Executive Privilege and the Congress: Perspectives and Recommendations

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COMMENTS

EXECUTIVE PRIVILEGE AND THE CONGRESS:
PERSPECTIVES AND RECOMMENDATIONS

The doctrine of executive privilege has surfaced at the height of several controversies recently and this exposure has raised numerous questions concerning its nature, none of which have been more debated than the validity of its existence. Its advocates have pointed to history, statutes, court decisions, and the Constitution in an effort to justify its use, while its skeptics using the same materials have arrived at a different conclusion. The ultimate resolution of this issue is of more than academic concern, for executive privilege has created an executive-legislative schism the breadth of which threatens the constitutional framework of this nation's government. Is executive privilege well-established doctrine or ill-supported dogma? What are the effects of its assertion? And most importantly, is constitutional government in the United States institutionally equipped to resolve fundamental differences between its co-equal branches? These are the questions which are raised by the privilege and which will be considered during the course of this analysis. However, before proceeding further, executive privilege must be defined. Its supporters contend that it is an unlimited right of the executive branch to withhold information requested by the legislature pursuant to its authority to investigate. Thus, the analysis will begin with a survey of the congressional power of investigation.


2. The problems caused by executive privilege have grown in intensity due to the fact that its use has increased. President Kennedy claimed it four times during his abbreviated term whereas President Nixon has invoked its shield nineteen times during his presidency. 31 CONG. Q. WK. REP. No. 38, at 729, Mar. 31, 1973.
COMMENTS

It is essential that Congress possess broad investigatory powers. To deny this authority would be to compel all of the legislative processes—that is, proposal, debate, decision, and assessment—to be performed in an injudicious fashion, the end product of which would be ineffective congressional enactments. Not only does Congress need information to perform its legislative tasks, but once a particular law has been passed it also needs to convey to the people all of the pertinent data concerning that legislation in order to generate the public support and voluntary compliance so necessary for the success of any legislative program. Thus, if Congress is to adequately meet its constitutional responsibilities to the people it needs facts—all of the facts.

In *McGrain v. Daugherty*, the Supreme Court determined that there were two bases to support the existence of an investigatory power. The first source is found by constitutional resort to the necessary and proper clause. However, principal reliance is placed on the power to legislate, a power which is felt to include attributive authority to investigate in furtherance of that end. As the Court was later to state: "Investigations, whether by standing or special committees, are an established part of representative government." Despite this type of blanket endorsement, congressional investigations are not without limitations.

In *Wilkinson v. United States*, the Supreme Court was confronted with a challenge to a contempt citation issued by the House Un-American Ac-
tivities Committee which was investigating Communist infiltration into the textile industry. During the course of the proceedings the witness, Wilkins, refused to answer the question, "Are you now a member of the Communist Party," on the grounds that the Committee was without lawful authority to interrogate him and that its questioning violated his first amendment rights. In rejecting these contentions and affirming the conviction, the Court delineated the boundaries within which Congress must confine its investigations.11

First, there must be a subject matter for the inquiry. Second, the investigation must be authorized by Congress.12 Third, the legislature must have a valid legislative purpose which it is pursuing. This requirement is especially broad, since there is an initial presumption that all congressional investigations are conducted with the requisite legitimate intent,13 and since congressional examinations are not limited to the scope or content of contemplated legislation.14 As the District of Columbia Court of Appeals explained:

In deciding whether the purpose is within the legislative function, the mere assertion of a need to consider "remedial legislation" may not alone justify an investigation . . . but when the purpose asserted is supported by reference to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation, then we cannot say that a committee of Congress exceeds its broad power when it seeks information in such areas.15

Fourth, the witness must be contemporaneously informed of his rights and then, in the subsequent proceeding, none of those rights must be violated.16 In Watkins v. United States,17 the Supreme Court, in holding the Bill of Rights applicable to congressional inquiries, posited the method by which to discern if an individual’s constitutional guarantees had been

10. Id. at 404.
11. Id. at 408-409.
"The critical element is the existence of, and the weight to be ascribed to, the interest of Congress in demanding disclosures from an unwilling witness." This balancing-of-interests approach was applied in *Barenblatt v. United States*, a case in which the petitioner asserted the first amendment's freedom of association mandate as a bar to questions concerning his relationship with the Communist Party asked by the House Un-American Activities Committee. The Court rejected this contention based on its feeling that the Government's interest in dealing with Communist activity, which it described as the right of self-preservation, far outweighed that of the individual in secreting his personal affiliations. It is to be noted, however, that the petitioner's argument was based on the first amendment and not on the fifth amendment's privilege against self-incrimination which, had it been asserted, would have successfully circumvented the interrogation.

The fifth and final limitation—whether the question is pertinent to the investigation—dovetails with the fourth requirement, for it directly focuses on the individual's right to expose and repel irrelevant inquiry. Once the subject matter of the investigation has been ascertained, the questions must be related to and in furtherance of that subject matter.

Two issues are raised when disclosure is refused by a witness on pertinency grounds. First, the due process clause of the fifth amendment requires that a criminal law clearly appraise those subject to its sanctions of possible violations. Since the appropriate remedial action for a congressional committee to take against a contumacious witness is contempt which carries criminal penalties, it is incumbent upon the committee at the time of the refusal to relate to the uncooperative witness the relevancy of the request in view of the subject matter of the inquiry, or a contempt proceeding will fail on the basis of vagueness. The necessary connection between the subject matter of the investigation and the particular request may be indicated by Congress through the resolution authorizing the investigation, the opening remarks of the committee chairman or members, the nature of the investigative proceedings thus far conducted, or even the questions themselves. However, if the witness, after receiving this explanation, still refuses to cooperate and if the commit-

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18. *Id.* at 198.
20. *Id.* at 134.
21. See pp. 698-99 and accompanying notes *infra*.
23. See note 32 and accompanying text.
tee then decides to initiate contempt proceedings, the second issue regarding the pertinency requirement is raised, for in a contempt proceeding Congress has the burden of proving the pertinency of its request.

The relationship between these two pertinency issues was explained by the Supreme Court in *Deutch v. United States*, in which a witness, asked certain questions by the House Un-American Activities Committee, refused to respond on the ground that his answer would violate a moral conviction he held against testifying against his friends. The Court, in dismissing the contempt conviction against Deutch, found that while his objection to the questions was not based on a pertinency claim and thereby did not necessitate a committee explanation of the connection between the subject matter and the request, nonetheless the government did not meet the pertinency burden at trial. Thus, in the first instance the pertinency of the request need only be explained by a congressional investigative committee if the witness raises the issue as an objection during the congressional inquiry. However, in the second phase of a contempt conviction, the trial, the pertinency requirement will always be encountered by the government since it is a statutory element of proof.

Another issue which frequently arises in the litigation of the pertinency requirement has been the exposure problem: the question cannot attempt to expose the private affairs of the witness merely for the sake of exposure. This claim was raised in *Hutcheson v. United States* in which the Senate Select Committee on Improper Activities in the Labor or Management Field, investigating the possibility of drafting legislation to stop the misuse of union funds by union officials, interrogated Hutcheson, a union president, about the use of union funds under his control. He refused to answer eighteen questions on this subject. He alleged as grounds for his uncooperative responses that the Committee's purpose in examining him was to subject his union activities to prosecutorial scrutiny. The Supreme Court rejected this argument by pointing out that a validly authorized congressional investigation, which has as its focus an area in

which it could legitimately legislate, need not avoid questions which, although otherwise relevant to the inquiry, may potentially be harmful to a witness in a law suit.29 Again though, questions which may produce incriminating answers may be averted by an assertion of the fifth amendment privilege.30

As this survey indicates, congressional exploratory power is as broad as the power to legislate and, as a cursory glance at the legislative history of the United States discloses, the power to legislate is all-pervasive. It has to be comprehensive. Congressional enactments, unlike judicial decisions, immediately affect the rights and expectations of millions of people—they are just too important to be established without an exhaustive examination of all of the pertinent facts. However, Congress’ authority to investigate means little if in addition Congress possesses no concomitant power to compel the cooperation of contumacious witnesses. As the Supreme Court stated in *McGrain v. Daugherty*:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.31

Therefore, in order to assert this power two statutes were enacted. The first statute, referred to earlier in the discussion of the pertinency requirement, enables Congress to punish for contempt any person properly summoned either to testify to or to produce records for a congressional com-

29. 369 U.S. at 618.
30. See pp. 698-99 and accompanying notes infra.
31. 273 U.S. at 175. *Cf. Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), wherein the Court stated:

We think, therefore, that the courts of appeals were correct in the view that Congress has authorized the Administrator rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon which that question, by seeking the production of petitioners relevant books, records and papers; and in case of refusal to obey his subpoena, issued according to the statutes authorization, to have the aid of the district court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the “necessary and proper” clause, as incidental to both its general legislative and its investigative powers.

*Id.* at 214.
mittee.\textsuperscript{32} The second statute\textsuperscript{33} disallows any claim of privilege based on the contention that the testimony or the production of records may disgrace the witness.\textsuperscript{34} Despite the existence of these statutes and the judicial limitation placed on the utilization of the Bill of Rights by a recalcitrant witness to avoid congressional examination, the fifth amendment's privilege against self-incrimination does, for all practical purposes, allow the witness to invoke its protection without a great possibility of successful challenge.\textsuperscript{35}

First, the privilege applies to answers that have a tendency to incriminate.\textsuperscript{36} For example, in \textit{United States v. Lacavoli},\textsuperscript{37} an individual suspected of illegal activities successfully claimed the privilege when a Senate committee investigating organized crime asked him the nature of his busi-

\begin{quote}

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.


No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Both this statute and 2 U.S.C. § 192 were found to be constitutional in In Re Chap-\textit{man}, 166 U.S. 661 (1897).

\textbf{34.} See pp. 695-97 and accompanying notes \textit{supra} for a discussion of the exposure problem.

\textbf{35.} As was seen in the discussion of the \textit{Barenblatt} case, \textit{supra} note 19 and accompanying text, the assertion of individual liberties by a witness to avoid congressional inquiry prompts the application of the balancing of interests test to determine whether the witness may justifiably decline to answer. However, the Court in \textit{Barenblatt} also indicated that the protection of the fifth amendment's privilege against self-incrimination if properly raised does, unlike reliance on the other constitutionally protected freedoms, afford the witness absolute protection. The Court stated: "[T]he protections of the First Amendment unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances." \textit{Barenblatt v. United States}, 360 U.S. 109, 126 (1959).


