Executive Privilege: Rhyme Without Reason

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EXECUTIVE PRIVILEGE: A RHYME WITHOUT A REASON

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As the nation sought judicial solutions to the sweeping problems that beset the Nixon Administration, the concept of executive privilege was the subject of much debate. The Supreme Court gave a necessarily narrow answer to the question of the privilege's power in the face of a judicial demand for information. In the parade of events ending in resignation, the critical question of the President's power to refuse to obey a congressional demand for information was, however, left unanswered. By refuting the most often advanced justifications for executive privilege — those of historical usage, separation of powers, and public policy — Mr. Gard persuasively argues that in such a confrontation between the President and the Congress, the Congress must prevail.

Amid the turmoil and unrest of the recent reappraisal of political morality, numerous investigations and inquiries were made concerning activities within the uppermost echelons of the Executive Branch. In an apparent effort to parry the deepest of these thrusts, the President withheld admittedly relevant material from both Congress and the courts. Justifying his actions as an exercise of executive privilege, he maintained that his position of absolute prohibition of disclosure was nonreviewable.

Suit was brought by the Watergate Special Prosecutor challenging presidential withholding of evidence in a criminal prosecution.

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1 The Senate sought tape recordings made at the direction of the President, who said of the subpoenaed tapes:

The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways.


In a case of first impression,\(^3\) the Supreme Court recognized the existence of executive privilege.\(^4\) Reasserting the judicial prerogative of final interpretation of constitutional claims, the Court disavowed the claim of absolute privilege but accorded great deference to other presidential assertions. Deeming the need for confidentiality of remarks among high government officials to be "too plain to require further discussion,"\(^5\) the Court noted that the decision making process would suffer if the public were allowed to learn of advice given to the President. Without secrecy, the Court reasoned, a President would never receive complete candor and objectivity from his advisors.\(^6\) The Court appeared uncertain\(^7\) as to the limits of confidentiality of presidential communications but felt that supremacy of each branch within its sphere of responsibility supported such a principle. In essence, while any presidential assertion of executive privilege is "presumptively privileged,"\(^8\) in the case before the Court the President's assertion was no more than "a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussion" and, as such, could not survive when balanced against demands for information based on the specific constitutional need for all relevant evidence in a criminal prosecution. As the President's position was found to be less weighty, the Court unanimously held that the contested material must be surrendered in accordance with the lower court's instructions.\(^9\)

The Court specifically refused to balance executive privilege against a congressional demand for information.\(^10\) Given the Court's use of the "constitutional balance" and the very limited scope of its holding, it must be assumed, however, that executive privilege will be evaluated on a case by case basis, each turning on its facts. Eventually, the Court will be called upon to decide the strength of executive privilege when asserted to withhold information from the

\(^4\) Id. at ___, 94 S. Ct. at 3107, 3109.
\(^5\) Id. at ___, 94 S. Ct. at 3106.
\(^6\) Id. For a discussion opposing this position, see text accompanying note 105 infra.
\(^7\) The Court stated:
Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.
___ U.S. at ___, 94 S. Ct. at 3106.
\(^8\) Id. at ___, 94 S. Ct. at 3107.
\(^9\) The district court ordered in camera inspection of subpoenaed material for determination of relevancy prior to disclosure to the Special Prosecutor. Id. at ___, 94 S. Ct. at 3110.
\(^10\) Id. at ___ n.19, 94 S. Ct. at 3109.
Congress. The thesis of this Article is that, when such a confrontation occurs, the balance must swing in favor of the Congress.

This Article will examine the validity of a presidential claim of executive privilege when exercised against a congressional inquiry by analyzing positions previously taken by proponents of executive privilege. First, the historical usage theory, often cited as a justification for the privilege, will be reevaluated, and it will be suggested that historical precedent does not support the existence of such a theory. Second, the separation of powers justification will be undercut by close examination of the constitutional principles involved. Finally, attack will be waged on the various public policy arguments used to support the privilege.

I. HISTORICAL PRECEDENT AND THE USAGE THEORY

In past debate on the issue, proponents and critics of executive privilege have almost invariably relied upon historical instances of executive refusal to provide information to Congress. Any argument based on the historical instances of executive withholding of information must begin with the recognition that the practice, which is today relatively commonplace, was, until recently, quite rare. While only three instances of such executive refusal occurred between 1929 and 1939, between 1964 and 1973 at least one hundred thirty such refusals were documented. Moreover, the term "executive privi-
"lege" itself is of recent origin, having first been used during the Eisenhower administration. Since present day advocates of executive privilege are attempting to support a new concept with precedent that arose before the birth of that concept, a danger exists that new justifications have been ascribed to actions which might have had, at the time, varying explanations and motivations.

The first relevant statement by either the Legislative or Executive Branch regarding such a privilege occurred in 1789 when Congress enacted the following statute:

The Secretary of the Treasury . . . shall make report and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office . . . .

Drafted by Alexander Hamilton, this statute was passed by the First Congress, whose membership included many of the framers of the Constitution, and was signed by President George Washington. The constitutional interpretations of the Congress that began the government "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of [the Constitution]." This statute has been authoritatively interpreted to apply, not just to the Secretary of the Treasury, but to all cabinet officers. Thus, it was the view of the early legislators that government officials must be responsive to congressional demands for information, and this view has subsequently been supported by interpretations of the Executive Branch.

