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EXECUTIVE PRIVILEGE: HISTORIC SCOPE AND USE IN THE WATERGATE AND ENVIRONMENTAL PROTECTION AGENCY HEARINGS

I. INTRODUCTION

Executive privilege is "a concept invoked by members of the executive branch of the government to justify withholding evidence and other communicative materials from the legislative and judicial branches."¹ Since the presidency of George Washington, the executive has attempted to withhold information from the other two branches.²

When the executive privilege has been asserted, it has always been in the context of a larger inter-branch struggle for political power. The results of these assertions have not been uniform,³ and it is not presently possible to define concretely the contours of the privilege.⁴

When presidents have asserted the executive privilege to obstruct judicial proceedings, the judiciary has always prevailed.⁵ The legislature, however, has been less successful in forcing revelation of particular executive information.⁶

The purpose of this comment is to trace the historical development of the executive privilege claim and to examine its use in the Watergate and Environmental Protection Agency hearings.⁷

II. FOUNDATIONS FOR THE EXECUTIVE PRIVILEGE

A. *The Separation of Powers Doctrine*

The separation of powers doctrine has been used as a basis for executive privilege claims.⁸ Although this doctrine is not expressly stated in the Constitution, it served as the theory which the founding fathers relied upon to frame the Constitution.⁹ Reflecting the founders' "distrust for the

1. Note, *Constitutional Law - Executive Privilege: Tilting the Scales in Favor of Secrecy*, 53 N.C.L. REV. 419, 419 (1974).

2. See *infra* text accompanying notes 41-53, 57-72.

3. See *infra* notes 57-69 and accompanying text.

4. See *infra* text accompanying notes 91, 128-37.

5. See *infra* text accompanying notes 41-50, 73-82.

6. See *infra* text accompanying notes 105-15.

7. The Environmental Protection Agency hearings refer to the hearings held in 1982 by the House Public Works Oversight Committee and House Oversight and Investigations Subcommittee concerning misconduct in the management of the Hazardous Substance Response Trust Fund, 42 U.S.C. § 9631 (Supp. V 1981).

8. *United States v. Nixon*, 418 U.S. 683, 703 (1974).

9. Gard, *Executive Privilege: A Rhyme Without A Reason*, 8 GA. L. REV. 809, 822 (1974).

power inherent in government,"¹⁰ the concept of separation of powers limits the power of the federal government and the branches of that government.¹¹ The doctrine itself grants no powers, but rather protects the powers granted in the Constitution.¹² The doctrine is based upon a balance of power among the legislative, executive, and judicial branches.¹³ The powers comprising the weights in the balance are provided by the Constitution.¹⁴

1. The Power of the Legislature

Congressional authority to demand information from the executive branch arises from Congress' power to investigate. The Constitution gives Congress the power to legislate,¹⁵ and inherent in that power is the power to investigate.

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—which not infrequently is true—recourse must be had to others who do possess it.¹⁶

Although this inherent investigative power is recognized as being broad, "it is not unlimited."¹⁷ Any congressional investigation must be related to current or future legislation or another legitimate task of Congress.¹⁸

Congress also has the authority to impeach¹⁹ and to appropriate funds.²⁰ The power to investigate is inherent in both functions. Impeach-

10. *Id.*

11. *Id.* See also *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("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 . . . to save the people from autocracy.").

12. Gard, *supra* note 9, at 823.

13. *Id.*

14. *Id.*

15. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

16. *McGrain v. Daugherty*, 273 U.S. 137, 175 (1927).

17. *Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congress' investigatory powers include investigating the administration of existing laws, correcting defects in society, and probing into government departments to expose corruption, inefficiency, or waste.).

18. *Id.* See also *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880) (a resolution authorizing an investigation into a bankrupt company indebted to the United States exceeded the powers conferred by the Constitution); *Watkins v. United States*, 354 U.S. 178, 200 (1957) (Congress cannot expose information just for the sake of exposure); *Quinn v. United States*, 349 U.S. 155, 161 (1955) (the power to investigate must be supported by a valid legislative purpose).