\textbf{37.} 102 F. Supp. 607 (N.D. Ohio 1952). \textit{See also} \textit{Jackins v. United States}, 231 F.2d 405 (2d Cir. 1956); \textit{United States v. Doto}, 205 F.2d 416 (2d Cir. 1953); \textit{United States v. Costello}, 198 F.2d 200 (2d Cir. 1952); \textit{Marcello v. United States}, 196 F.2d 437 (5th Cir. 1952).
ness interests. Moreover, the fifth amendment is also an appropriate shield for questions that may produce answers which, although not incriminating in themselves, may, nonetheless, provide a link in the chain of evidence needed for the prosecution of that witness.\textsuperscript{38} This is illustrated by the case of United States v. Auippa\textsuperscript{39} in which a Senate committee investigating organized crime asked the witness whether he owned a lodge in another state. The purpose of this inquiry was to solicit from the witness the names of others who were suspected of hiding at his lodge in order to avoid service of process. His reliance on the right against self-incrimination as grounds for a refusal to answer the question was upheld by a federal district court since the answer might have furnished a link in the chain of evidence needed to prosecute him.\textsuperscript{40} Assuming that the legislature has adhered to the limitations on its investigatory power and that the witness has unsuccessfully claimed or has not raised a constitutional shield to avoid the production of documents or the response to questions, Congress may, in order to preserve and carry out its legislative authority,\textsuperscript{41} punish the recalcitrant witness of contempt in accordance with 2 U.S.C. § 192.\textsuperscript{42}

\textit{Investigative Power and The Executive}

The primary problem faced by the national legislature when it attempts to assert its investigatory authority over the executive is one of power—the power to compel disclosure from a co-equal branch of the Government. The Supreme Court has held that the congressional subpoena power vests the legislature with the same scope of authority as is possessed by the courts in their use of judicial subpoenas.\textsuperscript{43} The only difference

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{38}
\item 341 U.S. at 486.
\item 102 F. Supp. 609 (N.D. Ohio), \textit{rev'd on other grounds}, 201 F.2d 287 (6th Cir. 1952).
\item 102 F. Supp. at 614.
\item See discussion at note 32 \textit{supra}.
\item In Kilbourn v. Thompson, 103 U.S. 168 (1880), the Supreme Court stated that Congress has “the right to compel the attendance of witnesses, and their answers to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.” \textit{Id}. at 190. In addition, the Court has likened the congressional investigative power to that of the grand jury, United States v. Johnson, 319 U.S. 503, 510 (1943), and in Branzburg v. Hayes, 408 U.S. 665 (1972), the Court, in commenting upon the function of the grand jury, cited approvingly the view of the Second Circuit Court of Appeals that a grand jury investigation “is not fully carried out until every available clue has been run down and all witnesses examined . . . .” United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970), \textit{as cited in} Branzburg v. Hayes, 408 U.S. at 701.
\end{enumerate}
\end{footnotesize}
is the purpose for which the information is gathered; the courts use the information to settle disputes while Congress considers the data in formulating national policy.\textsuperscript{44} Since the congressional inquiry into the Watergate scandal marks the first historic attempt by Congress to force an uncooperative President to relinquish information,\textsuperscript{45} the use of judicial subpoenas in analogous situations must furnish the guidance.

\textsuperscript{44} Although both the judicial and the legislative use of subpoenas serves vital interests, the legislative need is the more essential of the two, since initially more interests are involved in a legislative determination than are involved in a court decision. \textit{See} p. 697 \textit{supra}.

\textsuperscript{45} When past Presidents refused to comply with congressional requests for information, Congress acquiesced in these refusals by not pursuing the particular requests further. It is these self-serving refusals which the advocates of an executive prerogative have cited as precedential evidence favoring the existence of the privilege. Despite the Supreme Court's view that constitutional interpretation may be established by prior usage, the use of unchallenged, past presidential practice as support for executive privilege reveals the nature of its claim to validity; it is untested, unresolved political theory. However, for the purpose of historical reference some of the instances in which Presidents refused to comply with congressional demands for information are:

<table>
<thead>
<tr>
<th>PRESIDENT</th>
<th>DATE</th>
<th>TYPE OF INFORMATION REFUSED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas Jefferson</td>
<td>1807</td>
<td>Confidential information and letters relating to Burr's conspiracy.</td>
</tr>
<tr>
<td>James Monroe</td>
<td>1825</td>
<td>Documents relating to conduct of naval officer.</td>
</tr>
<tr>
<td>Andrew Jackson</td>
<td>1833</td>
<td>Copy of paper read by President to heads of departments relating to removal of bank deposits.</td>
</tr>
<tr>
<td></td>
<td>1835</td>
<td>Copies of charges against removed public official.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries, without holding office.</td>
</tr>
<tr>
<td>John Tyler</td>
<td>1842</td>
<td>Names of Members of 26th and 27th Congress who had applied for office.</td>
</tr>
<tr>
<td></td>
<td>1843</td>
<td>Colonel Hitchcock's report to War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.</td>
</tr>
<tr>
<td>James K. Polk</td>
<td>1846</td>
<td>Evidence of payments made through State Department on President's certificates, by prior administration.</td>
</tr>
<tr>
<td>Millard Fillmore</td>
<td>1852</td>
<td>Official information concerning proposition made by King of Sandwich Islands to transfer islands to U. S.</td>
</tr>
<tr>
<td>James Buchanan</td>
<td>1860</td>
<td>Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.</td>
</tr>
</tbody>
</table>
In *United States v. Burr,* the Supreme Court held that a letter in the possession of the President and relevant to the defense of the accused

<table>
<thead>
<tr>
<th>President</th>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abraham Lincoln</td>
<td>1861</td>
<td>Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.</td>
</tr>
<tr>
<td>Ulysses S. Grant</td>
<td>1876</td>
<td>Information concerning executive acts performed away from Capitol.</td>
</tr>
<tr>
<td>Rutherford B. Hayes</td>
<td>1877</td>
<td>Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.</td>
</tr>
<tr>
<td>Grover Cleveland</td>
<td>1886</td>
<td>Documents relating to suspension and removal of 650 Federal officials.</td>
</tr>
<tr>
<td>Calvin Coolidge</td>
<td>1924</td>
<td>List of companies in which Secretary of Treasury Mellon was interested.</td>
</tr>
<tr>
<td>Herbert Hoover</td>
<td>1930</td>
<td>Telegrams and letters leading up to London Naval Treaty.</td>
</tr>
<tr>
<td>Franklin D. Roosevelt</td>
<td>1932</td>
<td>Testimony and documents concerning investigation made by Treasury Department.</td>
</tr>
<tr>
<td></td>
<td>1941</td>
<td>Federal Bureau of Investigation reports.</td>
</tr>
<tr>
<td></td>
<td>1943</td>
<td>Director, Bureau of the Budget, refused to testify and to produce files. Chairman, Federal Communications Commission, and Board of War Communications refused records. General Counsel, Federal Communications Commission, refused to produce records. Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.</td>
</tr>
<tr>
<td></td>
<td>1944</td>
<td>J. Edgar Hoover refused to give testimony and to produce President's directive.</td>
</tr>
<tr>
<td>President Truman</td>
<td>1945</td>
<td>Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee. President's directive did not include any files or written material.</td>
</tr>
<tr>
<td></td>
<td>1947</td>
<td>Civil Service Commission records concerning applicants for positions.</td>
</tr>
</tbody>
</table>

See pp. 718-20 and accompanying notes *infra.* This list was compiled by the Truman administration in 1948 and articulated in the form of a memorandum which is now located in the Harry S. Truman Library in Independence, Missouri. It is reprinted from Wolkinson, *Demands of Congressional Committees for Executive Papers,* 10 Fed. B.J. 107, 147-49 (1949).

could be subpoenaed. However, Chief Justice Marshall, as the author of the majority opinion, indicated that a pragmatic enforcement dilemma would result if, after the delivery of a subpoena upon the President, the Chief Executive refused to obey its mandate. Thus, the Court qualified its denial of presidential immunity from judicial process by stating that there may be justifiable grounds for the President to ignore a court order.

The problem and its constitutional ramifications were precisely articulated by Attorney General Stanberry in *Mississippi v. Johnson* as he defended President Johnson in a suit brought by the state of Mississippi to enjoin the President from administering the Reconstruction Acts on the ground that the laws were unconstitutional. The Attorney General questioned the court's power to incarcerate the President for contempt if he disobeyed the injunction and he pointed out that even if the courts were able to have the President arrested, who would perform the Chief Executive's function while he was in jail? These considerations explain the different judicial treatment accorded the President as compared to that given subordinate executive officers: special deference to the Presidency is, if for no other reason than its unitary character, a constitutional necessity, whereas the subordinate executive officers' functions may always be performed by someone else.

The Court in *Johnson*, in concluding that the President could not be enjoined in this situation determined that the only time an official of the executive branch is in his official capacity subject to the power of a court order is when the subject matter of that order is a ministerial duty, involving no discretionary interpretation on the official's part. The Court found


48. 25 F. Cas. at 34.

49. 71 U.S. (4 Wall.) 475 (1866).

50. *Id.* at 488-89.

51. In contrast to the Court's cautious attitude toward the enforcement of judicial process on the President in *Burr*, subordinate executive officials have uniformly been found to be subject to judicial order. For example, in Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), a district court issued a writ of mandamus to the Postmaster General ordering him to pay certain persons sums of money owed to them by the government pursuant to several contracts. In upholding the writ the Supreme Court said:

[The authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution.]

*Id.* at 618. *See also* United States v. Guthrie, 58 U.S. (17 How.) 284 (1854).
that the executive function in executing the laws is not the equivalent of a ministerial duty.\textsuperscript{52} Despite the opinion's corollary implication, it did not explicitly state that a subpoena or any court order could be enforced to either compel or check the executive performance of a ministerial task. This concept though has been accepted, as the recent case of \textit{Minnesota Chippewa Tribe v. Carlucci}\textsuperscript{53} illustrates.