The first congressional inquiry came in 1792 when the House of Representatives appointed a committee to investigate the defeat of General St. Clair's expedition in the Northwest. During the course of that investigation, the committee sought to compel James Madison, then Secretary of the Treasury, to produce papers which were taken to be within his authority, but Madison declined to produce them. The committee then issued a resolution to the President, in which it sought to compel the production of the papers. The President refused to order their production, and the Attorney General was then asked to advise the President on the matter. The Attorney General's opinion, written in 1856, is significant because it sets forth the principle that to compel the production of papers over the President's objection requires the remedy of impeachment.


9 By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General.

6 Op. Atty Gen. 326, 333 (1856) (advice of Attorney General Cushing to the President). Later in the same opinion, Attorney General Cushing recognized that "[t]o coerce the Head of the Department is to coerce the President." Id. at 338.
of this inquiry, the committee requested documents from the Secretary of War. In response to this request, President Washington called a cabinet meeting at which the members studied the request and, according to Thomas Jefferson, reached the following conclusions:

1. that the house was an inquest, therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the committee nor the House had a right to call on the head of a department, who and whose papers were under the President alone, but that the committee should instruct their chairman to move the house to address the President . . . . It was agreed in this case that there was not a paper which might not be properly produced. . . .

Notwithstanding the views of his cabinet, President Washington complied fully with the committee request, instructing the Secretary of War on April 4, 1792: "You will lay before the House of Representatives such papers from your department as are requested by the enclosed Resolution."

All available evidence leads to the conclusion that the opinions of the Cabinet were never communicated to Congress. Thus, this precedent stands only for the proposition that the Cabinet, and arguably President Washington, had the unexpressed belief that the President possessed the discretion to withhold information from the Congress when the public interest so required. It is not an historic incident of presidential withholding of information since the docu-

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20 See 3 Annals of Cong. 490-94 (1792).
21 1 T. Jefferson, Writings 189 (Ford ed. 1892).
22 32 The Writings of Washington 15 (J. Fitzpatrick ed. 1939). As one biographer of President Washington has written, all of the requested documents were given to the committee and, "not even the ugliest line on the flight of the beaten troops was eliminated." 6 D. Freeman, Biography of Washington 339 (1948-57).
23 Jefferson's notes from the Cabinet meeting are printed in what he referred to as "The Anas," the "loose scraps" of his notes and writings. 1 T. Jefferson, Writings 154 (Ford ed. 1892). These notes were not even referred to at the time of the controversy over Washington's later refusal to provide information to the House concerning the Jay Treaty, when it was stated in Congress: "[T]he House had the fullest right to the possession of any documents in the Executive Department . . . this was the first time it had been controverted." 5 Annals of Cong. 601 (1796) (emphasis added). The origin of this interpretation is Rogers, supra note 12, at 944.
ments requested were given to the House committee by the President voluntarily and without protest.

At about the same time, the House instituted an inquiry into alleged wrongdoing by Alexander Hamilton as Secretary of the Treasury. President Washington did not simply acquiesce in the investigation but indeed welcomed it. Although Hamilton was exonerated, the power of the House to conduct the inquiry was never questioned. James Madison stated: "[I]t was the duty of the Secretary . . . to inform the House how the law had been executed . . . [and] to explain his own conduct. . . ."

One other incident meriting attention occurred during Washington's tenure. In 1796, Washington refused to furnish the House with documents relating to his instructions to John Jay in the negotiation of the Jay Treaty. In refusing to provide the House with the requested information, President Washington did not rely on any claim of presidential power. Instead, he relied solely on the position that the Constitution vested the treaty-making power exclusively in the President and the Senate and that the House of Representatives therefore had no right to such information. That the refusal was not grounded in terms of presidential power to withhold requested material is found in the fact that Washington without objection laid all of the relevant papers before the Senate.

Two congressionally authorized occasions of presidential withholding of information from Congress transpired during the presidencies of Jefferson and Monroe. In 1807, the House requested information concerning Burr's conspiracy, and in 1825 a House committee requested documents concerning the conduct of certain naval officers. These two incidents are similar because in both cases the

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24 See 33 THE WRITINGS OF WASHINGTON 95 (J. Fitzpatrick ed. 1939) (letter to Pendleton, September 23, 1793).
25 3 ANNALS OF CONG. 934 (1792).
26 5 ANNALS OF CONG. 760-62 (1796). Two other factors distinguish this situation. First, Washington recognized that the House had the right to request the documents pursuant to its impeachment power. Second, Washington was dealing with a very sensitive political situation. The Jay Treaty was extremely unpopular, even with Washington, and he reasonably feared that if he gave the information to the House (which would have to appropriate funds to implement the Treaty) before it was given to the Senate for ratification, the Senate might be offended and seize the excuse to defeat the Treaty. S. PADOVER, THE COMPLETE JEFFERSON 1123-24 (1943).
27 5 ANNALS OF CONG. 761 (1796). The House adopted a resolution insisting on its right to this information, thereby dissenting from Washington's refusal to comply with its request. Id. at 782-83.
28 Berger, supra note 13, at 1093. The Burr conspiracy also was the subject matter of United States v. Burr, 25 F. Cas. 30 (No. 14692d) (C.C. Va. 1807). This historic case involved the
House request specified that the President should withhold such information and documents as he deemed the public welfare required to be kept confidential. Accordingly, any conclusions to be drawn from these events must be narrow in scope. As the House committee said of the Monroe incident:

[It cannot] be presumed that the exercise of the discretion by President Monroe, in a case where it was conferred upon him, proves that he would have exercised it in a case where it was not conferred. This would be a somewhat violent presumption.