19. U.S. CONST. art. II, § 4.

20. U.S. CONST. art. I, § 8.

ment requires calling witnesses to answer questions,²¹ and appropriating funds necessitates inquiring into the use made of previous allocations and into the wisdom of spending programs.²²

Congress does not attempt to interfere with the performance of executive duties when requesting information.²³ It simply tries to perform its own duties, which require reviewing information relevant to a particular situation.²⁴ An absolute executive privilege would frustrate Congress in the performance of its functions.

2. The Power of the Judiciary

The judiciary's authority to demand information from the executive branch arises from its power under article III of the Constitution to adjudicate cases and controversies.²⁵ Implicit in this power is the authority to issue process to obtain evidence.²⁶ Since the executive is not immune from such process,²⁷ there appears to be no basis for an absolute executive privilege from the judicial fact-finding process.

3. The Power of the Executive

Supporters of the executive privilege contend that the executive's power to withhold information flows from the presidential powers found in article II of the Constitution.²⁸ Section 1 of article II provides that "the executive power shall be vested in a President."²⁹ Arguments that executive privilege is implicit in this executive power are contrary to the founding fathers' intention to have a government of limited, enumerated powers.³⁰ Although the President "is placed high and is possessed of power far from being contemptible, . . . not a *single privilege* is annexed to his character"³¹

The President's duty under article II, section 3 to "take Care that the Laws be faithfully executed"³² has been narrowly construed³³ and does

21. *Kilbourn*, 103 U.S. at 190.

22. Gard, *supra* note 9, at 826.

23. Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DE PAUL L. REV. 692, 714 (1974).

24. *Id.*

25. U.S. CONST. art. III, § 2.

26. Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1384 (1974).

27. *Id.* at 1385.

28. Gard, *supra* note 9, at 827.

29. U.S. CONST. art. II, § 1.

30. U.S. CONST. amend. IX.

31. Cox, *supra* note 26, at 1391 (quoting statement by James Wilson to the Pennsylvania Ratification Convention).

32. U.S. CONST. art. II, § 3.

33. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1962) (Douglas, J.,

not support an executive privilege. While it is recognized that the President has a vast range of discretion in executing the laws, there is no support for the idea that he may use his power to frustrate Congress' performance of its constitutional duties.³⁴

Proponents of the executive privilege further contend that the power to withhold information is inherent in the executive role.³⁵ This assertion is contrary to the intentions of the delegates to the Constitutional Convention to have a government of limited and enumerated powers,³⁶ with the states or people retaining any powers not specifically granted to the government.³⁷ The reluctance of the convention delegates to adopt the secrecy provision of article I, section 5³⁸ shows that they did not intend to give the President an inherent power to withhold information.³⁹ Additionally, in *The Steel Seizure Case*,⁴⁰ the Supreme Court refused to recognize an inherent presidential power where the exercise of such power would run contrary to the expressed will of Congress.

B. *The Executive Privilege in Judicial Proceedings*

The Supreme Court in *Marbury v. Madison*⁴¹ addressed the issue of a constitutional privilege protecting confidential transactions and conversations between the President and his immediate subordinates. The Court recognized the existence of an executive privilege,⁴² but at the same time retained the authority to determine when the privilege could be

concurring) ("The power to execute the laws starts and ends with the laws Congress has enacted."); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws . . .").

34. Gard, *supra* note 9, at 829.

35. *Id.* at 830.

36. U.S. CONST. amend. IX.

37. U.S. CONST. amend. X.

38. U.S. CONST. art. I, § 5 ("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 . . .").

39. The secrecy provision was adopted by the founding fathers after they were assured it would apply only to military secrets. See Berger, *Executive Privilege V. Congressional Inquiry*, 12 UCLA L. REV. 1043, 1067-68 (1965).

