, however, that the executive power to maintain secrecy is inherently greater than that of the two other coordinate branches of government, nor that the Executive has an unre-

⁶⁷ *Id.*

viewable discretion to withhold information from Congress in order to frustrate the legislative power of investigation.

The Supreme Court has in the past considered and rejected a President's claim of inherent executive power. In the Steel Seizure Case⁶⁸ President Truman was denied the authority to seize steel mills during the Korean War in order to maintain needed production. Justice Black writing for the Court noted that "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."⁶⁹ In a similar vein Justice Frankfurter's concurring opinion recalled the statement by Justice Holmes that "The duty of the President to see that the laws be faithfully executed does not go beyond the laws. . . ."⁷⁰

It is unnecessary to accept Justice Black's broad assertions about the lack of presidential power to reach a similar conclusion. In a separate analysis in the same case, Justice Jackson distinguished three situations—those in which the President acts pursuant to an express or implied authorization of Congress, where his authority is at a maximum; those in which Congress is silent, where the President can rely only on its own powers, and frequently the result is uncertain; and those in which "the President takes measures incompatible with the expressed or implied will of Congress." In the latter situation, according to Justice Jackson, and at least two other Justices in the Steel Case, the President's power "is at its lowest ebb."⁷¹

The case of executive privilege is plainly of the third type. While Congress has not legislated explicitly on the privilege, it has demonstrated its intention to obtain all necessary information from the executive branch in statutes going back to the Hamilton Treasury Reporting Act. Hence, even employing the analysis of Justice Jackson, which is less restrictive of executive powers than is the opinion of Justice Black, the President lacks the inherent and discretionary power of the sort being claimed.

Two other considerations, one textual and one rooted in history, support this conclusion. The only reference in the text of the Constitution is the power given to Congress to keep and publish Journals, except "such parts as may in their judgment require secrecy."⁷² The only reference in the text to making information available to another branch of government is the duty imposed on the *President* "from time to time to give

⁶⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶⁹ *Id.* at 589.

⁷⁰ *Id.* at 610.

⁷¹ *Id.* at 637.

⁷² U.S. CONST. art. I, § 5.

to the Congress information on the State of the Union."⁷³ While nothing definitive should be read into these clauses, their presence in the Constitution supports legislative access to executive documents rather than executive discretionary authority.

From a historical perspective it should be noted that the framers of the Constitution, fresh from bouts with the English kings, were more concerned about the dangers of presidential than congressional domination. Some recent writers have pointed to isolated evidence of the Framers' fear of the "despotic tendencies of the legislature," and of "legislative tyranny."⁷⁴ Nevertheless, the historical evidence marshalled by Professor Berger reveals a consensus in the Constitutional Convention and in the early histories of state governments that "'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty."⁷⁵

In the White House Tapes Case both the Special Prosecutor and the President sought to muster historical arguments.⁷⁶ The opponents of the discretionary privilege were more persuasive, as indicated by Judge Sirica's opinion:

A search of the Constitution and the history of its creation reveals a general disfavor of government privilege. Early in the Convention of 1787, the delegates cautioned each other concerning the dangers of lodging immoderate power in the executive department. This attitude persisted throughout the Convention, and executive powers became a major topic in the subsequent ratification debates. The Framers regarded the legislative department superior in power and importance to the other two⁷⁷

Modern history suggests that the precautions taken by the nation's founders to guard against executive abuses of power should not be relaxed today.⁷⁸ Various aspects of the operation of the modern executive branch serve to exacerbate the dangers of unchecked executive discretion.

⁷³ U.S. CONST. art II, § 3.

⁷⁴ Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pt. 2) 29 GEO. WASH. L. REV. 827, 905 (1961).

⁷⁵ Berger, *supra* note 33, at 1070.

⁷⁶ See, e.g., Memorandum in Support of Order to Produce Documents or Objects in Response to the Subpoena at 34-35, *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (1973); Brief of Petitioner at 10-27, *Nixon v. Sirica*, 42 L.W. 2211 (D.C. Cir. Oct. 12, 1973).

⁷⁷ *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1, 4 (1973).

⁷⁸ An experienced foreign observer, Louis Heren, has noted: ". . . the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than diminution of his power. In comparative historical terms the United States has been moving steadily backward." Quoted in Statement by Philip B. Kurland, 1971 *Hearings* 538.

Professor Kurland himself prophesied, without enthusiasm, that

Particularly dangerous has been the vast expansion in the size and role of the White House staff, and the recent practice of assigning one person the dual role of cabinet officer and presidential advisor. The former problem is partly a matter of numbers. During 1971 Henry Kissinger directed a National Security Council staff of more than 140, of whom 54 were substantive experts—a long way, indeed, from the small and rather clubby retinue of earlier presidents.⁷⁹ This situation is not, of course, solely the result of action taken by the Nixon Administration; the growth of the White House has been steady since the Roosevelt years. As a result of this growth, the denial to Congress of the opportunity to question members of the White House staff, in a formal way, regarding their activities, knowledge, or opinions becomes increasingly important.

The problem of multiple executive responsibilities is even more serious. A cabinet member who is called to testify on the actions of his department may be asked questions which touch upon his activities as advisor to the President. Former Assistant Attorney General Roger Cramton has stated that while the first “is a proper inquiry, the latter is subject to a claim of executive privilege.” He acknowledges, however, that “the matters shade into one another and the distinction is difficult to maintain, especially when a cabinet member is housed in the White House and has a separate role as Counselor to the President on specified matters.”⁸⁰

These modern developments emphasize the intellectual difficulty of accepting the President as final arbiter of the privilege issue. It is the President who decides the size of the White House staff, the allocation of responsibilities between it and the cabinet departments, and whether or not to fuse in one individual both line and staff assignments that formerly were kept distinct. To permit the President also to determine, finally, when an individual may be immunized from legislative questions or a document sequestered is surely to defeat the goal of a balanced federal government.