President Andrew Jackson did assert a power inherent in the presidency to withhold information from Congress. In 1833, Jackson refused to comply with a congressional request for a copy of a paper, read by the President to the heads of departments, relating to the withdrawal of government deposits from the United States Bank, stating:

The Executive is a coordinate and independent branch of the Government, equally with the Senate; and I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing made to the heads of departments, acting as a cabinet council.

Thus, after forty-five years of constitutional government in the United States, the theory of executive privilege was asserted for the first time by Andrew Jackson. This confrontation was one of many between Jackson and the Congress over requests for information.

issue of whether the Executive is “privileged” to withhold information from a criminal accused. Obviously, the constitutional considerations in weighing the right of a criminal accused to documents in the possession of the Executive differ significantly from those involved in the consideration of the right of Congress to such information and documents. In any event, Jefferson fully complied with the subpoena by submitting the requested documents to the Court for in camera inspection. See Berger, supra note 13, at 1107 n.333, 1108 n.336 and accompanying text.

Attorney General Rogers mentions this exception in the House request to Jefferson. Rogers, supra note 12, at 944.

H.R. REP. No. 271, 27th Cong., 3d Sess. 13-14 (1843) (emphasis in original). Clearly, the same reasoning applies to the Jefferson incident and destroys its utility as a precedent in support of executive privilege.

Cong. Globe, 23d Cong., 1st Sess. 23 (1833). In 1835, President Jackson refused to provide Congress with information relating to the appointment and removal of executive officers.

In some instances, the President prevailed and in some he yielded, but "[i]t is not thus accurate to say of even the Jackson administration that the President always prevailed."33

President Tyler, in 1842, refused a congressional request for the names of the members of the Twenty-sixth and Twenty-seventh Congress who had applied for appointment to an executive office. Tyler based his refusal not on a broad, discretionary, self-controlled power of the President to decide what information Congress should be given but rather on the narrow ground that Congress had no right to the information because the Constitution expressly provided that the appointment of executive officers was exclusively the province of the President.34 Certainly, a presidential refusal to provide information to Congress relating to a subject matter which is vested by the Constitution exclusively in the Executive cannot be equated with a broad claim of executive discretion to refuse information to Congress on all matters.

President Polk refused to comply with a House request for information concerning disbursements from a presidential Secret Service fund — a fund appropriated by Congress to enable the President to purchase the services of spies for use in clandestine foreign operations.35 This refusal does not, however, provide support for the executive privilege theory since, as in the Monroe and Jefferson refusals, congressional authorization provided legitimate grounds for the withholding of information. Indeed, Polk did provide the House with complete information, including documentation, of the amounts of the various expenditures made from the fund. He refused only to disclose the specific purposes for which the funds were expended, on the grounds that the authorizing statute specifically exempted this information from disclosure. In addition, many of the expenditures had been made under prior administrations and President Polk doubted his authority to release material deemed confi-

31 Id. at 81.
32 Cong. Globe, 27th Cong., 2d Sess. 349 (1842). As suggested by this precedent, certain specified powers are exclusively within the control of the President. Art. II, § 2, c.2 grants the President the exclusive power to nominate certain officials but requires the advice and consent of the Senate on all appointments. The granting of reprieves and pardons under Art. II, § 2, c.1 and the removal of executive officials (see Myers v. United States, 272 U.S. 52 (1926)) are also exclusive presidential powers. Into these areas the Congress has little or no power to inquire because, in face of the exclusive power of the Executive, the Congress does not have the requisite need to know.
dential by his predecessors. Significantly, Polk's concern for his predecessors' confidentiality was mooted when former President Tyler testified under subpoena and former President John Quincy Adams filed a deposition enabling the House committee to report that it had sufficient information to conclude its investigation. At no time did President Polk rely on the doctrine of executive privilege to justify his actions. Rather, he was careful to show deference to the congressional right of inquiry:

If the House of Representatives is the grand inquest of the Nation and should at anytime have reason to believe that there has been malversation in office and should think proper to institute an investigation into the matter, all the archives, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive afforded them to prosecute the investigation.

These factors clearly demonstrate that any reliance on this situation as precedent for the validity of an executive privilege is misplaced.

President Grant, ostensibly on "constitutional grounds," refused to provide Congress with information concerning executive acts performed away from the capitol. The language of Grant's refusal, however, can only be regarded as blunderbuss since Congress had only requested such information as Grant deemed compatible with the public interest to disclose. Furthermore, the validity of the position asserted by President Grant was clearly disputed by the Senate when, in 1886, Attorney General Garland, at the direction of President Cleveland, cited similar "constitutional grounds" to justify his refusal to provide the Senate Judiciary Committee with information relating to the suspension of George Duskin as United States Attorney in Alabama. The Senate promptly censured Attorney General Garland for his refusal.

Between the administration of Cleveland and that of Truman, the struggle over the power of the President to withhold information

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35 Id. at 698.
38 Id. at 28.
39 See 4 J. Richardson, Messages and Papers of the Presidents 435 (1904) (message of President Polk to the House).
40 Quoted in 1973 Hearings, vol. I, at 47.
41 9 Cong. Rec. 2168 (1876).
42 17 Cong. Rec. 1584-85 (1886).
43 Id. at 2211 (1886).
from the Congress continued apace. During this period, as in previous eras, the Executive generally complied fully with congressional requests, although isolated refusals based on various grounds did arise. Meanwhile, Congress continued to refuse to acquiesce in presidential assertions of a right to withhold information, as is evidenced by the enactment of the following statute in 1928:

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

This position is further supported by the congressional response to what is perhaps the most widely known executive refusal to provide information to Congress. During Senator Joseph McCarthy’s hearings on alleged subversive activities within the Executive Branch, President Truman’s thwarting of congressional investigations was met by the following reaction from then Congressman Richard M. Nixon:

The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason; that would mean that the President could have arbitrarily issued an executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the

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44 Incidents of executive refusal to provide information to Congress occurred during the administrations of Theodore Roosevelt, Calvin Coolidge, Herbert Hoover and Franklin D. Roosevelt. See generally Truman Memorandum (1948) in N.Y. Times, Sept. 3, 1948, at 5. This report lists all primary occurrences, beginning in 1796, of presidential refusals to furnish information or papers to Congress.