In \textit{Carlucci} a federal district court issued an order directing President Nixon to appoint the members of the National Advisory Council on Indian Education which he was authorized to do\textsuperscript{54} and which at the time of the suit he had failed to do.\textsuperscript{55} In the course of the opinion the court stated that the President is not completely immune from the judicial process, but that there are several situations which would prompt a court to refuse to issue a court order to the President. First, courts will refrain when the plaintiff lacks standing, that is, when the plaintiff does not have a personal stake in the outcome of the litigation. Secondly, the executive function which is the subject of the judicial scrutiny must not be of a discretionary nature, which of course excludes review of the President's role as Commander-in-Chief\textsuperscript{56} and the President's role in the execution of the laws—in short, any determination which is constitutionally committed to the sole discretion of the executive branch is immune from judicial scrutiny.\textsuperscript{57}

The derivative conclusions from this analysis should be prefaced by simply recognizing that Congress, just as the judiciary, has the authority to subpoena information from the President. However, whether Congress has the power to enforce that authority depends upon the answer to the core question in issue: Does an unlimited executive privilege exist, leg-

\textsuperscript{52} 71 U.S. at 498-99.
\textsuperscript{54} Section 442(a) of the Indian Education Act states: "appointments shall be made by the President..." Thus, the court, using this language found a duty devolving upon the President to make the appointments, but it was clearly within his discretion to determine whom to appoint. 358 F. Supp. at 975.
\textsuperscript{55} Subsequent to the court order against the President, the district court issued an order on May 8, 1973, dismissing its previous order as moot because the President had by that time filled the vacancies.
\textsuperscript{56} If the President is acting within the confines of article II, section two of the Constitution there can be no judicial review of his action since the Constitution appoints him alone Commander-in-Chief. However, the type and extent of executive action which is justified by the Commander-in-Chief power is a justiciable question. See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803).
\textsuperscript{57} 358 F. Supp. at 975.
ally? If the answer to this question is “Yes,” then the determination of whether to assent to a congressional demand for information is totally within the President’s discretion, and any decision he reaches is traditionally not subject to challenge. But, if the answer is “No,” then the President has no choice but to deliver the requested information to Congress, since Congress, by reason of its broad investigatory authority and its concomitant subpoena power, has the right to compel such a delivery. Despite this dissectional description, the situation is in reality not subject to such a neat distillation, since a third possibility exists. Even if the answer to the threshold question is “No,” the President, regardless of his lack of authority, does have the power by his mere possession of the information, to unlawfully resist the request. In this situation, because it is unrealistic to even contemplate the use of physical force to enforce a subpoena, the only recourse is the impeachment process with the legislature as the judge, or the ballot box with the people as the final arbiters of the dispute.

The answers to these perplexing quaeres can only be formulated after the legal status of executive privilege is determined. However, this determination is not easily made, since nowhere is affirmative, unambiguous authority to be found which establishes an executive exemption from the ambit of the congressional subpoena power. Nevertheless, executive privilege advocates have asserted that the doctrine’s source is not mythology, as has been suggested, but rather it is unequivocally established by the firmest of legal authorities—legislative acts, judicial decisions and constitutional mandates as buttressed by American political history.

THE ARGUMENTS FOR EXECUTIVE PRIVILEGE

The proponents of the privilege have frequently argued that its foundation was built by the Congress itself through both official statements which recognized the prerogative of the President and statutory enact-

58. As Mr. George Meader, member of the House of Representatives from Michigan said in 1958:

Mr. Speaker it is difficult to prove that a non-existent thing does not exist. That is the dilemma with the so-called Executive privilege. The burden of proof should be upon those who assert that there is Executive privilege which, of course, is nowhere mentioned in the Constitution or in any court decision in any controversy concerning the investigative power of Congress.

104 CONG. REC. 3853 (1958) (remarks of Representative Meader).

59. It has been urged that the statements of Congressmen in their official capacity have the force of establishing an all-pervasive doctrine of unchallengeable discretion in the executive to determine if Congress should or should not receive requested information. For example, Senator Stennis, in commenting upon President Kennedy’s refusal to submit to the Congress the names of the Defense Department speech reviewers, said:
ments which codified its existence. Although no statute specifically states that there is such a theory, its advocates have found support for their opinions in laws which focus on a specific problem and, in the course of that statutory treatment, allow some choice of informational disclosure to be exercised by the executive branch. The laws relied upon for these opinions have differed depending upon the time authored; however, several statutes have been discussed more frequently, and it is these which provide the most difficult challenge to the executive privilege critic.

The first statute is the Freedom of Information Act which, despite its initial mandate that "[e]ach agency shall make available to the public information," contains a section detailing certain exemptions to the general disclosure provision among which is information "required by Executive order to be kept secret in the interest of national defense or foreign policy." Although it is debatable whether the President qualifies as an "agency" within the meaning of the Act and is subject to its authority, that is beside the point, for it can be argued that apart from its role in the statutory scheme the exemption is a congressional admission that the privilege exists and as such is established by this official acknowledgement. The weakness in this position is threefold. First, the statute specifically states that this section "is not authority to withhold information from Congress;" in fact, the entire focus of the Act is on public disclosure. Second, there is a difference between recognition of the privilege and its establishment. Since the recognition of anything is premised on its establishment, it is indeed circular to attempt to refute a skeptical analysis of the basis of a legal theory by pointing

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either of them could. So the rule works three ways. Each is supreme within its field.

Hearings Before the Special Preparedness Subcomm. on Military Cold War Education and Speech Review Policies of the Senate Comm. on Armed Forces, 87th Cong., 2d Sess., pt. 2, at 512 (1962). This argument is extremely weak since an individual legislator's opinions, both official and unofficial, are of no use as legally binding precedential authority. Cf. p. 751 infra.


to the institutional recognition of that theory as an answer. In addition, it is somewhat curious to use as blanket justification for the right to withhold any and all information from Congress a statute authored and approved by Congressmen with the express purpose of providing information to the public.

The lack of an interrelationship between the Freedom of Information Act and executive privilege was indicated in the case of *Soucie v. David.* A group of citizens brought suit under the Act to compel the Director of the Office of Science and Technology to release certain documents concerning the development of the supersonic transport aircraft. Although the Director's claim of executive privilege was not properly raised, Chief Judge Bazelon, in the majority opinion, did comment on the roots of the privilege which he felt to be in the constitutional theory of separation of powers rather than in the statutory exemptions of the Act.

The second statute that is frequently cited in support of the privilege is the Departmental Regulations Statute which provides that:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Several cases interpreting this provision have been advanced as corroborative evidence of the existence of the executive's informational perogative.

The first case is *Boske v. Comingore* in which the state of Kentucky brought suit against the owners of a liquor distillery for tax evasion. During the proceedings Comingore, an Internal Revenue agent, was asked as a deponent to file with the court certain reports in his possession concerning the business activities of the defendants. This he refused to do based of a department regulation, issued pursuant to 5 U.S.C. § 301, which prohibited him as an agent from releasing Internal Revenue records to anyone without the express permission of the Secretary of the Treasury. After being found guilty of contempt of court and imprisoned, the agent filed for a writ of habeas corpus with the Supreme Court. The Court, in finding for the agent, held that it was neither inconsistent with the

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65. 448 F.2d 1067 (D.C. Cir. 1971).
66. 448 F.2d at 1071 n.9.
68. 177 U.S. 459 (1900).
Constitution nor with the laws of the United States for a department head to prohibit his subordinates from releasing agency records.\textsuperscript{69}

In the later case of \textit{Touhy v. Ragen},\textsuperscript{70} the Supreme Court decided the same issue as presented by facts analogous to those in \textit{Boske}. A subordinate official in the Justice Department refused to obey a court issued subpoena ordering the production of departmental papers under his control. The Court upheld his refusal, since, as in \textit{Boske}, it was based on a department regulation promulgated under the authority of 5 U.S.C. § 301 which the Court felt to be a valid regulation.\textsuperscript{71}

The privilege defenders have read these cases as holding that the executive has absolute discretion in determining whether and to what extent information should be released to Congress. Support for this position is derived from a combination of "wishful" reading and an expansive use of dicta, for the only issue decided in both opinions was that regulations issued by a department head pursuant to 5 U.S.C. § 301 prohibiting employees from releasing certain types of information were valid because the statute on which they were based was valid. This analysis is supported by Justice Frankfurter in his concurring opinion in the \textit{Touhy} case, because:

\[ \text{To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.} \textsuperscript{72} \]

The privilege issue and its relationship to 5 U.S.C. § 301 was finally raised in \textit{United States v. Reynolds}.\textsuperscript{73} In \textit{Reynolds} three widows brought suit under the Torts Claims Act against the United States when their husbands were killed as the result of an Air Force plane crash. The plaintiffs moved for the production of the official accident report made by the Air Force but this motion was met by the Government's claim that Air Force regulations, issued according to 5 U.S.C. § 301, authorized it to decide what documents are discoverable and in this case they had simply rejected the plaintiff's request. The Court accepted this contention, as it determined that the privilege does exist. However, Chief Justice Vinson's majority opinion modified the Government's position and in the process negated the strength of executive privilege when it placed some stringent

\begin{itemize}
\item \textsuperscript{69} \textit{Id.} at 468-69.
\item \textsuperscript{70} 340 U.S. 462 (1951).
\item \textsuperscript{71} \textit{Id.} at 468-69.
\item \textsuperscript{72} \textit{Id.} at 473.
\item \textsuperscript{73} 345 U.S. 1 (1953).
\end{itemize}
limitations on its assertion. There first must be a formal claim to the privilege by the head of the department after he has personally evaluated the information requested, and it is then the court's responsibility to determine whether the information subject to the claim is in fact privileged.\textsuperscript{74} The method by which courts are to make this determination is a balancing test where

\begin{quote}
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. When 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.\textsuperscript{75}
\end{quote}

\textsuperscript{74} Id. at 8.

\textsuperscript{75} Id. at 11. In EPA v. Mink, 410 U.S. 73 (1973), the Supreme Court, in explaining the nature of the protection afforded by the statutory disclosure exemptions of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(1) and (b)(5) (1970), recognized the existence of an executive privilege for the executive consultative function and for information that is to be kept secret in the interest of national defense or foreign policy.

The protection given the consultive function is limited to information reflecting executive policy deliberations and recommendations, and it does not extend to the factual data upon which those deliberations are based. 410 U.S. at 89. Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); McFadden v. Avco Corp., 278 F. Supp. 57 (M.D. Ala. 1967); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966). The Court then proceeded to review the method used in past cases to determine whether requested information in the government's possession was discoverable.

In each case, the question was whether production of the contested document would be injurious to the consultive functions of government that the privilege of nondisclosure protects . . . . In applying the privilege, courts often were required to examine the disputed documents in camera, in order to determine which should be turned over or withheld.