3. Judicial Power

To conclude our discussion of the separation of powers, it is necessary to consider the proper role of the courts in resolving the problem of

We will continue . . . to see the President wage war without Congressional declaration, to see executive orders substitute for legislation, to see secret executive agreements substitute for treaties, and to see Presidential decisions not to carry out Congressional programs under the label of “impoundment of funds.”

Id. at 539. *But see* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 *YALE L.J.* 476 (1957).

⁷⁹ Statement of Hon. J. W. Fulbright, 1971 *Hearings* 21.

⁸⁰ Speech by Roger C. Cramton, *supra* note 32.

executive privilege. In our view, if an issue concerning the privilege cannot be negotiated, it should be resolved by the Supreme Court.⁸¹ Neither the President nor the Congress should be the judge in its own cause. Accordingly, just as we deny the right of the President to determine the issue definitively, we also reject the assertion by Senator Ervin, which he later qualified, that a congressional committee should be "the final judge on whether a White House aide could refuse to answer any of the committee's questions."⁸²

The courts have a general responsibility to decide cases that involve disputes over the allocation of power between the political branches of the federal government. The Supreme Court, for example, in the mid-nineteenth century ruled on the power of the President to order a blockade without Congressional approval,⁸³ and during the Korean war it held that the President lacked the power to seize private property without Congressional authority.⁸⁴

It is sometimes suggested that executive privilege controversies can best be resolved by the accommodations and realities of the political process rather than by formal judicial proceeding. Admittedly an informal solution permits judicious leaks of information from the Executive to the Congress that cannot be provided on the record, and encourages the familiar meetings between congressmen and presidential advisors at which presumably valuable data is exchanged.⁸⁵ In short, the political give and take allows flexibility that many regard as desirable. The difficulties with this *modus operandi* include the tendency of such a surreptitious and informal means of communication to demean the governmental process. Information acquired in this way is not on the record, and therefore is not usable in any stable way by other members of Congress or the public. We agree with Justice Brandeis that "sunlight is said to be the best of disinfectants; electric light is the best of policemen."⁸⁶ The informal leak and the Old School Tie are not satisfactory substitutes for open testimony that the Executive must be able to defend publicly.

⁸¹ There are technical questions to be faced here—the existence of a case or controversy, of proper standing, and of the possibility of a "political question" not meet for judicial determination. Analysis of these questions we postpone until § V of this article.

⁸² N.Y. Times, April 19, 1973 at 1, col. 4.

⁸³ The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863).

⁸⁴ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁸⁵ See, e.g., Testimony of Hon. Dean Acheson, former Secretary of State, 1971 *Hearings* 259-72.

⁸⁶ L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

IV. THE PROPER SCOPE OF THE PRIVILEGE ASSERTABLE BY THE EXECUTIVE BRANCH

If our conclusion is correct that a discretionary executive privilege is untenable, this does not foreclose the question whether secrecy can properly be maintained by the executive branch in the three types of cases where a privilege has most often been asserted: foreign and military affairs, investigatory files and litigation materials, and advisory communications.

A. *Foreign and Military Affairs*

A degree of executive secrecy is probably necessary in foreign or military affairs, as the Supreme Court asserted in its *Curtiss-Wright* decision.⁸⁷ Nonetheless, Congress must have access to foreign and military information if it is to exercise its express constitutional powers under Article I to advise the President in making treaties, to declare war, and to appropriate funds for raising and supporting armies.

Congress has already exercised its constitutional power to authorize limited secrecy in the conduct of foreign and military affairs. The Freedom of Information Act, for example, incorporates by reference the provisions of the executive order on classification of documents in exempting from its mandate matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."⁸⁸ This reference, however, does not mean that a constitutional authority to classify information rests with the President alone. The Supreme Court in *Environmental Protection Agency v. Mink*, while upholding broad exemption from the Freedom of Information Act of information classified by executive order, pointed out that "Congress could certainly have provided that the Executive Branch adopt new procedures [for classifying documents] or it could have established its own procedures. . . ."⁸⁹

Congress, therefore, is theoretically an active partner with the President not only in conducting foreign affairs, but also in maintaining a system of confidentiality. This shared constitutional responsibility was reflected in a recent recommendation by a House subcommittee chaired

⁸⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁸⁸ 5 U.S.C. § 552(b)(1) (1970).

⁸⁹ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973).

In response to the decision in *Mink* restricting the availability of *in camera* inspection under the Freedom of Information Act, bills were introduced in 1973 in both the House, H.R. 5425, and Senate, S. 1142, which would require that in all cases involving contested information, the district court's examination must include an examination *in camera* to determine the validity of the claimed exemption. See Statement of Hon. William S. Moorhead, 1973 *Hearings* 180.

by Congressman William Moorhead urging the establishment of an independent Classification Review Commission to be composed of members appointed both by Congress and by the Executive. In the view of the committee chairman, the Commission

would have broad regulatory and quasi-adjudicatory authority over the . . . classification system. [I]t would also have the responsibility of settling disputes between Congress and the Executive over access to both classified and unclassified types of information requested by Congress.