United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.\textsuperscript{47}

The saga of Senator McCarthy continued despite presidential opposition. In 1954, McCarthy attempted to subpoena members of the Army Loyalty and Security Appeals Board. Eisenhower's Attorney General supported the announced intention of the loyalty board members to refuse to answer questions concerning their participation in the loyalty program, recognizing a requirement to testify only if a congressional committee disclosed a bona fide intention to interrogate the members about misconduct in their official duties.\textsuperscript{48} Nonetheless, Senator McCarthy's abandonment of his intentions to subpoena the members of the Army Loyalty and Security Appeals Board cannot be interpreted as subcommittee acquiescence in the position asserted by Attorney General Brownell. The majority report of the subcommittee stated: "We cannot accept the point of view that such officials are immune from subpoena, although we realize there may be subjects on which they should not be forced to testify."\textsuperscript{49}

Historically, presidential assertions of an inherent right to withhold information from the Congress are rare, the first not occurring until 1833. Congressional acquiescence in such assertions is even more infrequent. In fact, the Congress has, on several occasions, forcefully expressed its opposition to these presidential assertions. Simply stated, there is little truth to the assertion of the counsel for President Nixon that "[f]rom the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands."\textsuperscript{50}

Proponents of executive privilege rely upon historical analogies such as those discussed above in an effort to establish a constitutional right by usage. Actually, the United States Supreme Court has enunciated no clear precedent as to whether a constitutional

\textsuperscript{47} 94 Cong. Rec. 4783 (1948).


right may be so derived. At best it can be said that the relevant cases are in conflict. On the one hand is precedent to the effect that no constitutional right can be established solely by usage:

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than non-existent powers can be prescribed by an unchallenged exercise.\(^1\)

On the other hand is the view of Mr. Justice Frankfurter that constitutionality of executive action, absent express constitutional authorization, can be established, but only if it is “systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned.”\(^2\)

For obvious reasons, neither of the foregoing arguments provide favorable support for the existence of executive privilege. It may be contended, however, that the following language from *United States v. Midwest Oil Co.* provides the necessary authority:\(^3\)

Both officers, lawmakers 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 rule 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 the subject of investigation.\(^4\)

It is submitted that *Midwest Oil* may not properly be utilized to justify a theory of executive privilege for two reasons. Most importantly it has been illustrated that executive privilege is not such an oft repeated theory “as to crystallize into a regular practice.” Further, the above language, when seen in the light of context, does not provide the support that proponents of executive privilege claim.

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Factually, *Midwest Oil* concerned the withdrawal by executive order of lands previously declared by the Congress to be available for purchase by private citizens. Much of this land contained oil, and it was feared by the Administration that America's reserves were being depleted. After the President issued the executive order, private citizens entered the lands, found oil, and assigned their interests therein to the Midwest Oil Company, which began extracting the oil. The United States then filed suit to recover the lands and an accounting for the oil which had been extracted. The Supreme Court upheld the validity of the executive order on the grounds that literally hundreds of such orders had been effectuated without any protest from Congress whatsoever. Referring to the President as the agent of Congress, the Court noted that "in not a single instance was the act of the agent disapproved." In support of its decision, the Supreme Court further stated:

Neither at that session nor afterwards did [the Congress] ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

Thus, far from supporting the existence of executive privilege, the *Midwest Oil* case actually warrants adherence to a middle position by illustrating that usage by the Executive becomes a basis for power only if clearly acquiesced in by the Legislative Branch.

Overall, historical support does not appear to exist for the proposition that the Executive possesses an inherent power to withhold information from the Congress. Such an "historical usage" justification, if valid, would mean that history would reveal a series of presidential refusals to speak and a meek Congress' rushing to acquiesce. An objective view of history does not disclose such occurrences. More fundamentally, even if such usage were found, when two gov-

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5 Id. at 466-68.
6 Id. at 475.
7 Id. at 481 (emphasis added). Elsewhere in the opinion the Court stated:

The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice . . . .

Id. at 471 (emphasis added).
II. SEPARATION OF POWERS AS A BASIS FOR EXECUTIVE PRIVILEGE

The supporters of executive privilege also seek support from the doctrine of separation of powers. Although this doctrine is nowhere expressed in the Constitution, it can be described as a theory upon which the Founding Fathers relied in the framing of the Constitution. Such being the case, their intention must be the starting point of a rational inquiry into the separation of powers justification.