The executive privilege pertaining to national defense and foreign policy information was also the subject of the Court's discussion, and while the Court emphatically stated that there would be no \textit{in camera} inspection allowed when this type of information is in issue, this remark was addressed to the statutory exemption of the Act, 5 U.S.C. § 552(b)(1) (1970), and not to the executive privilege question. In fact, the opinion, citing United States v. Reynolds, separated executive privilege from the statutory exemption when it stated that

\begin{quote}
Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures (for determining disclosure)—subject only to whatever limitations the Executive Privilege may be held to impose upon Congressional ordering. \textit{Cf. United States v. Reynolds, 345 U.S. 1 (1953).}
\end{quote}

410 U.S. at 83.

Thus, the Court implied that the standard articulated in \textit{Reynolds} controls an executive privilege claim for national defense and foreign policy secrets, and as the quotation in the text discloses it is not the executive who determines what is or
The message from the Reynolds case is clear: While there is certain information which the Government has a right to conceal, there is no absolute right in the executive to determine what information enjoys that status. In essence this is the focus of the executive privilege debate—who makes the decision as to what is privileged? Thus, as this analysis demonstrates, far from establishing the presidential prerogative 5 U.S.C. § 301 and its judicial interpretations have either not addressed themselves to the issue or their combined effect has been to dilute its authority to the extent that it no longer can be termed executive privilege. The statute is a “housekeeping” statute which allows a department head to review information under his agency’s control, which is sought for use in another proceeding, and determine if that information will be the subject of an executive privilege claim. The statute is procedural in nature, and as to executive relationships with other institutions it does not vest any substantive authority.

None of these cases, however, involved a congressional request for information; they merely settled a private party’s access to its political agent’s files. As was previously discussed, the interest of a private party in the release of executive information is not of the same magnitude nor of the same nature as that of Congress. The private party seeks to vindicate his personal rights in an adversary context, whereas the legislature is concerned with the beneficial interests of everyone within its jurisdictional limitations, and it operates by constitutional design in a partnership capacity with the executive to effect this end. Thus, if the executive does not possess an absolute right to claim executive privilege when it concerns the rights of private citizens, it is questionable whether this authority exists at all in the President’s relationship with the Congress. The privilege proponents would answer this question in the affirmative by pointing to their front-line of support, the Constitution and the doctrine of separation of powers.

is not privileged. Also, it is to be remembered that these executive privilege claims were made in judicial proceedings to protect against informational disclosure to individuals, and both the private citizen’s role and the judiciary’s institutional role in policy formulations are far more indirect than the legislature’s role. See pp. 728-30 and accompanying notes infra.


77. See p. 697 supra.

78. As Attorney General Rogers said in 1958, “the executive privilege is not related to any statute; the executive privilege is an inherent part of our government,
The Constitution

There is nothing in the Constitution which explicitly bestows upon the President or any other part of the executive branch a constitutional right to withhold information from the national legislature. In fact, the only reference to a legislative-executive communication exchange requires the President to "from time to time give to the Congress information of the state of the Union . . . ."\(^{79}\) In addition, the only privileges mentioned in the text of the Constitution are the legislative privilege,\(^{80}\) allowing Senators and Representatives to freely discuss and determine national policy without fear of legal sanction,\(^{81}\) and the fifth amendment privilege against self-incrimination. Thus, by a literal reading of the document the President does not possess the power to refuse a congressional request for pertinent facts. However, a constitution, being a blueprint for a governmental system rather than a collection of confining proscriptions, cannot be interpreted by singular resort to its literal translation, for necessity demands that its phraseology emit a multi-dimensional network of implied powers.\(^{82}\) Therefore, the first step in determining if executive privilege can be viewed as one of the President's implied powers is to examine the objectives of its authors, the framers' intentions.

Framers' Intent

Because there is nothing in the constitutional debates expressly addressing the subject,\(^{83}\) it is necessary to examine the general attitude of the

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81. The broad judicial interpretations of this provision indicate the constitutional importance attached to legislative policy decisions. See, e.g., United States v. Johnson, 383 U.S. 169, 180 (1966). In fact the purpose of this privilege is the prevention of executive intimidation of the legislative process. Gravel v. United States, 408 U.S. 606, 617 (1972). For an indication of the breadth of protection afforded, see Doe v. McMillan, 412 U.S. 306 (1973), in which congressional committee members, members of their staff and various consultants and investigators were held to be immune from a suit based on their publication of a derogatory report on the District of Columbia school system. For an in depth study of the privilege, see Reinstein and Silvergate, Legislative privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973).
82. See pp. 721-26 and accompanying notes infra.
83. In II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 503 (1937) [hereinafter cited as FARRAND], James Madison suggested that the privileges afforded the new executive should be discussed and determined. However, there is no evidence in the debates that that discussion ever in fact took place.
founding fathers toward the increments of executive power, because it is from these concepts that the existence of an executive privilege may arguably be indicated.

James Wilson and Gouverneur Morris, who together were the principal theorists and drafters of the executive article, favored the creation of a strong, independent institution to be occupied by one man for the purpose of insuring his ability to act quickly. In fact, Wilson, in delineating the necessary attributes of the office, used the words "secrecy, vigour, & Dispatch." He was to be elected by the people so that he would be a person of widespread esteem who would not become controlled by the legislature. Realizing the enormous concentration of power which would have to be invested in the office to effectuate this description, and that such a great degree of power concentration in one institution to be controlled by one person would supply that individual with the ability to destroy the system, the framers provided a short term of office as a periodic check. Thus, the people would control the potential for abuse by politically monitoring the President's performance. The inclusion of the impeachment process also furnished the scheme with an emergency check. As Abraham Baldwin, a Georgia delegate to the convention explained:

As to a President, it appeared to the Opin. of Convention, that he shd be a Character respectable by the Nations as well as by the foederal Empire. To this End that as much Power shd be given him as could be consistently with guardg against all possibility of his ascending in a Tract of years or Ages to Despotism and absolute Monarchy:—of which all were cautious Nor did it appear that any Members in Convention had the least idea of insidiously layg the Founda of a future Monarchy like the European or Asiatic Monarchies either antient or modern. But were unanimously guarded and firm against every Thing of this ultimate Tendency. Accordingly they meant to give considerable Weight as Supreme Executive, but fixt him dependent on the States at large, and at all times impeachable.

As Baldwin's summation indicates, there was a distinct fear on the part of the constitutional delegates that what they were about to create by

84. III FARRAND at 170. Both Wilson and Morris were delegates from Pennsylvania. III FARRAND 558.
85. I FARRAND at 65-66 (Wilson), II FARRAND 52 (Morris).
86. I FARRAND at 70 (Form in original).
87. II FARRAND at 29 and 403-404 (Morris), I FARRAND 68 (Wilson).
88. II FARRAND at 55 and 407 (Morris), I FARRAND 71 (Wilson). The realization of this intent is seen in U.S. CONST. art. II, § 1, cl. 1, as amended by, amend. XXII.
89. U.S. CONST. art. 1, § 3, cl. 6 and 7.
90. Mr. Baldwin's impressions were revealed by the diary of Ezra Stiles. III FARRAND at 168 and n.4.
way of the executive article was actually a monarch under a different
title, because as James Madison pointed out:

The chief advantages which have been urged in favor of unity in the
Executive, are the secrecy, the dispatch, the vigor and energy which the
government will derive from it, especially in time of war. That there are
great advantages, I shall most readily allow. They have been strongly in-
sisted by all monarchical writers. . . .

Thus, the framers intended to invest in the executive branch of the new
government strong powers, while at the same time, due to their past ex-
perience with a system of centralized, unitary direction, they also at-
ttempted to design a system in which abuse of that power could be insti-
tutionally thwarted.

In an effort to determine the compatibility of the concept of executive
privilege with this governmental outline, any impression at this time can
only be inconclusively ambiguous, because if its adaptibility is viewed pos-
itively, that is, that the fundamentals of “secrecy, vigour and dispatch”
imply total executive control over information in the President's posses-
sion, then the legislature’s functional performance may be within his dis-
cretionary dominion, whereas if the analysis leads to a negative reaction
the skeptic must contend with the seemingly irreconciliable aims of “sec-
resy, vigour and dispatch.” At this point though, it is hardly to be ex-
pected that a question of the magnitude of executive privilege would be
subject to a decisive assessment, for that requires a contextual framework
to which the executive structure can be referred.

In The Federalist, James Madison intimated that the prevailing fund-
amental assumption of the framers and the view upon which this nation
has conducted its governmental affairs for close to two-hundred years is
that man by his nature is avariciously power hungry, since as Madison

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91. I FARRAND at 112. Madison's views were shared by his contemporaries but
for different reasons, for example: Edmund Randolph (Virginia) was opposed to
the executive's unitary structure, I FARRAND 66, as was Hugh Williamson (North
Carolina) who was, additionally, fearful of the President's reeligibility after his first
term of office, II FARRAND 101; Benjamin Franklin (Pennsylvania) disapproved of
a salary for the President since he felt that remuneration would attract only power-
hungry types, I FARRAND 81-85; John Dickinson (Delaware) felt the only system
of government in which a strong executive could exist was a monarchy, which he
disfavored, I FARRAND 86, 90-92; George Mason (Virginia) opposed a suggestion
that the duration of the President's term of office should be for good behavior, for
as Madison reported, "He considered an Executive during good behavior as a softer
name only for an Executive for life. And that the next would be an easy step to
hereditary Monarchy," II FARRAND 35; Roger Sherman (Connecticut) viewed the ap-
pointment power of the President as a means to form a strong, loyal military the
result of which would be, he feared, a presidentially-inspired military junta, II FAR-
RAND 405; Even Gouverneur Morris, the sponsor of strength in the executive, ex-
pressed his disdain for monarchy, II FARRAND 35-36.
reasoned, "If men were angels, no government would be necessary." Therefore, in Madison's opinion, the way to counteract this human tendency in government would be to check power with power; create a system in which every affirmative capability of one branch could be effective neutralized by supplying another branch, possessing discordant institutional responsibilities, with a correlative negative capability. Using the nature of man as a theoretical backdrop for the mechanics of the structure, it is not difficult to arrive at the ultimate purpose of the system: By counter-balancing the power vested in its constitutional agents, the collective will of the people, which is what the governmental structure is designed to serve, will be fulfilled. It is this core concept of checks and balances that is meant when the phrase "separation of powers" is used. As Justice Brandeis said in his dissenting opinion in *Myers v. United States*:

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

In application to the presidential model the doctrine of separation of powers has not been refuted by the executive privilege advocates. Rather it has been used by them as a rationale for the privilege's existence. They reason that the doctrine of separation of powers mandates each of the co-ordinate branches of government to operate in its sphere

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92. *The Federalist* No. 51, at 322-23 (H. Lodge ed. 1892) (Madison or Hamilton).