. . .⁹⁰

The argument is often made that substantial breaches in security might result from unimpeded congressional access to classified information. This argument is not compelling. In the first place, the existing statutory scheme is indicative of congressional self-restraint with respect to executive classification practices. Furthermore, the record of the executive branch itself is far from exemplary in managing the classification system, which is often put to political use to manipulate the Congress or public opinion.⁹¹

The Pentagon Papers are an example of the kind of information relating to national defense which is improperly withheld from Congress under a spurious claim of executive privilege. On December 20, 1969, former Defense Secretary Melvin Laird in a letter to Senate Foreign Relations Committee Chairman Fulbright explained that the documents could not be made available to the Senate because they contained "an accumulation of data of the most delicate sensitivity, including National Security Council papers and other presidential communications which have always been considered privileged."⁹² As Senator Fulbright responded, this assertion of privilege illuminated Congress' waning foreign policy role:

If the Senate is to carry out effectively its Constitutional responsibilities in the making of foreign policy, the Committee on Foreign Relations

⁹⁰ *Operation and Reform of the Classification System in the United States*, A Paper Delivered by Rep. William S. Moorhead, Chmn., Foreign Operations & Gov't. Info. Subcomm., Comm. on Gov't. Operations, U.S. House of Rep., at Center for Internat. Studies, N.Y. Univ. (Feb. 24, 1973).

⁹¹ Congressman Moorhead summarizes the practice well:

On the one hand, the full power of the government's legal system is exercised against certain newspapers for publishing portions of the "Pentagon Papers" and against someone like Daniel Ellsberg for his alleged role in their being made public. This is contrasted with other actions by top executive officials who utilize the technique of "instant declassification" of information they want leaked. . . . Such executive branch "leaks" may be planted with friendly news columnists. Or, the President himself may exercise his prerogative as Commander-in-Chief to declassify certain information in an address to the nation or in a message to Congress seeking additional funds for a weapons system.

Id.

⁹² 1971 *Hearings* 37-38.

must be allowed greater access to background information which is available only within the Executive Branch than has been the case over the last few years.⁹³

In summary, there is probably a need for secrecy in foreign and military affairs. This means that information properly classified pursuant to statutory authority may be withheld in certain circumstances from the general public and provided to reliable persons within the government on a need to know basis. But this conclusion provides no justification for denying Congress the foreign and military information it requires in order to fulfill its constitutional responsibilities. Accordingly, Congress has the power to compel production of such information by statute or congressional resolution.

B. *Investigatory Files and Litigation Materials.*

The second major category of information frequently included under the umbrella of executive privilege is information which the government may have to produce in court—principally investigatory files and other litigation materials. Roger Cramton recently described this as a “widely accepted legitimate area of executive privilege,” agreeing with Attorney General Jackson that disclosure of investigatory files would prejudice law enforcement, impede the development of confidential sources, and result in injustice to innocent individuals.⁹⁴

It is unnecessary to dispute the validity of these conclusions under certain limited circumstances to demonstrate that investigatory and litigation files need not be protected from unwarranted disclosure to Congress by anything so grand as an executive privilege. The government's law enforcement interest, as well as the privacy of individuals under investigation, are amply safeguarded by common law evidentiary privileges, by the statutory exemptions from the Freedom of Information Act, and by the constitutional protections against self-incrimination and denial of free speech and due process. Unlike a discretionary executive privilege, these doctrines assimilate and attempt to balance competing interests in disclosure which are frequently advanced by private litigants, by Congress and by the public. Furthermore, it would be difficult to imagine a greater inconsistency in the law than permitting a private litigant to compel the disclosure of information from the Executive not accessible to Congress. Yet this is precisely the effect of extending executive privilege into the area of investigatory files and litigation materials.

⁹³ *Id.* at 38. See also Affidavit of Max Frankel in *New York Times v. United States*, 403 U.S. 719 (1971).

⁹⁴ Speech by Roger C. Cramton, *supra* note 32.

The hallmark of the evidentiary privileges is that the judiciary and not the executive determines when the circumstances are appropriate for a governmental claim of privilege. To invoke the court's power to review such a claim, a private litigant need only show, to the extent required by the Federal Rules of Civil and Criminal Procedure, that the information he is seeking to discover is "relevant" to his criminal defense or civil claim.

If the information is demonstrably relevant, the litigant may seek to have the court apply the following general rules in considering the government's claim. First, the information at issue must be submitted to the court for an *in camera* (but not necessarily *ex parte*) inspection to determine whether it is properly covered by the privilege, and if so whether the government's interest in non-disclosure outweighs the private litigant's need for the information to prove his case. Where classified information is not involved, the courts generally reject government claims of a confidential privilege for any of the factual content of investigatory reports. Second, if the information is not privileged, or if the litigant's need for proof is greater than the government's interest in confidentiality, the government can be compelled to choose between losing its case or dropping its prosecution and producing the relevant documents which it claims are privileged.⁹⁵

The Congress has demonstrated a sensitivity to the Executive's need for confidentiality in this area by enacting exemptions to the Freedom of Information Act which protect both "investigatory files compiled for law enforcement purposes," and "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁹⁶ It is significant that the application of these exemptions in cases where executive agencies have sought to invoke them has been made by judicial intermediaries. Moreover, the agencies have the burden of proving that they are

⁹⁵ The efficiency of this procedure was demonstrated in a recent district court decision, *Center on Corporate Responsibility, Inc. v. Shultz*, 42 U.S.L.W. 2314, Civil Action No. 846-73 (D.D.C. Dec. 11, 1973). The plaintiff in that action sought a tax refund and a ruling that it was entitled to a charitable income tax exemption. The Internal Revenue Service had refused to grant such a ruling under circumstances which suggested the possibility of improper political influence. The plaintiff through discovery sought access to White House, Treasury, and IRS files and obtained an appropriate discovery order from the court. Defendants refused to comply with the order, making instead a conclusory and unsubstantiated claim of executive privilege, whereupon the court invoked the sanctions of Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure and held that for purposes of the case, plaintiff's allegations would be accepted as established, thereby nullifying the validity of the Internal Revenue Service Ruling.

Such a procedure is an appropriate solution for the usual civil case in which the government is a party and the privilege issue arises in a discovery context. It is of little utility, however, in such litigation as the White House Tapes Cases, where the sole issue is whether the Executive can be ordered to disclose contested documents or information.