The framers of the Constitution incorporated the doctrine of separation of powers and the complementary doctrine of checks and balances into their concept of the new American government, thus reflecting their distrust for the power inherent in government. Through these doctrines, the Founding Fathers achieved their purpose of limiting the powers of the federal government by dividing the powers between the three branches, granting to each branch certain specified powers which were not to be exercised by either of the other branches. According to James Madison, "The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny." Thus, the separation of powers doctrine was unquestionably designed to limit, not expand, the power of the federal government and each of its branches. As Justice Brandeis stated:

The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.
Consistent with its purpose, the doctrine of separation of powers grants no powers whatsoever, but rather protects the integrity of the powers specifically granted elsewhere in the Constitution. Even the most ardent proponents of executive privilege implicitly recognize this fact.\textsuperscript{62}

In examining the propriety of the separation of powers justification of executive privilege, a threshold determination must be made as to whether a power exists in Congress to demand information from the Executive Branch. If such a legislative power exists, it then becomes necessary to determine whether the Constitution grants the Executive the power to refuse such a congressional demand. The theoretical foundation for such an inquiry into the proper relationship between the respective powers of the different branches of government was well defined by Justice Jackson:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . .

. . . .

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.\textsuperscript{63}

A. Power of the Congress

The concept of separation of powers is premised on a balance, not a conflict, of power among the branches of the federal government. As is proper in such fundamental matters, the Constitution itself must provide the measurements by which the balance will be struck. As previously stated, the initial focus should be on the con-
stitutionally supportable power of Congress to demand information from the President. If such a power is found, it must be weighed against the constitutionally based power, if any, of the Executive to refuse compliance.

It is the congressional power to conduct investigations that provides the basis for any demand the Congress might make for presidentially controlled information. Traditionally, the power to conduct investigations has been viewed as a necessary and proper incident of Congress' constitutional responsibility to legislate. Logically, it is imperative that the Congress have the power to investigate before it legislates:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the leg-

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61 It is axiomatic that this power of Congress extends to investigations of the Executive Branch. Most of the congressional investigation during the first hundred years of the United States concerned the operations of the Executive Branch. Historically, the purpose and function of congressional investigations was to reveal executive mismanagement whereas investigations into the affairs of private citizens was a phenomenon which did not occur until later in American history. T. Taylor, Grand Inquest: The Story of Congressional Investigations 33-34 (1955). The first House investigation into the Executive Branch was the 1792 House investigation into the St. Clair expedition. See notes 20-23 and accompanying text supra.

62 The Constitution provides in Art. I, § 1, that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." The definitive powers of Congress are found in Art. I, § 8 wherein the Constitution provides that "Congress shall have the Power To" conduct a broad range of governmental functions. The legislative responsibility of Congress, however, is completed by the pervasive "Necessary and Proper" clause in Art. I, § 8, which provides that the Congress shall have the power:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

The Supreme Court, in reviewing the powers of the Congress, has supported the principle that the Constitution does not deny to Congress the necessary resources of flexibility and practicality to perform its legislative functions. See Yakus v. United States, 321 U.S. 414 (1944); Currin v. Wallace, 306 U.S. 1 (1939); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The power to investigate is such a necessary resource. As an incident to its legislative responsibility, the congressional power to investigate is broad, and the scope of the power is as penetrating and far reaching as its potential power to legislate. Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957). See also McGrain v. Daugherty, 273 U.S. 135 (1927). The Court in Watkins illustrated the scope of the investigative power of Congress:

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

354 U.S. at 187.
islation is intended to affect or change; and where the legisla-
tive body does not itself possess the requisite information —
which not infrequently is true — recourse must be had to others
who do possess it.66

The judiciary has broadly construed the power of Congress to
make inquiries incidental to its power to legislate, with the proviso
that the very breadth of the power demands close scrutiny as to its
outer parameters. Consequently, to insure constraint on this broad
power the Court has required that such investigations be supported
by a valid legislative purpose,67 that they be properly authorized68
and that they not be merely an attempt to "expose for the sake of
exposure."69 Essentially, the questions propounded during the in-
vestigation must be narrowly drawn to elicit only information which
is pertinent to the subject matter of the investigation.70

The United States Supreme Court has indicated that these re-
strictions may not be fully applicable to congressional investigations
of "corruption, maladministration or inefficiency in agencies of the
Government."71 This power of Congress to investigate the other
branches of the federal government can best be understood as not
simply incidental to the power of Congress to legislate, but as a
power essential to each constitutional function of the Legislative
Branch.

Moreover, the specific constitutional authority for impeachment72
necessarily carries with it investigative power by the House of Rep-
resentatives to determine the facts allegedly justifying such a sanc-
tion. This feature of the impeachment process has been recognized
by the United States Supreme Court:

The House of Representatives has the sole right to impeach
officers of the government, and the Senate to try them. Where

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67 The power to investigate does not extend to an area in which Congress is forbidden to
legislate. Quinn v. United States, 349 U.S. 155 (1955) and cases cited in note 65, supra. Some
lower courts have, however, held that the legislative purpose supporting a congressional
investigation must be presumed. See Townsend v. United States, 95 F.2d 352 (D.C. Cir.
1938).
70 Barenblatt v. United States, 360 U.S. 109, 123 (1959); Watkins v. United States, 354 U.S.
178, 200 n.33 (1957).
71 354 U.S. at 200 n.33.
the question of such impeachment is before either body acting
in its appropriate sphere on that subject, we see no reason to
doubt the right to compel the attendance of witnesses and their
answer to proper questions, in the same manner and by the use
of the same means that courts of justice can in like cases.\textsuperscript{73}

The inquiry into questionable conduct of the government for the
purpose of possible impeachment proceedings knows few limitations
since it should naturally include investigation into virtually any
matter relevant to the official’s exercise of his duties. Furthermore,
given the significant impact on the government and the concerned
individual that necessarily accompanies an impeachment proceed-
ing, it would seem proper to allow congressional investigations
based on the impeachment power even where formal impeachment
proceedings have not yet been declared, thus protecting the integ-
riety of both the proceeding and the individual under suspicion. This
argument could be extended to incorporate the proposition that in
order to exercise its impeachment function properly the Congress,
or at least the House, should assume a “watchdog” role. Such a role
would require a somewhat continuous review of the activities of the
Executive.\textsuperscript{74} Regardless of whether the power of impeachment
should be given such an expanded reading, it seems axiomatic that
the congressional power to investigate, based either on the impeach-
ment power in particular or the legislative power in general, could
not be effectively exercised if subjected to an absolute privilege in
the Executive to control the flow of information critical to such
investigations.