93. In Madison's words:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

*Id.* at 323-24.

94. See *Stone v. Miss.*, 101 U.S. 814 (1880), in which Chief Justice Waite's majority opinion expressed the same view:

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.

*Id.* at 820.

95. 272 U.S. 52 (1926).

96. *Id.* at 293.
independently of the others.\textsuperscript{97} This leads to the conclusion that one branch cannot, without destroying the separation, be forced to yield to the informational demands of another branch. This argument ignores the qualifying phrase, "in its own sphere," and therefore, regards the structure inherent in the concept of separation of powers as one of mutual exclusion rather than its actual connotation of mutual interaction.\textsuperscript{98} Each branch is meant to perform its constitutionally appointed function without the intervention of a co-equal branch. For example, the President is given no vote when bills are being assessed in the House of Congress, just as Congress is not a party to the execution of those bills once they have become law. However, when considering executive privilege, this fact is quite irrelevant: Congress does not request the information for the purpose of interfering in the performance of the executive function; it only seeks to discharge its own obligations in the most responsible manner which, as previously discussed, necessitates an assessment of all data relevant to a particular problem. Since the President is charged with executing the laws, he is bound to accumulate a great amount of information concerning the relative success or failure of legislative programs. If he can effectively immunize these facts from congressional study, the checks and balances of the separation of powers doctrine are abrogated, because the President will be able to dictate the context within which Congress will consider a problem. The chief executive could supply the legislature with only the facts which indicate the failure of particular legislation, thus suggesting more stringent regulation as a solution, or he could supply only the information which indicates success and mislead the Congress into disregarding a pressing problem. Yet, in order for separation of powers to remain a viable theory, no one branch can control the institutional power balance, otherwise the system of checks and balances becomes an illusory concept.

As proof that this interpretation is thoroughly consistent with the intended application of the doctrine by the framers, a poignant thought of Charles Montesquieu, universally acknowledged as the person responsible for the theory's articulation,\textsuperscript{99} is offered:

\textsuperscript{97} See Brief for Petitioner at 1101, Nixon v. Sirica, No. 73-1962 (D.C. Cir., filed 1973), as reprinted in, 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1100, 1101 (No. 37, 1973).

\textsuperscript{98} Alexander M. Bickel, Professor of Law at Yale University and an authority on constitutional law, in commenting upon the attributes of the separation of powers theory stated "that the separation of powers is an arrangement that leads to friction to be sure. . . ." Transcript of The Advocates 32 (taped Sept. 27, 1973). See Massett Bldg. Co. v. Bennett, 4 N.J. 53, 57, 71 A.2d 327, 329 (1950), for a similar explanation of the effect of separation of powers.

\textsuperscript{99} E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 2 (H. Chase
But if the legislative power in a free state has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed. ... 100

Hence, by an analysis of the prior discussion, it can be inferred that the reaction of the framers toward the constitutional inclusion of an implied power of executive privilege would not be favorable. Despite the stated goal of "secrecy" for the Chief Executive, which can be accomplished without an unlimited executive privilege, the fear of monarchy coupled with the importance the framers ascribed to the theory of separation of powers provides authority too persuasively negative to the concept to infer their assent. Nonetheless, in evaluating the constitutional validity of a peripheral concept such as executive privilege, the framers' intent may not be a legitimate inquiry. As Professor Walter Murphy argued, the framers' views are irrelevant. Due to the change in the basic character of the country—from a relatively small, predominantly agrarian economy to a large, highly industrialized society—the framers' feelings are irrelevant to modern constitutional interpretation. It is extremely difficult, if not impossible, to accurately attribute one collective intent to the founding fathers, since the "intent" can only be determined by considering the attitudes of each individual responsible for the Constitution's creation, which includes not only each drafter but each ratifier as well. 101 This problem is particularly noteworthy, since as Justice Jackson once said,

and C. Ducat ed. 1973); The Federalist No. 47, at 300 (H. Lodge ed. 1892) (Madison). Even the constitutional debates reflect the framers' intent to follow the principles of Montesquieu regarding the separation of powers. I Farrand at 71 and II Farrand at 530.

100. C. Montesquieu, The Spirit of the Laws 158 (T. Nugent transl. 1949). Montesquieu's theory on the separation of powers has at times been mistakenly represented as standing for total separation in the various governmental branches. This is because his writings have been quoted out of context. For example, he stated, "When the legislative and executive powers are united in the same person, or in the same body of magistrates there can be no liberty." Id. at 151. However, as the quote in the text indicates, he did believe that each department should have at least some control over the power wielded by the other departments. See C. Montesquieu, The Spirit of the Laws 151-62 (T. Nugent transl. 1949); The Federalist No. 47, at 301-302 (H. Lodge ed. 1892) (Madison). See also F. Fletcher, Montesquieu and English Politics 1750-1800, at 136-37 (1939).

101. Murphy, The Constitution: Interpretation and Intent, 45 A.B.A.J. 592, 593-95 (1959). See also Wofford, The Blinding Light: The Uses of History In Constitutional Interpretation, 31 U. Chi. L. Rev. 502 (1964), [hereinafter cited as Wofford] which advances another noteworthy argument that is particularly applicable to the executive privilege issue. Wofford contends that when a constitutional issue is raised, "the problem is not to apply one constitutional principle, but to reconcile two or more such principles." Thus, the two or more intents that are involved will most often clash allowing for nothing but a speculative determination. Wofford at 510.
A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources or each side of any question. They largely cancel each other.  

A suggestion as to the correct approach for constitutional interpretation was made though, by Gouveneur Morris when in a letter of 1814 he urged that it be analyzed "by comparing the plain import of the words, with the general tenor and object of the instrument."  

Words and Structure

Lacking a definitive determination of the legal status of executive privilege, it is appropriate to use Morris' suggestion and turn the focus on the instrument itself, examining both its words and structure in order to ascertain its objectives.

The first objective of the Constitution relevant to the privilege issue is a check and balance system of power distribution through the institutional establishment of the familiar separation of powers theory. The executive article delineates three powers of the President which may be utilized by him to effect national policy, and all of these executive rights are countered by correlative congressional authority. The executive power clause which states that "[t]he executive power shall be vested in a President," is further explained by the admonishment, "he shall take Care that the Laws be faithfully executed . . . ."  

This is checked by the general design of the system; in order for there to be laws to execute Congress must exercise its legislative power which, again, can only be effectively done when Congress possesses all of the necessary information. The second presidential power is that given to him as Commander-in-Chief which has popularly been viewed as a mandate of presidential autonomy in the conduct of foreign affairs. However, the

103. III FARRAND at 420.
104. U.S. CONST. art. II.
105. U.S. CONST. art. II, § 1, cl. 1.
106. U.S. CONST. art. II, § 3.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations.

Id. at 727.
text of the Constitution reveals a somewhat contrary scheme, for not only does it assign to Congress the responsibility for declaring war, but it also empowers the national legislature to raise and support armies, provide a navy, regulate armed forces, regulate commerce with foreign nations and to define and punish offenses against the law of nations. The third presidential power, authorizing his entering into treaties with foreign countries, is conditionally restricted by the necessity of Senate approval before any treaty can become effective. Thus, as the power structure evinces, the framers successfully expressed their intent in the document regarding the separation of powers.

The second pertinent objective of the Constitution is the establishment of Congress as the principal formulator of national policy. As the prior discussion indicates the legislative branch is empowered with authority to deal with virtually every phase of national policy. This conclusion is buttressed by the presence of the carte blanche legislative authority contained in the necessary and proper clause. In addition, only Congress, with its power to override a presidential veto, has the constitutional capability to unilaterally institute policy, since once a policy has been officially expressed in the form of law, a duty devolves upon the chief executive, regardless of his personal objections, to faithfully administer the measure. Also, essentially every program, goal, and policy

110. U.S. Const. art. I, § 8, cl. 11.
114. U.S. Const. art. I, § 8, cl. 3.
118. U.S. Const. art. I, § 8, cl. 18.
120. U.S. Const. art. II, § 3 states that "he shall take Care that the Laws be faithfully executed . . ." (emphasis added). That this provision imposes a duty on the President is indicated not only by the bare words but by judicial interpretations as well. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the majority opinion considered this clause and concluded:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

343 U.S. at 587.

The lower courts have used this interpretation to determine that the executive branch cannot constitutionally impound funds appropriated by the legislature. See,
championed by the President is dependent upon money for its successful realization, and the direct control of all appropriations rests with Congress.121

It has already been established that the separation of powers objective could be frustrated by the constitutionally sanctioned existence of an executive privilege, but the role of Congress as the chief innovator of national policy could also be undermined in view of the discretionary control afforded the President by the privilege over the data necessary for effective legislative determinations. Despite these conclusions, the privilege advocates have maintained a firm position regarding its constitutional validity by directing attention to the historical incidents of successful presidential privilege claims122 in conjunction with the Supreme Court's position that when the text of the Constitution does not specifically address a particular question, constitutional power may be established by usage.

In United States v. Midwest Oil Co.,123 the Court stated that

[both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rules that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is subject to investigation.]

Even if this method is phrased in more positive terms without reference to a presumption, such as, “constitutional power when the text is doubtful may be established by usage,” it is still tempered by the constant of reason.

The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.126

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122. Id. at 472-73.
123. Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940).
125. Id. at 472-73.
126. Id. at 472-73.
It is this appeal to reason, combined with judicial reverence for constitutional principles, which has shaped United States constitutional history, for it has encouraged a more dynamic approach to constitutional adjudication. It is one which recognizes that in order for the Constitution to retain its position as the legal nucleus of American society, it must be a flexible instrument which, instead of stating specific rules, expounds principles capable of just application to unforseen circumstances. It then promotes this purpose by analyzing constitutional ambiguities in the following fashion:

[In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were unfamiliar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.]

Although the purposes of the Constitution never change, the structure in which they are pursued does. Therefore, the first step in the appli-

127. As Justice Cardozo stated:
A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars it loses its flexibility, the scope of interpretation contracts, the meaning hardens.