⁹⁶ Freedom of Information Act, 5 U.S.C. § 522(b)(6), (7) (1970).

entitled to exemption under the Act, again in contrast to an unreviewable claim of privilege by the Executive. The Executive, for example, often claims that investigatory files are permanently exempt from disclosure even if an investigation and prosecution have been completed—a claim which the courts have rejected with equal frequency.⁹⁷

Independent of these evidentiary privileges and exemptions from the Freedom of Information Act, there are a variety of important constitutional guidelines for the conduct of legislative inquiries. These guidelines prescribe limits to avenues of investigatory inquiry, consistent with the requirements of procedural due process and the privilege against self-incrimination. They also establish an absolute bar against inquiries into matters of belief protected by the First Amendment. As applied to the use of investigatory information in congressional hearings, these principles can be summarized as follows:⁹⁸

1. Before airing defamatory, adverse or prejudicial information, a committee should screen such material in executive session to determine its reliability.

2. An individual whom information tends to prejudice should be properly notified and given an opportunity to appear before the committee in executive session. He should be allowed to call supporting witnesses if he so requests, and to produce other evidence in order to rebut the prejudicial information. The same requirement of fair notice pertaining to witnesses at public hearings should apply, including a ban on disclosure of the names of witnesses in advance of their appearance.

3. No information discussed at an executive session should be disclosed prior to public session, and any defendant prejudiced by unauthorized disclosure should be entitled to dismissal of the indictment against him.

4. If adverse testimony is given in public session after the committee has determined in executive session that it is vital to an investigation, any person about whom such testimony is offered should be afforded an opportunity to:

- (a) Testify or offer sworn statements in his behalf;
- (b) subject a witness offering prejudicial testimony or documents to cross-examination; and
- (c) obtain the assistance of the committee in compelling the attend-

⁹⁷ See, e.g., *Getman v. N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971); *Bristol-Myers v. F.T.C.*, 424 F.2d 935 (D.C. Cir. 1970); *M. A. Schapiro & Co. v. S.E.C.*, 339 F. Supp. 467 (D.D.C. 1972); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968). *But see* *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) petition for certiorari pending, 42 U.S.L.W. 3434 (Jan. 21, 1974).

⁹⁸ See Policies # # 227-28, *Policy Guide of the American Civil Liberties Union* (1973 ed.).

ance of witnesses and the production of documents reasonably necessary to rebut the charges against him.

These constitutional principles, together with the evidentiary and Information Act privileges, assure the protection of the investigatory process and the privacy of persons under investigation. There is no need to import an "executive privilege," whether or not discretionary, to achieve the same ends.

C. *Advice Within the Executive Branch*

The remaining claim of privilege which must be examined relates to the power to withhold communications or documents that relate solely to internal advice within the executive branch. The principal reason for recognizing such a privilege as a necessary protection for the process of governmental decision making is the undoubted fact that persons will tend to be less candid in exchanging views and making recommendations if they know or fear that their ideas will be subject to later examination and possible public criticism.⁹⁹ There is no reason, however, that such a privilege should be regarded as exclusively "executive." Insofar as the privilege exists at all, it should apply equally to attempts to protect advice that law clerks or legislative assistants provide to judges or members of Congress. The principle involved is the necessity to protect the delicate internal decision-making process of each branch of government.

From a pragmatic standpoint there seems to be merit in conceding to the President the right in some situations to withhold advice, provided the power may be exercised only under carefully limited circumstances and is fully reviewable. The development of public policy will arguably be inhibited if individuals in government cannot rely on the confidentiality of their communicated opinions. A tragic example of such inhibition was the stagnation of American policy toward China in the wake of the censorious treatment of China experts in the State Department after the Communist regime came to power in 1949. To require all advice to be subject to potentially unfriendly scrutiny and misinterpretation would probably discourage candor and innovative ideas.

A second reason for protecting the advice that flows from one official to another is based on the realities of power and personal vulnerability. As stated by Professor Bishop:

It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a

⁹⁹ See Testimony of Hon. Dean Acheson, former Secretary of State, 1971 *Hearings* 259-72.

middle-aged, middle-ranking civil servant, who needs his job to do so.¹⁰⁰

In many cases, though not all, it will be sufficient if the bureaucrat's superior appears and testifies as to government decisions actually made. Congress should usually be able to obtain the requisite information in this fashion without injury to the reputation, sensibilities, or legal rights of a lower echelon bureaucrat. If a privilege is admitted on practical grounds to allow executive officers to decline to testify at the discretion of the President, it should apply down the line to the lesser and weaker members of the bureaucracy.

Assuming the existence of a privilege, it is important to determine its scope and practical application. We have attempted, therefore, to formulate a workable and coherent set of rules for applying the "advice privilege" that could be the basis for legislation.¹⁰¹

1. No witnesses summoned by a congressional committee may refuse to appear on the ground that he intends to invoke the privilege as to all or some of the questions that may be asked.¹⁰²

It has been suggested that certain officers in the executive branch—notably those who are White House aides to the President—may decline altogether to appear. This argument is based on the reasonable view that a Chief Executive needs some intimate advisors with whom to share private counsel entirely uninhibited by the risk of disclosure.¹⁰³

The difficulty is that we are no longer in an era when close personal advisors act purely in a counseling capacity. Not only do some individuals occupy dual positions of cabinet members and advisors to the President, but it is apparent that all chief White House aides are action officers as well as advisors. Accordingly, at least until we return to the days of a few personal White House advisors, if a presidential assistant is directed not to testify, he should make himself available to explain the reasons for the refusal. Any other rule opens the door wide to unjustified and even arbitrary assertions of privilege and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. a. The advice privilege may be claimed on behalf of a witness

¹⁰⁰ Bishop, *supra* note 78, at 477-88.