The Constitution also explicitly grants Congress the power to
appropriate funds.\textsuperscript{75} Obviously, Congress therefore has the power to
investigate the wisdom of specific appropriations and to scrutinize
the actual use of such expenditures by the Executive Branch. This
authority includes the power to determine not only whether the
funds were expended for the purpose intended, but also to ascertain
the effectiveness of past appropriations in order to allocate funds
wisely in the future.\textsuperscript{76}

Thus, it can be stated that Congress possesses a broad investiga-

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\textsuperscript{73} Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).
\textsuperscript{75} U.S. Const. art. I, \$ 8.
\textsuperscript{76} Barenblatt v. United States, 360 U.S. 109, 111-12 (1959); United States v. Bryan, 72 F.
\end{flushleft}
tory power which is essential to the exercise of each power explicitly granted to it by the Constitution. These constitutional powers are not sharply distinguished in practice and cannot be in theory. The Congress frequently begins an investigation based on one of its powers and concludes exercising another. Efficient management of government demands that the various congressional powers be exercised concurrently. In any regard, Congress has the power to demand information from the Executive Branch pursuant to each of several constitutionally granted legislative powers. Unless the Congress exceeds the scope of its constitutional authorization or the Executive Branch possesses a power to refuse a congressional request for information, such a request must be honored by the President.

B. The Power of the Executive

In support of executive privilege, the contention has been raised that an executive power to withhold information from Congress "necessarily flows from the powers vested in the President by Article II." This assertion necessitates an inquiry into the powers granted, either explicitly or implicitly, to the Executive Branch of the government by the Constitution.

Article II, § 1 provides that "[t]he executive power shall be vested in a President . . . ." The argument that executive privilege is implicit in this grant of executive power to the President is premised on a theory first enunciated by Mr. Justice Taft in Myers v. United States:

The executive power was given in general terms, strength-
ened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed.

Justices Holmes, Brandeis and McReynolds sharply dissented from the view expressed by Chief Justice Taft. Justice McReynolds succinctly stated their position:

"That the government of the United States is one of delegated, limited and enumerated powers," and "that the federal government is composed of powers specifically granted with the reservation of all others to the States or to the People," are propositions which lie at the beginning of any effort rationally to construe the Constitution.

Both constitutional history and the fundamental theory of the Founding Fathers that the federal government was to be one of limited, enumerated powers refute the position of Chief Justice Taft. The view of the distinguished dissenters in the Myers case was subsequently embraced by the Supreme Court in the Steel Seizure Case wherein Justices Black, Frankfurter, Douglas and Jackson rejected the assertion that the Constitution granted the President a broad, unenumerated "executive power." Clearly, the proper interpretation of Article II, § 1 is that it is descriptive and not a grant of power: "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."

Neither is the power to withhold information from the Congress conferred upon the President by the Article II, § 2 provision that "[t]he President shall be commander-in-chief of the Army and Navy of the United States . . . ." Under the Constitution, the Congress is granted the exclusive power to raise and maintain armies and navies. The obvious conclusion is that the powers of the

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80 Id. at 118. See also Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).
81 272 U.S. at 231 (dissenting opinion).
82 See, e.g., Berger, supra note 13, at 1075-76.
84 Id. at 641 (Jackson, J., concurring).
85 U.S. Const. art. II, § 2.
86 U.S. Const. art. I, § 8. Mr. Justice Jackson succinctly stated that "[w]hile Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (concurring opinion).
commander-in-chief are actually relatively limited; the President is the First General and no more. As commander-in-chief, the power of the President is limited to executing the will of the Congress.87

The duty imposed upon the President to "take care that the laws be faithfully executed"88 is also a narrowly defined power. In essence, this duty grants no more power than the words plainly imply: "The power to execute the laws starts and ends with the law Congress has enacted."89

While it is true that the President possesses a vast range of discretion in executing laws which have been duly enacted by the Congress; the idea that the President can use this power to frustrate the will of Congress is unsupportable: "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible."90

An imaginative construction of the Constitution suggests that executive privilege finds its support in the grant of power to the President to require written opinions from department heads.91 This contention is best refuted by reference to a corollary power granted to the Legislative Branch. Article I, § 5 specifically imposes upon the Congress the duty of keeping a journal of its proceedings and specifies that parts of said journal may be kept secret, if it is so required. The history of this clause affirmatively shows that the Founding Fathers were extremely hesitant to allow anything to be kept secret. The secrecy provision was accepted by the framers of the Constitution only after lengthy debate and numerous assurances that the power to keep parts of the congressional journal secret was narrowly limited to military secrets.92 Certainly, the Founding Fathers who so reluctantly granted Congress an express power to keep only a limited class of information secret did not intend by their silence to grant the President a much broader power.93 This conclusion is buttressed by Article II, § 3 which imposes an affirma-