128. United States v. Classic, 313 U.S. 299, 316 (1941). See also McCulloch v. Md., 17 U.S. (4 Wheat.) 316, 407 (1819); Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934). However, even if the dynamic approach is not followed, and the privilege is deemed established by presidential usage, this does not mean that Congress has relinquished its authority to legislatively control the privilege's exercise. Justice Black made this clear in response to the Government's contention that the President's seizure of the steel mills in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) was constitutional because past Presidents had taken the same action.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

343 U.S. at 588-89.

129. The notion of an organic governmental structure, sensitive to and responding in accordance with changing times, has been the guiding principle in Supreme Court decisions. For example, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court confronted a challenge to the Virginia poll tax. In finding the tax unconstitutional, thus overruling Breedlove v. Suttles, 302 U.S. 277 (1937), Justice Douglas' majority opinion offered this justification:
cation of this method is to determine if executive privilege is consistent with modern presidential power.

The Power of the Modern President

Having once examined the pristine form of the enumerated powers of the President, it is now appropriate to examine the effect of their elaborated translation.

In *Youngstown Sheet & Co. v. Sawyer*[^150^] the most definitive judicial interpretation of the contemporary Presidency to date, the President, despite a lack of congressional authorization, ordered the Secretary of Commerce to seize many of the country's steel mills for the purpose of averting a threatened strike. The President based his decision on the disastrous effects a halt in steel production could have on American involvement in the Korean conflict. To justify his act he argued that as President he possessed an emergency power to act in the public interest emanating from the aggregate of his enumerated powers[^131^]. In rejecting this contention, the Court held that the Chief Executive's power to issue


such an order must come either from a congressional act or the Constitution. Since it did not stem from an act of Congress, the Court turned its attention to the Constitution and again found no authorization either express or implied.

It is necessary to briefly survey the important cases prior to Youngstown which focused on the nature of presidential power before the actual impact of the decision can be appreciated.

In *In re Neagle*, a United States marshal assigned to protect Supreme Court Justice Field was arrested for murder when he frustrated an attempt on the life of Justice Field by killing the would-be assassin. The Supreme Court determined that he was entitled to habeas corpus despite the absence of a statute expressly assigning United States marshals to Supreme Court Justices as bodyguards. The Court found that Neagle, as an executive official, was acting pursuant to a delegation of the general obligation of the President to see that the laws are faithfully executed. Therefore, no statutory authorization was necessary for the power's exercise. It is significant, however, that in addition to its reliance on the executive power clause the Court supported its decision by reference to an act of Congress which expressed the duties of a marshal in very general terms.

In 1895, the Court focused on the propriety of an injunction issued by a lower federal court ordering the American Railway Union to stop its intereference with railroads using Pullman cars. In rejecting the contention that the court lacked jurisdiction because no statute expressly authorized courts to enjoin conduct interfering with interstate commerce, Justice Brewer's opinion in *In re Debs* found, as an attribute of sovereignty, power in the federal government to regulate interstate commerce. This power extended to the executive branch in the form of an inherent authority to remove all obstacles in the path of commerce, and it also extended to the judiciary in the form of an inherent power to adjudicate disputes involving such regulatory attempts.

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132. 135 U.S. 1 (1890).
133. Because Neagle was being detained by California authorities for a crime committed against that state, he had to show that his act was done pursuant to a law of the United States in order to qualify for habeas corpus. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634, quoted in 135 U.S. at 58. This ground is still available today for the issuance of a writ of habeas corpus. 28 U.S.C. § 2241 (1970).
134. 135 U.S. at 68.
135. 158 U.S. 564 (1895).
136. *Id.* at 599.
tive congressional reaction to related problems of interstate commerce figured significantly in the Court's rationale.\textsuperscript{137}

While both the Neagle and Debs opinions subtly indicate an inherent power in the President to act in the best interests of the American people, both cases fortified these indications by reference to statutes which displayed policies consistent with the President's utilization of the power. However, in \textit{United States v. Midwest Oil Co.}\textsuperscript{138} no such congressional inducement was present when the President through an executive order withdrew public lands from private acquisition. In fact, the President's action, taken for the purpose of conserving the petroleum resources present in the withdrawn land, was contrary to the act of Congress which declared the land in question accessible to private investment. The Court, in upholding the President's order, expressly rejected the contention that "the Executive can be his own action create a power."\textsuperscript{139} Instead, the Court construed congressional acquiescence in previous land withdrawals as congressional authorization by implication for an executive withdrawal power.\textsuperscript{140}

Finally, in \textit{Meyers v. United States}\textsuperscript{141} the Supreme Court overturned an act of Congress which conditioned the President's dismissal of certain classes of postmasters on Senate consent. Chief Justice Taft, writing for the majority, viewed the opening phrase of article II, "[t]he executive power shall be vested in a President," as a grant of power rather than a mere expression of the Chief Executive's title. He felt that the authority to remove executive officials rested solely in the province of the President. While this decision may arguably be asserted to support the stewardship theory of executive power,\textsuperscript{142} nonetheless close scrutiny

\begin{footnotes}
\item[137] \textit{id.} at 579-81.
\item[138] 236 U.S. 459 (1915).
\item[139] \textit{id.} at 474.
\item[140] \textit{id.}
\item[141] 272 U.S. 52 (1926).
\item[142] The President credited with formulation of this theory is Theodore Roosevelt who stated in his autobiography:

\begin{quote}
My view was that every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the Presi-
\end{quote}
\end{footnotes}
discloses Chief Justice Taft's reticence to expand on his initial determination regarding the opening phrase of article II. Instead, the opinion's primary discussion revolved around the President's authority to select the people who would fill positions in the executive branch. The decision did nothing more than to affirm that as a practical necessity in constitutional construction each branch possesses those implied powers necessary to effect its enumerated powers.

These four cases taken together reveal that the President has no inherent power to institute domestic policy, since even in the Debs opinion, which explicitly referred to inherent executive power, legislative expression consistent with the President's action grounded the judicial approval. However, the Chief Executive does possess, in addition to his enumerated powers, implied authority to fulfill those express delegations, including the prerogative to reassign their implementation to lower officials and to choose who will share in such a reassignment. He does not, though, have the authority to ignore valid congressional policy.

In the area of foreign affairs, the President's power at the time of Youngstown, while broader than that in the domestic field, was not unlimited. In the Prize Cases the constitutional validity of President Lincoln's blockade of certain Southern ports without the prior approval of Congress was in issue. Ruling that the President's action was constitutional, the Supreme Court used the Chief Executive's power as Commander-in-Chief and his obligation to see that the laws are faithfully executed to support its decision. However, since the circumstances which prompted the blockade, namely a surprise civil rebellion, necessitated a quick and
decisive response, the Court recognized that Congress was unable to react with the requisite speed and thus the responsibility had to fall on the President.\textsuperscript{145} In addition, the Court diluted the strength of the opinion by pointing to the subsequent ratification of the blockade by the legislative branch as support.\textsuperscript{146}

Then in 1936 in \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{147} the Court was confronted with a challenge to a statute allowing the President to forbid the sale of arms to South American countries engaged in the Chaco conflict if in his discretion such action might contribute to a peaceful settlement. Justice Sutherland's majority opinion rejected the claim that the statute was an unconstitutional delegation of legislative power and found that the President is "the sole organ of the federal government in the field of international relations . . .\textquotedblright\textsuperscript{148} and that the power afforded him by virtue of this status is not dependent upon congressional action for its exercise. However, two considerations concerning this broad holding should punctuate its acceptance. First, the inherent power determination was dictum, since Congress had conferred upon the President's action its statutory blessing. Second, even though the inherent power theory is authenticated as a result of this case, its theoretical potency is questionable since the Court determined that its application must be in subordination to the relevant provisions of the Constitution which could include mandatory presidential deference to the legislative will when expressed.\textsuperscript{149}

Thus, at the time of the \textit{Youngstown} decision the President had in the field of foreign relations broad inherent power to initiate and develop national policy without congressional assistance. This authority was limited, though, by concurrent jurisdiction constitutionally vested in Congress which, as \textit{Curtiss-Wright} hinted, might predominate when exercised.

Returning now to the effect of the President's unconstitutional seizure of the steel mills,\textsuperscript{150} it should be remembered that the reason for the Court's finding was the absence of a statutory or constitutional grant of power which would sustain the President's act. The opinion rejected both the President's role as Commander-in-Chief and the executive power clause as proper authority for the deprivation of private property in order

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.} at 669. \textit{See also} United States v. Russell, 80 U.S. (13 Wall.) 623, 627 (1870).
  \item \textsuperscript{146} 67 U.S. (2 Black) at 670-71.
  \item \textsuperscript{147} 299 U.S. 304 (1936).
  \item \textsuperscript{148} \textit{Id.} at 320.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579 (1952).
\end{itemize}
to maintain economic productivity and, in the process, impliedly rejected
the proffered aggregate of powers theory. 151 This opinion, while dispositive of the issue, did not represent the consensual posture of the Court since it was accompanied by five concurrences and one dissent. The specifics of each Justice's view are not significant, but what is important is the fundamental agreement reached by all of the opinions, including Chief Justice Vinson's dissent, regarding the basic relationship between presidential and congressional power. They concluded that while the President may possess power beyond the enumerated authority of article II, nonetheless, Congress may amend, limit, or provide for the method of its exercise if the subject is one which Congress can constitutionally regulate. 152 But, when the national legislature has not manifested its will, the nature and amount of inherent executive power which can be exerted will depend upon the nature and gravity of the situation. 153 As Justice Jackson stated in his concurrence:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential respon-

151. The Court's opinion did not specifically address the aggregate of powers contention. However, it did examine each alleged component of the aggregate individually and in each case it found no support for the President's action. Justice Black, writing for the majority, first considered the President's role as Commander-in-chief and found the requisite "theater of war" to be absent. Next, he examined the provisions which bestow upon the President the executive power, namely article II, sections one and three, and concluded that the determination of when it is appropriate for the government to seize private property is a decision to be made by the nation's lawmakers and the Constitution clearly delegates that role to the Congress.

152. This is true even when applied to the area of international relations in which presidential initiative has been accorded the widest latitude. New York Times Co. v. United States, 403 U.S. 713, 727 (1971) (Stewart, J., concurring). Thus a treaty negotiated by the President and approved by the Senate may be abrogated by an act of Congress. Reid v. Covert, 354 U.S. 1, 18 & n.34 (1957); Fung Yue Ting v. United States, 149 U.S. 698, 720-21 (1893); Chinese Exclusion Case, 130 U.S. 581, 600-601 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 598-99 (1884).