¹⁰¹ Compare Report of Comm. on Civ. Rts. of the Assoc. of the Bar of the City of N.Y., *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 THE RECORD 177-208 (1974).

¹⁰² See S. Con. Res. 30, 1973 *Hearings* 492-93.

¹⁰³ See NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA 53-55 (N. Dorsen & S. Gillers eds.), to be published June 1974. (remarks by Burke Marshall).

¹⁰³ Cf. *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 133 (1927).

summoned by a congressional committee only at the personal direction of the President.

b. This privilege may be asserted only with respect to recommendations, advice, and suggestions passed on to members of the executive branch for consideration in the formulation of policy.

c. A witness may not decline to answer questions about policy decisions that he personally made or personally implemented. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

d. A witness may not decline to answer questions about factual information that he acquired while acting in an official capacity.

The separation of "fact" from "advice," while sometimes difficult, is achievable. Indeed, executive departments are often required by the courts to make this separation in order to comply with requests for documents under the Freedom of Information Act and in other litigation. Without this separation an advice privilege invites abuse. As one witness pointed out in the 1971 Senate hearings on executive privilege, the protection of "advice" is potentially "a most mischievous privilege:"

Virtually every scrap written in the executive branch can, if desired, be labeled an internal working paper. Rarely are matters neatly labeled "facts," "opinions," or "advice." It can be used as readily to shield opinion corrupted by graft and disloyalty as to protect candor and honest judgment. And it can be used as a "back door" device for withholding state secrets and investigative reports from Congress.¹⁰⁴

Of course, if facts within the personal knowledge of a witness, or information relating to decisions that a witness personally made or implemented, are "inextricably intertwined with policy-making processes,"¹⁰⁵ secrecy should prevail. But if the separation can be made, Congress is entitled to the information not protected by executive privilege.

e. Executive privilege cannot be claimed as to material relating to a President's role as leader of his political party, as distinguished from his position as head of the executive branch of the government.

f. If the President or some other official has already made statements about the matter under inquiry by the Congress, the privilege is waived as to that subject. The potential net effect of selectively withholding information is to mislead the public as well as the legislative branch.

¹⁰⁴ Testimony of Professor Alvin C. Swan, 1971 *Hearings* 249.

¹⁰⁵ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92 (1973) *quoting* *Mink v. Environmental Protection Agency*, 464 F.2d 742, 746 (D.C. Cir. 1972).

3. a. Documents may be withheld from Congress or a committee of Congress only on the personal authorization of the President.

b. The privilege should extend not to entire documents but only to those portions which meet the criteria justifying an exercise of the advice privilege.

In the *Mink* case the Supreme Court declined to apply this discriminating rule with regard to classified documents because of the express language of the Freedom of Information Act.¹⁰⁶ On the other hand, in the Pentagon Papers case,¹⁰⁷ where a constitutional claim against prior restraints was presented, the Supreme Court held that the first amendment interests at stake were of such paramount importance that it declined to excise any portions of the documents. It would probably have been permissible for the President to have ordered purely advisory communications among the Pentagon Papers to be withheld from Congress if he had complied, as he should have, with the Senate Foreign Relations Committee's earlier request for the documents in December 1969.

Executive privilege is inconsistent with constitutional principles underlying the investigative power of Congress and the judicial reviewing function of the Supreme Court. The executive branch is therefore on weak ground in asserting that an entire document may be withheld solely because a portion of the document contains "advice."

4. Whatever the effect of these rules in other circumstances, there should be no executive privilege when the Congress has already acquired substantial evidence that the information requested concerns criminal wrong-doing by executive officials or presidential aides.¹⁰⁸ There is obviously an overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by the veil of an advice privilege. While the risk of abusive congressional inquiry exists, as the McCarthy experience demonstrates, the requirement of "substantial evidence" of criminal wrong-doing should guard against improper use of the investigative power.

In two 1972 cases the Supreme Court underscored its impatience with claims of constitutional privilege, based on the separation of powers, that shield investigations concerning "possible third party crime."¹⁰⁹ In the first case, the Court ruled that Senator Mike Gravel's assistant could

¹⁰⁶ *Id.* See text accompanying note 14, *supra*.

¹⁰⁷ *New York Times v. United States*, 403 U.S. 713 (1971).

¹⁰⁸ In such situations, of course, individuals summoned before Congress are entitled to exercise their constitutional rights such as the fifth amendment privilege against self-incrimination. They might also, for example, seek to suppress wiretap evidence seized in violation of their fourth amendment rights.

¹⁰⁹ *Gravel v. United States*, 408 U.S. 606 (1973); *United States v. Brewster*, 408 U.S. 501 (1973).

be compelled to testify about publication of the Pentagon Papers which Senator Gravel had read on the Senate floor. Justice White, speaking for himself and the four Nixon appointees to the Supreme Court, stated that the Senator himself could be interrogated by a grand jury if his sources of information related to crime. The Constitution "provides no protection for criminal conduct threatening the security of the person or property of others."¹¹⁰

The second Supreme Court case involved former Senator Daniel Brewster of Maryland, who was prosecuted for having received a bribe to influence his action on postal legislation. A lower court had held that such an indictment was invalid because it put into question Brewster's motives for legislative action—a subject that is constitutionally protected. The Court ruled, however, that "[t]aking a bribe is, obviously, no part of the legislative process or function."¹¹¹

The Gravel and Brewster cases are powerful precedents because the Supreme Court was dealing with an *explicit* constitutional immunity. In setting forth the privileges of Senators and Representatives, article I, § 6 of the Constitution provides that "for any speech or debate in either House, they shall not be questioned in any other Place." There is no such specific immunity based on executive privilege. It is therefore all the more evident that the privilege, whatever its reach, should not permit the Executive to withhold information concerning criminal conduct.