87 343 U.S. at 645-46 (Jackson, J., concurring).
88 U.S. CONST. art. II, § 3.
89 343 U.S. at 633 (Douglas, J., concurring). See Myers v. United States, 272 U.S. 52, 177 (1927), where Justice Holmes commented in dissent: "The duty of the President to see that the laws be exercised is a duty that does not go beyond the laws. . . ."
91 Brief of Nixon, supra note 50, at 13-14.
92 See, e.g., Berger, supra note 13, at 1067-69.
tive duty upon the President to keep the Congress informed: "He [the President] shall from time to time give to the Congress Information of the State of the Union . . . ."94 Despite the fact that this constitutional provision has come to be associated with the traditional State of the Union message, the better interpretation is that this provision was intended to impose upon the President the broad obligation to advise the Congress, from time to time as the Congress might require, as to how its laws have been executed, how the funds it has appropriated have been spent, and, generally, the manner in which the Executive Branch has functioned. As Senator Edmunds stated in 1886: "The 'state of the union' is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law. . . ."95

The last stronghold of the proponents of executive privilege is the claim that the Executive possesses an inherent power to withhold information from the Congress. This theory extends beyond that of an inferred power from Art. II, § 1 of the Constitution to the argument that the President has power inherent in the executive role itself. This "pernicious doctrine"96 has been uniformly rejected by the American judiciary.97 The famous Steel Seizure Case,98 for example, clearly illustrates the disrepute of the doctrine. In that case, Youngstown Sheet and Tube Company was seeking a declaratory judgment and an injunction to restrain the enforcement of a presidential order which directed the Secretary of Commerce to seize most of the nation's steel mills in order to prevent the disruption of steel production endangered by the threat of a labor strike. The President asserted that he possessed the inherent power "to protect the 'well-being and safety of the Nation.'"99 The United States Supreme Court rejected this assertion, stating simply: "The Presi-

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94 U.S. Const. art. II, § 3 (emphasis added).
95 17 Cong. Rec. 2215 (1886).
96 The term "pernicious doctrine" originated in Ex parte Milligan, 71 U.S. (4 Wall.) 120-21 (1866), wherein the Court stated:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

99 Id. at 584.
dent's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."

The courts have thus recognized that the doctrine of "inherent power" is contrary to the genius of our constitutional form of government. As expounded by the Founding Fathers, the federal government is one of limited and enumerated powers, with all powers not granted the government retained by the states and the people. Viewed in this light, the doctrine of "inherent power" is no more than an attempt to amend the Constitution without regard to the amendment machinery and procedure specified in the Constitution:

Inherent power! That is a new principle to enlarge the powers of the general government. . . . The partisans of the executive have discovered a third and more fruitful source of power. Inherent power! Whence is it derived? The Constitution created the office of President, and made it just what it is. It had no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. Do gentlemen mean by inherent power, such power as is exercised by the monarchs or chief magistrates of other countries? If that be their meaning they should avow it.

The inescapable conclusion to be drawn is that authority for a finding of executive privilege is not expressly or impliedly contained in the Constitution and cannot be accurately described as inherent in the office of the presidency. Withholding of information from Congress is thus not within the definable power of the President.

III. Public Policy

Proponents of executive privilege rely heavily on the argument that the alleged power of the President to withhold information from the Congress has its foundation in the requirements of "public policy." Accordingly, it is stated that invocation of the privilege is justifiable only if it is "demonstratable that Executive withholding will further the public interest."

100 Id. at 585.
101 U.S. Const. amends. IX and X.
"public policy" is quite similar to the doctrine of "inherent power". Unlike the basis of the latter—that the office of President necessitates certain extra-constitutional powers—the "public policy" argument would legitimize an extension of executive powers beyond those contained in the Constitution for the reason that the exigencies of the situation warrant such an extension. 105

Two arguments based on public policy and advanced to support the privilege are admittedly compelling. One is that presidential advisers must be able to communicate candidly with the President without fear that their thoughts will be made public, and the other is that some information within the control of the President is simply too sensitive to be treated as an open book.106 Nevertheless, upon closer examination, these contentions do not warrant the conclusion that executive privilege is absolute, or even desirable.107

The assertion that the privilege is necessary to assure that the President receives honest, candid and frank advice, which he allegedly would not receive absent a guarantee of absolute confidential-

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105 For discussion of the concept of inherent power see notes 97-102 and accompanying text supra.

106 This position was recognized by the Supreme Court as a legitimate basis for the privilege in United States v. Nixon, ___ U.S. ___, 94 S.Ct. 3090, 3106-07 (1974).

107 An "analogy" is often made between executive privilege and the privileges asserted by the other two branches of the federal government. While it is true that both the legislative and judicial branches have long asserted the privilege of confidentiality in their official communications, the bases of these privileges differ significantly from executive privilege and from each other, despite the reasoning of the Supreme Court in United States v. Nixon, ___ U.S. at ___. n.16, 94 S. Ct. at 3106.

The privilege which protects the confidentiality of a Congressman's conversations with his aids is expressly conferred by the "Speech and Debate Clause" of the United States Constitution, which provides: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. See also Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972). The limitation "in any other place" clearly implies that the Congress itself can inquire into the activities of an individual legislator; indeed, Art. I, § 5, cl. 2, grants each house of Congress the power to discipline its members.