40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). President Truman asserted that he had the inherent power to protect "the well-being and safety of the Nation . . ." *Id.* at 584. The Supreme Court, in rejecting this assertion, stated that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585.

41. 5 U.S. (1 Cranch) 137 (1803) (The Attorney General, who was Acting Secretary of State under President Adams, was asked to supply information concerning whether commissions had been signed by the President and sealed by the Secretary of State.).

42. *Id.* at 144 (The Attorney General was not bound to reveal anything communicated to him in confidence.).

asserted.⁴³

The Court's power to subpoena the President was articulated in Chief Justice Marshall's first opinion in *United States v. Burr*.⁴⁴ In his second *Burr* opinion,⁴⁵ Marshall recognized the existence of an executive privilege to "withhold private letters of a certain description,"⁴⁶ but never specified the basis, scope, or method for determining the validity of the privilege.⁴⁷ Instead, it was the executive branch that recognized the judiciary's authority to determine whether the information was privileged,⁴⁸ thus making *Burr* of little value as precedent for an absolute executive privilege.

Not until 1953, in *United States v. Reynolds*,⁴⁹ was a determination of the scope and validity of the executive privilege firmly delegated to the courts. The Supreme Court stated: "The court itself must determine whether the circumstances are appropriate for the claim of privilege Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."⁵⁰ However, the Court still had not articulated a method for determining the validity of an executive privilege claim.⁵¹ The balancing test used by the lower federal courts⁵² was not adopted by the Supreme Court until its decision in *United States v. Nixon*.⁵³

43. *Id.* at 144-45 (whether the commissions were in the office was not confidential, but rather was "a fact which all the world [had] a right to know," and therefore must be disclosed).

44. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

45. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). Chief Justice Marshall's second opinion addressed the issue of whether a presidential claim of absolute executive privilege based on confidentiality was an adequate response to a subpoena.

46. *Id.* at 191-92.

47. Note, *supra* note 1, at 424.

48. *Burr*, 25 F. Cas. at 190. The government attorney stated, "The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection."

49. 345 U.S. 1 (1952).

50. *Id.* at 8-10.

51. The Court did state, however, that "[i]n 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." *Id.* at 11.

52. See, e.g., *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 791 (D.C. Cir. 1971) (per curiam) ("the settled rule is that the court must balance the moving party's need for the documents in the litigation against the reasons which are asserted in defending their confidentiality"); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (1966) (The court weighed "the public concern in revelations facilitating the just resolution of legal disputes, and . . . public needs for confidentiality.").

53. 418 U.S. 683, 711-12 (1974).

C. *The Executive Privilege in Legislative Proceedings*

The first relevant legislative statement which dealt with a privilege to withhold information from the legislative branch occurred in 1789 when Congress enacted a statute providing that "[t]he 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"⁵⁴ This statute has been interpreted to apply to all cabinet members.⁵⁵ It was the view of most early legislators that government officials would obey congressional demands for information.⁵⁶

Presidents have attempted to withhold information from Congress for a variety of reasons. Presidents Jefferson, Monroe, Polk, and Grant withheld information requested by Congress only where they believed the information could not be disclosed without harm to the public welfare.⁵⁷ Any conclusions based upon these incidents must be narrow in scope because "[i]t cannot be presumed that the exercise of . . . discretion . . . [by the President] 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."⁵⁸

During the Washington, Jackson, and Tyler administrations, each President challenged Congress' authority over the subject matter of requested documents. President Washington, in voluntarily releasing the papers requested by the Senate, did not base his initial refusal to comply on an

54. Gard, *supra* note 9, at 812 (citing Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, *as amended*, 31 U.S.C. § 1002 (1970) (emphasis added by Gard)).

55. 6 Op. Att'y Gen. 326, 333 (1856).