153. These conclusions have been borne out by recent cases. For example, in Local 2677, American Fed. of Gov. Emp. v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), the Acting Director of the Office of Economic Opportunity, an arm of the executive branch, attempted to dismantle OEO before the program's congressional authorization had expired. The District Court for the District of Columbia citing Youngstown as its authority, held that the executive branch must continue to operate an authorized program until the funds expire or until Congress declares otherwise. See, e.g., Penn v. Lynn, 362 F. Supp. 1363 (D.D.C. 1973); Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973).
sibility. In this area any actual test of power is likely to depend on the
imperatives of events and contemporary imponderables rather than on ab-
stract theories of law.\textsuperscript{154}

Considering the issue of executive privilege in light of these principles, it is
evident that its existence is inconsistent with the prevalent view of
constitutional power distribution between the executive and legislative
branches. First, there is, as previously discussed, no provision of the
Constitution that grants an executive privilege.\textsuperscript{155} Second, executive
privilege is not a power which can be viewed as an implied method of
instituting one of the Chief Executive's enumerated powers.\textsuperscript{156} Third,
while a congressional request for information may seek the disclosure of
data relating to an emergency, there is nothing in the request itself which
would require of the President the urgent and decisive action necessary
to justify uncooperative refusals on the basis of an inherent power theory.
In addition, the inherent power theory is only applicable to situations in
which the Congress has not acted or is not empowered to act. Neither
of these circumstances is presented by the privilege issue since by its
request for information Congress has acted, and due to the broad scope
of its legislative and investigative power it has the authority to act.

Beside the lack of a power base from which to seriously assert its exist-
ence, there is another more practical consideration which militates
against the constitutionality of executive privilege: the ability of the
President to dominate the media threatens to upset the delicate power
balance of the check and balance system of power distribution.

Recent statistics, disclosing that 97 percent of all Americans possess
at least one television set which on the average operates about seven
hours every day,\textsuperscript{157} and that most people rely on television as their pri-
mary source of news,\textsuperscript{158} demonstrate how media-oriented American so-
ciety has become. In modern times the President has been able to har-
ness television's evident potential and turn it into a devastating political
weapon. For example, support for President Nixon's position on South-
east Asia rose 18 percent after one televised address to the nation.\textsuperscript{159}

\begin{itemize}
\item 154. 343 U.S. at 637.
\item 155. See p. 710 and accompanying notes supra.
\item 156. See, e.g., Meyers v. United States, 272 U.S. 52, 161-64 (1926).
\item 157. N. MINOW, J. MARTIN AND L. MITCHELL, PRESIDENTIAL TELEVISION 5
(1973) [hereinafter cited as TELEVISION], citing B. BIGDIKIAN, THE INFORMATION
MACHINES 183 (1971), and BROADCASTING, Feb. 14, 1972, at 36.
\item 158. TELEVISION at 5-6, citing, BROADCASTING, April 5, 1971, at 24, and BROAD-
CASTING, April 10, 1972, at 88.
\item 159. TELEVISION at 19, citing, Hearings on S. J. Res. 209 Before the Subcomm.
\end{itemize}
This dynamic potential coupled with the realizations that the President's access to the air waves is a virtual monopoly when compared to the television opportunities available to Congress and that the President's reliance on this communication vehicle is increasing reveals the enormous amount of raw political strength which the President possesses in addition to his constitutional endowments. The question then, is this: should executive privilege be added to the President's political arsenal? The constitutional response is no, for if it is included then the President is not only capable of manipulating the public reaction to national policy, but he may additionally control the indispensable ingredient for wise policy determinations—the facts.

160. It is easy for a President to command television time; after all, the executive branch through the FCC controls all television licenses, and the members of the FCC are appointed by the President. TELEVISION at 150. In addition, a half-hour program during prime time costs an individual about $250,000, but for the President the use of the air waves is free. However, there is no congressional right to free time, and even if an individual Congressman's request for a television appearance is granted, he is just one of five hundred thirty-five voices which, of course, diminishes the effect of his message proportionately. TELEVISION at 105, citing, interview of Senator Charles Mathias (R. Md.), interviewed on Thirty Minutes, Nov. 30, 1972. In fact, sometimes a Congressman's request is turned down because in the broadcasters' opinion his message is not newsworthy. Consider the case of Senator McGovern when he requested time as a presidential candidate to explain to the nation the resignation of Senator Eagleton as his running-mate. The networks refused because in their view Senator McGovern's appearance would not be important unless he were to name Senator Eagleton's successor. TELEVISION at 22.

Justice Jackson made this point in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), when he stated:

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

343 U.S. at 653-54 (Jackson, J., concurring).

161. In three and one-half years, President Nixon made thirty-one prime-time appearances, compared with twenty-four for President Johnson in five years, ten for President Kennedy in three years and twenty-three by President Eisenhower in eight years. TELEVISION at 56, citing, Address by Richard Salant, President of CBS News to the Journalism Foundation of Metropolitan St. Louis, May 1, 1972.

162. As Minow, Martin and Mitchell explain:

Congressmen supporting a move to override a presidential veto of legislation—a veto message delivered by a president before millions of television viewers—are not likely to be able to command free, prime, simultaneous three-network broadcast time for their side of the issue to quell
Thus, no provision, theory, or method of construction supports the constitutional existence of an absolute right in the President to withhold information from Congress. There remains, however, one more supporting argument and it is by far the most plausible.

The Need For Secrecy

Privilege advocates have asserted that as a matter of policy the Chief Executive needs to keep his presidential communications secret. In fact, they adamantly insist that the effective operation of the executive office is dependent upon the existence of a presidential shield. In support of their position they have offered two reasons.

First, wise executive policy formulations are contingent upon the exploration of all available options. If there is a possibility that the opinions of the President and his advisors on policy matters may be subject to congressional scrutiny they will be reluctant to discuss and consider every view. The Supreme Court has recognized this problem and has in some cases sanctioned secrecy as a solution. For example, in *EPA v. Mink* the Court rejected a challenge to the exemption of certain documents from the disclosure section of the Freedom of Information Act. Although a statutory privilege enacted for the purpose of protecting against unwarranted disclosure in judicial proceedings rather than executive privilege vis-a-vis Congress was in issue, the Court made the general statement that

> [t]here is a public policy involved in this claim of privilege . . . the policy of open frank discussion between subordinate and chief concerning administrative action.164

In addition to this, both the national legislature and judiciary enjoy a similar privilege for this same reason. The congressional shield is the result of an explicit constitutional grant so it is of little use as analogy.

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165. U.S. CONST. art. I, § 5, cl. 3, provides:

> Each House shall keep a journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy. . . .

However, the principal constitutional provision which bestows this privilege upon Congress is the speech and debate clause, U.S. CONST. art. I, § 6, cl. 1. See discussion in note 81, supra.
But the general acceptance of the Court's privilege, in view of its apparent lack of legal justification, provides support for the executive since as Chief Justice Burger has pointed out:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.\(^{166}\)

Accordingly, in order to avoid a chilling effect on discussion within the executive branch, an executive privilege should extend.\(^{167}\)

There are, however, two problems with this analysis. First, it would seem that any person who is reluctant to have his views subjected to the scrutiny of Congress perhaps has not sufficiently considered and substantiated his view to justify any audience whatsoever, much less with the President who might make a major policy decision based on those views. Second, using the judiciary's privilege to justify one for the executive ignores the functional difference between those two institutions. The judiciary is the only branch assigned by the Constitution to resolve disputes between parties, whereas the President, in sharing the responsibility for national policy with the concurrent authority of Congress, does not have complete dominion over the decisional process. In the few areas where Congress does not possess such authority,\(^{168}\) the President, like the judiciary, can secrete information, since as previously pointed out Congress' investigatory powers only comprehend materials in which it has a valid legislative interest.\(^{169}\)

The second reason offered by the supporters of the executive confidentiality is the need for security. The merit in this contention was recognized by Justice Stewart in his concurring opinion in *New York Times Co. v. United States.*\(^{170}\)

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\(^{167}\) In addition to the privilege accorded the officials in the government, the private citizen also has certain rights to secrecy for the purpose of promoting candid communication in the form of evidentiary privileges. The attorney-client privilege, marital privilege and physician-patient privilege are some examples of these. *McCormick's Handbook of the Law of Evidence* §§ 87 (attorney-client), 86 (marital), and 98 (physician-patient) (2d ed. E. Cleary 1972). 8 J. WIGMORE, *Evidence in Trials at Common Law* §§ 2291 (attorney-client), 2332 (marital), and 2380(a) (physician-patient) (J. McNaughton rev. ed. 1961).

\(^{168}\) One obvious example would be the pardoning power, U.S. Const. art. II, § 2, cl. 1, the exercise of which is totally committed to executive discretion.

\(^{169}\) See pp. 695-97 and accompanying notes supra.

\(^{170}\) 403 U.S. 713, 727 (1971).
Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.\textsuperscript{171}

The settlement reached in Viet Nam and the resumption of relations with the People's Republic of China, both the result of delicate and confidential negotiation, indicate the need for some degree of secrecy in the area of foreign relations. However, despite the impressive merit of these accomplishments, the need for secrecy should be accepted cautiously for the executive practice of conducting foreign affairs without congressional assistance has also culminated in catastrophe. The information revealed as a result of the release of the "Pentagon Papers" underscores the enormity of consequences to the nation when a decision is made by a very limited group of executive officials who reject the demands of the legislature for full information thus preventing the responsible exercise by Congress of its constitutionally appointed duties of declaring war and maintaining an army.\textsuperscript{172}

Considering all of the competing factors, it is apparent that in order for the Presidency to remain a functional institution, it must enjoy a certain degree of secrecy if all executive policy alternatives are to be vigorously explored and if the President, as the country's primary foreign ambassador, is to carry on delicate foreign relations in an effective and confidential manner. It is because of this dilemma, that is, the need for both secrecy and disclosure, that Congress must take decisive legislative steps to clear up the quagmire that harbors the question of executive privilege.