The privilege asserted by the judiciary has no textual support in the Constitution, and its validity, if any, is based on tradition and public policy. In fact, the validity of the privilege has been persuasively challenged. See Miller & Sastri, Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain, 22 Bur. L. Rev. 799 (1973). In any event, the stringent Canons of Judicial Ethics generally render inquiry into a judge's motivations unnecessary.
ity to his advisers, rings hollow since executive privilege does not guarantee confidentiality to the adviser. The privilege can be asserted only by the President, and the President can waive the privilege in his sole discretion. Moreover, the argument presents the disturbing thesis that, absent the "protection" of the privilege, presidential advisers would be less than candid and honest in the advice they gave the President. As a general rule, the public should be confident that individuals enter government service for reasons of patriotism, career advancement and personal loyalty to the President and would continue to do so regardless of executive privilege. These considerations are especially important because it was precisely the same factors which caused the United States Supreme Court to reject the "newsman's privilege." Finally, while considerations favoring the privilege are relatively insignificant, the public interest in disclosure is urgent and immediate:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.¹¹⁰

¹⁰⁸ See, e.g., Executive Order 11,652, "Classification and Declassification of National Security Information and Materials," issued by President Nixon on March 8, 1972, which gives persons "who have previously occupied policy making positions to which they were appointed by the President" access to classified materials to assist them in writing their memoirs. The effect of this Executive Order, when coupled with a recognition of executive privilege, is to give a small clique of presidential intimates and loyalists a virtual monopoly on the writing of recent American history.

¹⁰⁹ Branzburg v. Hayes, 408 U.S. 665 (1972). But see, United States v. Nixon, ___ U.S. ___ (1974): A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications.

While the above observation has relevance in the question of whether a President has the power to withhold information from the Judicial Branch (where any private citizen can issue a subpoena), its relevance to the right of Congress to obtain information from the Executive Branch is doubtful. It is precisely this type of information which Congress requires in order to discharge its constitutional duties. Interestingly, our forefathers created the Congress to be the policy-making body of the federal government. See notes 64-76 and accompanying text, supra.

The argument that executive privilege is necessary to protect the confidentiality of "sensitive" information supports at best only a partial privilege. Assuming that some information must remain secret for reasons of "national security" — a rather dubious proposition — the public interest still does not require that such information be kept secret from the Congress. Despite self-serving statements by executive officials, the record of Congress in maintaining the confidentiality of classified information has been excellent. The congressional leadership was, for instance, fully informed of the Bay of Pigs operation and the Cuban Missile Crisis, and, due to the size of the appropriations involved, the congressional leadership was undoubtedly advised of the Manhattan Project. Raoul Berger has concluded that "[g]rave matters of state inevitably must be and are shared, so that in reality the plea of secrecy serves chiefly to shield the inconsequential." The fact that the members of the Joint Chiefs of Staff are permitted by statute to express their views on national security matters to the Congress confirms this observation.

Congress has the power to assure that its members do not violate the confidentiality of classified information. Admittedly, information which members of the Executive Branch have wished to keep

No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.


There are many who believe that secrecy is needed for reasons of national security. The fact is that secrecy did not prevent loss of leadership by the United States in the field of nuclear weapons. On the other hand, much more open policy permitted the rapid development of electronic computers, in which field the United States has a position of undisputed leadership.

Secrecy has erected barriers between our country and our allies. These barriers are harmful to science and are a source of weakness in the free world.

Members of the Executive Branch have often complained that Congress does not have the capability to maintain confidentiality and thus that a real necessity exists for executive privilege when matters of great sensitivity are at issue. The major complaint is over premature "leaks" to the press of material which should be kept secret. Typical of the executive attitude is the comment by former Secretary of State Dean Acheson that when a government official is required to produce information before that "greatest of all frauds," the executive session of a Congressional committee, "secrecy hardly outlasts the hearing hour itself, before everything said or produced is given to the press." 1971 Hearings, supra note 12, at 262.


Berger, supra note 13, at 1322.


U.S. Const. art. I, § 5 cl. 2.
from the public has, on occasion, been publicized by the Congress, but such exposure has not compromised “national security.” Rather, it has frequently served to expose deceit and dishonesty in the Executive Branch. Clearly, the public interest requires that Congress be able to gain information from the Executive Branch in order to uncover “the footprints of a nervous bureaucrat or a wary executive.” If it were otherwise, “the head of an executive department would have the power to cover up all evidence of fraud and corruption. . . .”

IV. CONCLUSION

History, the Constitution and public policy do not support the doctrine of executive privilege as a presidential justification for failing to respond to a valid congressional inquiry. In fact, a correct analysis shows the contrary to be true. Congress has the power, if not the responsibility, to demand information from the Executive Branch in order to carry out its constitutional duties. Properly understood, the claim of executive privilege is simply an unwarranted attempt to further aggrandize the power of the Executive Branch. The Supreme Court in United States v. Nixon declared that the privilege will not stand in the face of the judiciary’s demand for the information. It is submitted that the privilege should similarly pale when challenged by congressional need to know.

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117 The Pentagon Papers are a good example. Originally, Daniel Ellsberg presented the material to the Senate Foreign Relations Committee, which refused to disclose it to the public because much of it was classified. Schrag, The Ellsberg Affair, 54 Saturday Review, Nov. 13, 1971, at 34-36. After the information was published by the New York Times and later read into the record of a committee hearing by Senator Gravel, it became apparent that the Papers in no way compromised “national security” but instead exposed the deceit and duplicity of executive officials during the conduct of the Vietnam war. See, e.g., THE PENTAGON PAPERS, THE DEFENSE DEPARTMENT HISTORY OF THE UNITED STATES DECISION-MAKING ON VIETNAM (Senator Gravel ed. 1971); D. Wise, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY AND POWER (1973).