56. Gard, *supra* note 9, at 812.

57. *Id.* at 814-17. President Jefferson was asked to submit all information to the House regarding the Burr conspiracy except that information which he felt the public welfare did not require to be disclosed. *Id.* at 814-15 (citing 9 ANNALS OF CONG. 334, 336 (1806-07)). The House asked President Monroe for information concerning the misconduct of naval officers. The President's response suggests that the House only requested information which President Monroe thought was consistent with the public interest and justice to release. Cox, *supra* note 26, at 1397 n.55 (citing 2 MESSAGES AND PAPERS OF THE PRESIDENTS 278 (J. Richardson ed. 1898)). President Polk was asked for information concerning Secret Service fund disbursements. The President provided the House with complete information regarding expenses, but refused, pursuant to a congressional authorization statute, to disclose the specific purposes for which the funds were expended. Gard, *supra* note 9, at 816 (citing CONG. GLOBE, 29th Cong., 1st Sess. 636-38 (1846)). President Grant refused to provide Congress with information concerning executive acts performed away from the capitol. Only information deemed compatible with the public interest to disclose was requested. Gard, *supra* note 9, at 817 (citing 9 CONG. REC. 2158 (1876)).

58. Gard, *supra* note 9, at 815 (quoting H.R. REP. No. 271, 27th Cong., 3d Sess. 13-14 (1843)) (emphasis in original).

executive power to withhold information.⁵⁹ President Tyler refused to provide Congress with information pertaining to subject matter exclusively vested in the executive by the Constitution.⁶⁰ Thus, these two incidents cannot be equated with an absolute executive privilege. President Jackson was the first to claim that the President has an inherent power to withhold information from Congress.⁶¹ He stated:

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.⁶²

President Jackson had many confrontations with Congress concerning the withholding of information; he did not always prevail.⁶³

In this century, President Truman responded to the McCarthy hearings on alleged subversive activity within the executive branch by thwarting all congressional investigations.⁶⁴ The President's action prompted the following response from then Congressman Richard 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 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 United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.⁶⁵

The McCarthy probe continued into the Eisenhower administration⁶⁶ and resulted in the first use of the term "executive privilege."⁶⁷ The even-

59. President Washington, relying on the President's treaty-making powers, refused to furnish the House with documents disclosing instructions he gave to John Jay for negotiating the Jay Treaty. Gard, *supra* note 9, at 814 (citing 5 ANNALS OF CONG. 760-62 (1796)).

60. President Tyler refused, based on his power under article II, § 2, cl. 2 of the Constitution, to release the names of the members of the 26th and 27th Congresses who applied for appointment to executive offices. Gard, *supra* note 9, at 816 (citing CONG. GLOBE, 27th Cong., 2d Sess. 349 (1842)).

61. Gard, *supra* note 9, at 815. President Jackson refused to comply with a congressional request for a paper which he read to department heads concerning the withdrawal of government deposits from the United States Bank.

62. *Id.* (quoting CONG. GLOBE, 23d Cong., 1st Sess. 23 (1833)).

63. See Wiggins, *Government Operations and the Public Right to Know*, 19 FED. B.J. 62, 80-81 (1959).

64. Gard, *supra* note 9, at 818.

65. 94 CONG. REC. 4783 (1948).

66. See Gard, *supra* note 9, at 819.

67. Schlesinger, *Executive Privilege: A Murky History*, Wall St. J., Mar. 30, 1973, at 8,

tual abandonment of Senator McCarthy's subpoena attempts, however, cannot be viewed as acquiescence to the executive privilege claim.⁶⁸ Congress simply recognized that "there may be subjects on which [the Executive Branch] should not be forced to testify."⁶⁹

Proponents of the executive privilege rely upon the foregoing historical instances of presidential claims of an inherent right to withhold information to establish a constitutional right by usage.⁷⁰ However, the "constitutionality of executive action, absent express constitutional authorization, can be established . . . only if it is 'systematic, *unbroken*, executive practice, long pursued to the knowledge of Congress and *never before questioned*.'"⁷¹ History has shown that presidential claims of an inherent right to withhold have been rare and the instances of congressional acquiescence have been infrequent.⁷²