V. JUSTICIABILITY AND ENFORCEMENT

Judicial resolution of disputes concerning executive privilege will enable these issues to be determined in a manner that will minimize political considerations and establish precedent for the future. It is necessary, therefore, to consider the context in which an issue of executive privilege might be presented to the courts, the attendant problems of jurisdiction and justiciability, and the ways in which a court might enforce a decision on the merits.

A threshold question is how Congress itself might make a determination to submit the dispute to the courts. Not all congressional demands for information are expressive of the will of Congress, or even of a congressional committee, since many are pressed by individual members solely for private political reasons. To ensure that the contested information is sought pursuant to a formal legislative inquiry and thereby to prevent unnecessary confrontations, some checks are essential. One possibility would be a requirement that a legislative committee not seek

¹¹⁰ Gravel v. United States, 408 U.S. 606, 629 (1973).

¹¹¹ United States v. Brewster, 408 U.S. 501, 526 (1973).

judicial review of the Executive's assertion of privilege without the concurrence of a majority of that committee's members. Since a committee's request could be overruled by a vote of the full legislative body, a legislative resolution supporting judicial review would present the clearest indication of congressional will.¹¹²

Once a decision is made to seek a judicial resolution of the controversy, the party bringing suit must establish that its claim is within the jurisdiction of a federal court. The initial requirement, of course, is the existence of an Article III case or controversy. Despite the apparent incongruity of a suit between two branches of the federal government, the interests of the parties in an executive privilege dispute are adverse. One authority on executive privilege has properly cited the Supreme Court's decision in *United States v. I.C.C.*¹¹³ in pointing out the adversity of the interests involved in similar disputes:

[When] the disputants are Congress and the executive it would be sheer conceptualism to regard the United States as the *dominum litis*, for aside from the "people" to whom an appeal on this issue is unfeasible and remote, there exists no organ or body but the courts which can compel them to reconcile their differences.¹¹⁴

In addition to the "case or controversy" requirement, Congress must establish that the federal courts have subject matter jurisdiction to hear its claim. In the White House Tapes Case, Judge Sirica found that the federal courts have jurisdiction to resolve questions of executive privilege within the context of a subpoena issued by the Special Prosecutor acting with the authorization of a grand jury,¹¹⁵ but held that no such jurisdictional basis exists for a civil action by a congressional commit-

¹¹² A bill reflecting this approach was recently introduced by Senator Kennedy to authorize any Senate, House or joint committee to bring suit to contest claims of executive privilege. The bill confers jurisdiction on district courts to hear such suits, voidable by any subsequent expression of a contrary congressional intent:

§ 3103, General

. . .

(b) A civil action brought by a joint committee of Congress or a committee of either House of Congress shall be immediately dismissed with prejudice by the district court if—

(1) in the case of a civil action brought by a joint committee, Congress passes at any time a concurrent resolution stating that it does not favor the bringing of that action; or

(2) in the case of civil action brought by a committee of either House of Congress, that House of Congress passes a resolution at any time stating that it does not favor bringing that action.

S. 2073, 93rd Cong., 1st Sess. § 3103 (1973). See 1973 *Hearings* at 537.

¹¹³ 337 U.S. 426 (1949).

¹¹⁴ Berger, *supra* note 33, (pt. 2) at 1287.

¹¹⁵ *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973), *aff'd sub nom. Nixon v. Sirica*, 42 U.S.L.W. 2211 (D.C. Cir. Oct. 12, 1973).

tee.¹¹⁶ As we have seen, the Senate Watergate Committee's suit to obtain the tapes asserted four bases of jurisdiction, each of which was rejected by the district court.¹¹⁷

Since Congress is constitutionally empowered to define the jurisdiction of the federal courts, the congressional response to this rebuff was S. 2641.¹¹⁸ This Act, which became law on December 18, 1973 without presidential signature, confers original jurisdiction on the District of Columbia District Court, without regard to the sum or value in controversy, to entertain any civil action brought by the Committee to enforce or secure a declaration concerning a subpoena or order seeking relevant information, documents or tapes from any members of the executive branch.¹¹⁹

By drafting S. 2641 narrowly to meet the immediate exigencies of the Senate Select Committee on Campaign Activities, the Senate may have ensured its prompt passage, but it did little to solve the general problem of jurisdiction to entertain questions of executive privilege. A bill introduced by Senator Kennedy would, if enacted, avoid any future question of a federal court's jurisdiction in a privilege controversy. The bill provides that:

(a) 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.¹²⁰

¹¹⁶ Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

¹¹⁷ The Committee claimed jurisdiction under 28 U.S.C. § 1345, 28 U.S.C. § 1361, 28 U.S.C. § 1331, and the Administrative Procedure Act, 5 U.S.C. §§ 701-06. See note 21, *supra*.

¹¹⁸ Pub. L. No. 93-190 (Dec. 18, 1973); 119 CONG. REC. 20130-31 (daily ed. Nov. 9, 1973).

¹¹⁹ The District of Columbia District Court which ultimately considered the Committee's suit under the new jurisdictional statute found that the Court had jurisdiction, but determined that the Committee was not entitled to the tapes. 42 U.S.L.W. 2435 (D.C. Cir. Feb. 8, 1974). See note 135, *infra*. A more drastic method of getting an executive privilege issue before the courts than that which was utilized by Congress in the White House Tapes Case would be "by the simple and forthright process of causing the Sergeant at Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the Capitol police." Bishop, *supra* note 78, at 484 (1957). The prisoner's ensuing petition for a writ of habeas corpus would then present an unavoidable occasion for the courts to decide whether the executive had the authority to withhold the information which precipitated the dispute. Before imposing legislative punishment the Congress would have to give the "offender" due process—notice of the charge and an opportunity to appear and defend against it. If Congress were upheld, the "offender" would remain in custody until he testified, or procured the document in question, or until the end of the session of Congress.