RECOMMENDATIONS

Several proposals dealing with the privilege are presently pending in Congress. Senate Bill 858,\textsuperscript{173} introduced by Senator Fulbright, allows for

\begin{itemize}
  \item \textsuperscript{171} Id. at 728. As illustrative of the great control the President has over foreign policy, consider executive agreements. No provision of the Constitution grants the power for their creation, yet they have uniformly been found to be within the President's authority. See, e.g., United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
  \item \textsuperscript{172} U.S. CONST. art. I, § 8, cl. 11 and cl. 12.
  \item \textsuperscript{173} S. 858, 93d Cong., 1st Sess. (1973).
\end{itemize}
the members and employees of the executive branch to claim the privilege only if that claim is accompanied by a signed statement from the President requiring the employee to refuse the congressional request.\textsuperscript{174} If the President takes this action it is for the committee requesting the information to determine if the executive position is justified.\textsuperscript{175} If the committee finds that the claim is unwarranted, it is to file a resolution, together with a report and the portion of the record of its proceedings relevant to the claim, with the House it represents to then determine the proper action to be taken.\textsuperscript{176} Also there is another section of the Bill which focuses on executive privilege claims by agencies.\textsuperscript{177} The procedure for resolving these cases is essentially the same as that applied to executive officials, except that in the President's verifying statement he must also articulate his reasons for approving the claim,\textsuperscript{178} and in the event a congressional request is totally ignored by an agency for more than forty days, the General Accounting Office is to deprive the agency of access to its funds until either a privilege claim is made or the information is given to Congress.\textsuperscript{179}

Although the general tenor of Senate Bill 858\textsuperscript{180} is sound, the specifics in its approach could still be improved. First, the policy section or preamble should establish that, for the reasons discussed in this article, the legality of the doctrine of executive privilege is questionable and that

\textsuperscript{174} Id. § 306(b).
\textsuperscript{175} Id. § 306(c).
\textsuperscript{176} Id.
\textsuperscript{177} Id. § 307.
\textsuperscript{178} Id. § 307(e)(3).
\textsuperscript{179} Id. § 307(f) states:

If the General Accounting Office determines that any information requested of an agency by any such committee, subcommittee, or office has not been made available within a period of thirty days after the request has been received by that agency, and if during such period the President has not signed a statement invoking executive privilege with respect to that information, no funds made available to that agency shall be obligated or expended commencing on the fortieth day after such request is received by such agency or employee of that agency, unless and until such information is made available or the President invokes executive privilege with respect to such information.

\textsuperscript{180} There are also two other pieces of legislation pending before the Senate. These are: S. Con. Res. 30, 93d Cong., 1st Sess. (1973), and S.J. Res. 72, 93d Cong., 1st Sess. (1973), both of which mirror the sentiments and procedures specified in S. 858. However, it should be noted that Senate Concurrent Resolution 30 would add the requirement that when the President seeks to invoke executive privilege on behalf of an officer or employee of the executive branch, he must set forth the grounds on which the invocation is based. S. Con. Res. 30, 93d Cong., 1st Sess. § 1 (1973).
Congress possesses the broadest power to require executive disclosure. In addition, the preamble should state that, as a general policy, the executive, to the greatest extent possible, should cooperate with the Congress by giving it the information it seeks. It should also express a similar legislative commitment that Congress will not meddle unnecessarily in the executive function, but will only seek information which legitimately relates to the legislative process. The Fulbright Bill fails to make sufficiently clear Congress's broad power; it tends to sanctify a right to executive privilege without stating clearly and forthrightly Congress' concomitant right to obtain information.

Second, the instances in which executive privilege might properly be invoked should be defined. It is not enough to allow the President to claim the privilege and then give Congress a procedural mechanism to overcome the President should it not agree with his claim. Congress or the judiciary may have to decide whether the privilege is being properly invoked; they should be provided with a clear standard by which to make such a determination. Therefore, in recognition of the President's need for secrecy on policy grounds, the direct communications between the President and another party should be protected if the matters in discussion legitimately relate to aspects of national policy. Thus, if there were questions in a committee hearing about illegal activities by members of the executive branch, or questions about campaign activities not related to government business, this information would still be accessible to a congressional demand—even if the information were contained in a memo to or from the President.

Other communication within the executive branch which, although legitimately relating to policy matters do not include the President as a party, should be subject to the protection of the executive's shield if two requirements are met: (1) the information would be protected from a judicial demand under certain exemptions of the Freedom of Information Act; and (2) from all the circumstances surrounding the claim

181. The preambles to S. Con. Res. 30 and S.J. Res. 72 seem to adequately meet this need by stressing the separation of powers, the erosion of checks and balances and the need of Congress for information in order to legislate effectively.

182. See pp. 728-30 and accompanying notes supra.

183. The exemptions which should be used for this privilege are contained in section (b) of the Act:

(b) This section [the disclosure section] does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(3) specifically exempted from disclosure by statute;
of privilege, it appears that the congressional need for the information is outweighed by the necessity for executive suppression. The second of these requirements can of course only be satisfied when the President himself certifies the need for the privilege with reasons why it should attach. As in Senator Fulbright's Bill, the merit of the President's contentions will be determined by the committee.\footnote{84}

Third, procedures for resolving impasses over executive privilege should be included. Senate Bill 858 authorizes the committee to submit a resolution to the floor of its House of Congress which states that the information requested is essential to the conduct of its legislative business. However, it stops here by simply providing that if the House of Congress agrees with its committee it shall determine the subsequent action to be taken.\footnote{85} Some have suggested that Congress use its own remedy, the contempt power, by sending the Sergeant-at-Arms out to place the indi-

\begin{itemize}
\item[(4)] trade secrets and commercial or financial information obtained from a person and privileged or confidential;
\item[(6)] personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
\end{itemize}

\footnote{Freedom of Information Act, 5 U.S.C. §§ 552(b)(1), (3), (4) and (6) (1970).}

\footnote{184. Probably the most workable formula by which a committee could make this determination would be a restricted \textit{in camera} type of hearing. If after the committee has reviewed the Chief Executive's reasons for the privilege claim and the surrounding circumstances of that particular case does not agree with the President's position, it should allow the President to choose from among those serving on the committee, one person from each party who will partially review the requested information. These two Congressmen will report to the committee their recommendations for further action. It will then be the responsibility of the entire committee to determine if these recommendations should be followed. If the President should refuse to assent to the restricted review of the material, the committee may always, by filing a report, turn the disposition of the matter over to its House. The \textit{in camera} inspection procedure has been used by the courts for determining the nature of material claimed to be privileged under the exemptions of the Freedom of Information Act. In EPA v. Mink, 410 U.S. 73 (1973), the Court indicated when an \textit{in camera} inspection is appropriate:

Plainly, in some situations, \textit{in camera} inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is of course, on the agency resisting disclosure.

\footnote{185. S. 858, 93d Cong., 1st Sess. § 306(c) (1973).}
vidual in custody; then arraign him and try him for contempt. As applied to the President or a high executive official, this is an unnecessarily contentious method which would probably fail and in the process create a strong base of public support for the beleaguered President. But, in order to maintain the dignity of the legislature and to maximize the probability of executive compliance with legislative requests, Congress should enlist the help of the federal courts.

In Senate Select Committee v. Nixon, the District Court for the District of Columbia dismissed the Senate Committee’s attempt to subpoena certain tape recordings of conversations between the President and his aides. The basis for the ruling was a lack of jurisdiction. Senator

188. Id. Although jurisdiction was the problem in the “Tape Case,” critics have also argued that there is another more compelling reason for finding a congressional challenge to executive privilege nonjusticiable, and that is the political question doctrine. Brief for Defendant at 1177, Senate Select Committee v. Nixon, 366 F. Supp. 51 (D. D.C. 1973), as reprinted in, 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1174, 1177 (No. 39, 1973). In presenting this position the privilege advocates have relied on statements such as the one made by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803):

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable.

5 U.S. (1 Cranch) at 166.

First, as a practical matter the courts should decide this issue since if they do not it is incumbent upon the two interested branches to resolve their differences and make the determination. As the Supreme Court recently stated:

The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority.


Finally, a case between the President or any member of the executive branch and the Congress concerning the issue of executive privilege would not present a political question since it simply does not fall within any of those categories defined as a political question. In Powell v. McCormack, 395 U.S. 486 (1969) the Supreme Court reaffirmed the definition for a political question previously formulated in Baker v. Carr, 369 U.S. 186 (1962). A political question is a textually demonstrable constitutional commitment of the issue to a coor-
Kennedy has introduced a bill which would alleviate this problem. It would allow either House of Congress or any committee thereof to bring a civil action against a contumacious witness in order to compel the disclosure. This suit would be heard in the District Court for the District of Columbia by a three judge panel who would determine the validity of an executive privilege claim. If the court found that the need for such protection was unsubstantiated it would issue an injunction ordering the witness to yield to the congressional demand.

The engagement of this neutral third branch to settle a dispute between the Congress and the President is the best remedial procedure; a contempt citation from an impartial court certainly would lend credibility to the congressional position. If, however, the President were to ignore the judicial order then the ultimate breakdown in a government of laws would be reached and Congress would have to resort to its own impeachment power for a solution.

CONCLUSION

As the analysis of statutory authority and constitutional theory and interpretation demonstrates, there is no solid basis for the existence of an executive privilege. Furthermore, its unsupported assertions have relegated Congress to the role of executive caddy in the legislative process, the result of which has been inept national policy and a growing cynicism

395 U.S. at 518-19, quoting from, Baker v. Carr, 369 U.S. at 217. Obviously, there is no clear constitutional commitment of executive privilege to the President. The statutory proposals provide clear standards by which to determine the issue. Also, since as a practical matter it is better for the courts to intercede in this dispute rather than leaving the resolution to the interested branches, there would be no lack of respect shown to either party if the Court settled the controversy arising over a privilege claim. Last, when Congress takes a position and the President assumes a contrary stance, it certainly does not complicate or intensify the issue if the judiciary plays referee. In fact, a Court decision lessens the possibility of future confrontations.

190. Id. at § 3101.
193. U.S. CONST. art. I, § 3, cl. 6 and cl. 7.
in the American people toward their government. The Congress, by tac-
itly accepting the President's claim to an inherent right to the privilege,
and the President by increasing the use of executive secrecy, must both
share the blame for this situation. However, it can be remedied; Con-
gress must take the initiative by defining and limiting the instances of
its use, and the President must realize that for every privilege claim made,
a proportionate decrease in executive credibility both with the Congress
and with the people results. There are some considerations which suggest
a need for a certain amount of confidentiality in executive operations,
but there are no extenuations that justify the inclusion of a wholesale
executive privilege in a government where effective policy is dependent
upon the cooperation of the executive and legislative branches.

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