¹²⁰ S. 2073, 93rd Cong., 1st Sess., § 1364. See 1973 *Hearings* at 534-35. See note 112 *supra*.

Once the constitutional and statutory prerequisites to jurisdiction are satisfied, several further hurdles remain before a decision on the merits can be reached. Principal among these are the standing of Congress or one of its committees to invoke the judicial process, and the justiciability of a dispute between the two political branches of government.

Standing should not be difficult to satisfy, even in the absence of a statute. In *Baker v. Carr*¹²¹ the Supreme Court stated that the question turns on whether the party has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues"¹²² Whenever the Executive withholds information essential to a coordinate branch of government, that branch is hindered, if not blocked, in the performance of its function. This impairment of function should constitute sufficient "personal stake" to establish the standing of a congressional committee.¹²³

Any uncertainty as to standing might be relieved by an appropriate statute specifically conferring standing on Congress and its committees to bring suit. Such a statute is exemplified by the bill proposed by Senator Kennedy which would give standing to "either House of Congress, a joint committee of Congress, or any committee of either House of Congress" to bring suit challenging an assertion of executive privilege.¹²⁴ An even broader statutory standing is conferred by the Freedom of Information Act, which permits any person to sue the federal agency denying a request for information.¹²⁵

The final barrier to judicial resolution of the privilege issue is the possibility that the matter will be considered a political question and

¹²¹ 369 U.S. 186 (1962).

¹²² *Id.* at 204. This test is applicable when the plaintiff does not rely on any specific statute authorizing invocation of the judicial process. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹²³ A recent Second Circuit decision, *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), reversing 361 F. Supp. 554 (E.D.N.Y. 1973), suggests that an individual member of Congress, suing in that capacity may not have the requisite personal stake to challenge executive action which allegedly infringes upon the prerogatives of Congress. In *Holtzman*, a congresswoman challenged the President's use of American military forces in Cambodia, which she claimed usurped the war making power granted to Congress under Article I, § 8 of the Constitution. The district court held that she had standing. The court of appeals reversed, finding no injury to the plaintiff in her role of congresswoman, since there had been no interference with her right to vote or participate in debate on the Cambodia issue. The limitation on standing which *Holtzman* reflects, however, should not prevent a court from finding that a congressional committee acting in its official capacity has standing to obtain judicial review of the propriety of the executive's refusal to comply with its demand for information.

¹²⁴ S. 2073, 93d Cong., 1st Sess. § 1364 (1973).

¹²⁵ 5 U.S.C. § 552(a)(3) (1970). While the Freedom of Information Act exempts nine categories of information from disclosure, subsection (c) of the Act provides that it is not authority to withhold information from Congress.

therefore not appropriate for judicial determination. The doctrine of executive privilege as presently asserted by the executive branch is the product of repeated and often sharp clashes between the two political branches of the government. For this reason it may initially be thought that the issue is incapable of judicial resolution. But in the past the courts have not hesitated to intercede in legislative-executive conflicts. This intercession is best demonstrated by the series of decisions in which the Supreme Court resolved the dispute over the power of the President to remove presidential appointees from congressionally-created commissions and the power of Congress to restrict such removals.¹²⁶ In so doing the Court was able to draw a line

. . . between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government" . . . as to whom a power of removal exists only if Congress may fairly be said to have conferred it.¹²⁷

In *Baker v. Carr*,¹²⁸ the Supreme Court provided its most comprehensive analysis of the political question doctrine. A Federal court may properly refuse to entertain only those controversies (1) which the Constitution explicitly remits to another branch of government for resolution or where judicial resolution would reflect a lack of respect for the powers of a coordinate branch of government; (2) where no judicially discoverable and manageable standards are available; and (3) where fashioning an appropriate remedy is inordinately difficult.¹²⁹

The Constitution is devoid of language remitting the resolution of executive privilege claims to another branch of government, and it has already been demonstrated that the "unreviewable discretion" asserted by the Executive is itself without any explicit or implied foundation in the Constitution. By the same token there is nothing in the Constitution which expressly grants to Congress an absolute right to information or

¹²⁶ *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

¹²⁷ *Wiener v. United States*, 357 U.S. 349, 353 (1958), quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935).

¹²⁸ 369 U.S. 186 (1962).

¹²⁹ This third criterion received the greatest emphasis in Justice Frankfurter's dissenting opinion. The majority opinion actually referred to several other factors none of which would be relevant to an executive privilege question, including the potentiality of embarrassment for multifarious pronouncements by different departments on one question, an unusual need for unquestioning adherence to a political decision already made, and the impossibility of deciding without an initial policy determination of a kind clearly requiring non-judicial discretion. *Id.* at 266-330.

a right to determine what information the President may treat as privileged.

In *Powell v. McCormack*,¹³⁰ the Supreme Court reviewed the action of the House of Representatives in expelling Congressman Adam Clayton Powell, Jr. The House claimed on the basis of article I, § 5 of the Constitution¹³¹ that it had been granted the explicit and exclusive right to determine its own membership. The Court was unimpressed by this argument and took the position that it had to decide what powers were conferred by the Constitution before determining the scope of judicial review.

If judicial review is appropriate despite the specific constitutional language granting Congress control over its own membership, it should also be appropriate in the context of executive privilege where there is no such express authority:

Although the House in *Powell* raised the argument that an embarrassing confrontation would be created by a decision rejecting the claimed legislative prerogative, the Court pointed out that on occasion the judiciary is required to "interpret the Constitution in a manner at variance with the construction given the document by another branch."¹³² Similarly, the District of Columbia courts in resolving the question of grand jury access to the Nixon tapes stated that their duty was to determine the applicability of executive privilege to material evidence in a criminal investigation.¹³³ If judicial resolution of an executive-judicial controversy is proper, a decision regarding congressional access to the tapes or any other executive documents or information would certainly create no greater confrontation.

Having the power to decide an issue of executive privilege, the courts do not lack available standards for review. In contrast to the difficult problem of working out criteria for equal representation in the apportionment cases, the standards for deciding the scope of executive privilege can be based on distinctions no more difficult to make than those outlined above,¹³⁴ and no more difficult than those which courts are accustomed to make in resolving problems of evidentiary privilege. For example, in analyzing the claim of an absolute privilege in the White House Tapes

¹³⁰ 395 U.S. 486 (1969).

¹³¹ U.S. CONST. art. I, § 5, reads in pertinent part: "Each House shall be the Judge of the . . . Qualifications of its own Members. . . . Each House may . . . expel a Member."

¹³² *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

¹³³ *Nixon v. Sirica*, 42 U.S.L.W. 2211 (D.C. Cir. Oct. 12, 1973); *In re Grand Jury Subpcena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

¹³⁴ Section IV, *supra*.

Case, the district court referred to prior case law concerning the privilege of secrecy among jurors.¹³⁵

Although the privilege of the Executive to deny documents and information to Congress has arisen in a context different from that in which rules of privilege have generally developed, the same underlying policies are applicable. The benefits and injuries, both to those directly involved and to the general public, resulting from disclosure must be assessed. If the courts can do this in defining the scope of executive privilege with respect to evidence requested by the grand jury, they should also be able to do it with respect to the information sought by Congress.

The last factor to be considered is the ability of the court to shape an "appropriate mode of relief." Reference can again be made to *Baker v. Carr*¹³⁶ and the willingness of the Supreme Court to reach the merits of a "political" dispute. The Court in *Baker* indicated no qualms about remanding the case, although it was evident that a decision for the petitioners would require the lower court to order and supervise a plan of reapportionment involving thirty-three senate districts and ninety-nine house districts in the State of Tennessee.¹³⁷ In a similar fashion, the Court in *Brown v. Board of Education*¹³⁸ remanded the case to the district court with instructions to weigh a series of complex factors in deciding whether to admit the plaintiffs to public schools on a racially nondiscriminatory basis. If courts are able to respond to situations such as these, they have no justification for withdrawing from controversies over executive privilege. Appropriate relief would not be extraordinary and could be accomplished either by an order to produce¹³⁹ or a ruling that the information is privileged.

¹³⁵ *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1, 13 (D.D.C. 1973), citing *Clark v. United States*, 289 U.S. 1 (1933). The possible interchangeability of privilege rules is further suggested by the fact that the *Clark* opinion drew an analogy from the attorney-client relationship.

An indication that the same considerations traditionally utilized to resolve issues of contested evidence are appropriate to an executive privilege question is suggested by Judge Gesell's resolution of the Senate Committee's suit to obtain Watergate related tapes. Judge Gesell found that the Committee had not made such a demonstration of need as would outweigh the Special Prosecutor's need for secrecy, because of the possibility that pre-trial publicity might preclude the possibility of a fair trial for defendants in Watergate related trials. 42 U.S.L.W. 2435 (D.C. Cir. Feb. 8, 1974). See note 119, *supra*.

¹³⁶ 395 U.S. 486 (1969).

¹³⁷ For an account of all the litigation and a description of the plan finally approved, see *Baker v. Carr*, 247 F. Supp. 629 (M.D. Tenn. 1965). It is understandable that in such a task the lower court was willing to rely upon the litigants to implement or suggest various plans and retain for itself the power to approve or disapprove.

¹³⁸ 349 U.S. 294 (1955).

¹³⁹ Rather than an absolute order to produce, the court might require delivery of the documents to the court for an *in camera* inspection, as in *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

A collateral consideration in terms of shaping appropriate relief is the enforcement of an order against the Executive, should production be required. In the White House Tapes Case, the court conceded that it lacked the physical power to enforce the production order, but it considered this to be "immaterial to a resolution of the issues."¹⁴⁰

Regardless of its physical power to enforce them, the Court has a duty to issue appropriate orders. The Court cannot say that the Executive's persistence in withholding the tape recordings would tarnish its reputation, but must admit that it would tarnish the Court's reputation to fail to do what it could in pursuit of justice.¹⁴¹

Furthermore, judicial enforcement of an order resolving an executive privilege dispute would not create other dangers against which the Supreme Court fashioned the political question doctrine: it would not "risk embarrassment of our government abroad, or grave disturbance at home," nor would it embroil the courts in "overwhelmingly party or intra-party contests."¹⁴² For these reasons, we do not believe that the Executive would refuse to comply with a resolution of the issue by the judicial branch.

Nor do we mean to suggest that such a resolution would always be against the asserted interests of the Executive. An absolute congressional power to compel information should not be substituted for an absolute executive power to withhold it. All unlimited power is inherently dangerous, and it is the salutary function of the courts to circumscribe the boundaries of the executive and legislative powers so that neither branch is exalted at the expense of the other. The so-called executive privilege seems preeminently an issue to be resolved in this manner.

¹⁴⁰ *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1, 9 (D.D.C. 1973).

¹⁴¹ *Id.* (footnote omitted). See also *Powell v. McCormack*, 395 U.S. 486, 549 n.86 (1969) ("it is an inadmissible suggestion that action might be taken in disregard of a judicial determination").

¹⁴² *Baker v. Carr*, 369 U.S. 186, 324 (Frankfurter, J., dissenting).