III. WATERGATE

A. *Judicial Proceedings*

The claim of executive privilege was a critical issue in the Watergate investigations. One basis for President Nixon's refusal to comply with the grand jury's subpoena was his belief that a President had absolute immunity from the compulsory process of the courts.⁷³ The President recognized the court's ability to issue subpoenas, but he believed the court lacked the authority to command presidential obedience to subpoenas.⁷⁴ Judge Sirica dismissed the President's contention and ordered him to release the subpoenaed tapes to the court for an *in camera* inspection.⁷⁵ Judge Sirica could find no reason to suspend the court's power to obtain evidence relating to criminal activity simply because the President was

col. 3.

68. Gard, *supra* note 9, at 819.

69. S. REP. NO. 2507, 83d Cong., 2d Sess. 81 (1954).

70. Gard, *supra* note 9, at 819.

71. *Id.* at 820 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (emphasis added)).

72. Gard, *supra* note 9, at 819.

73. *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973). The President explained that he would "follow the example of a long line of . . . [his] predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the courts." *Id.* at 3.

74. *Id.* at 7. Chief Justice Marshall's decision in *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), recognized a difference between issuing and ordering compliance with a subpoena, but the distinction did not pertain to judicial power or jurisdiction. Compliance, according to Marshall, required weighing the President's reasons for confidentiality. The President was to be shown deference in this weighing, but the court was to make the ultimate decision. See *Nixon v. Sirica*, 487 F.2d 700, 709-11 (D.C. Cir. 1973).

75. *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

the person who had the evidence.⁷⁶ It is a well established principle, wrote Sirica, that "the grand jury has a right to every man's evidence."⁷⁷ The character of the evidence, not the character of the possessor, is the determining factor in deciding the propriety of introducing evidence.⁷⁸ Both the President and the special prosecutor challenged Judge Sirica's order: the President because it required him to release the tapes to the judge; the special prosecutor because the order did not require full and immediate disclosure of the tapes to the grand jury and did not provide the special prosecutor with access to the tapes for *in camera* inspection.⁷⁹ The court responded by requiring the district judge to inspect the subpoenaed evidence and determine what evidence, if any, should be disclosed to the grand jury.⁸⁰ The court of appeals did not address an issue unanswered in *United States v. Burr*: the right of opposing counsel to full disclosure prior to judicial determination of relevancy.⁸¹ The court took the opportunity to reaffirm that it is the province of the judiciary, not the executive, to determine the scope of the executive privilege.⁸²

The Supreme Court's majority opinion in *United States v. Nixon*⁸³ addressed the President's need for confidentiality in communications with advisors.⁸⁴ The Court concluded that this need for confidentiality was "too plain to require further discussion."⁸⁵ Surprisingly, the need for

76. *Id.* at 10.

77. *Id.* at 6.

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

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

80. *Id.* at 721. In its opinion, the court of appeals outlined the steps to be followed on remand:

Following the *in camera* hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or, when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The District Court shall provide a reasonable stay to allow the President an opportunity to appeal. In case of an appeal to this Court of an order either allowing or refusing disclosure, this Court will provide for sealed records and confidentiality in presentation.

Id. (footnote omitted).

81. *See Nathanson, From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current Historical Perspectives*, 16 ARIZ. L. REV. 59, 66 (1974).

82. *Nixon v. Sirica*, 487 F.2d at 713.

83. 418 U.S. 683 (1974).

84. *Id.* at 705.

85. *Id.* Confidentiality is necessary to encourage open and candid discussions between the President and his advisors and to allow them the freedom to explore alternatives that often would not be expressed if it were known that the ideas would be made public. *Id.* at 708. In recognizing confidentiality as a source of an executive privilege claim, the Court followed Justice Marshall's ruling in *United States v. Burr*. *See supra* notes 45-48 and accompanying text. *See also* *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-26 (D.D.C. 1926) (confidentiality allows the frank expression and discussion that is essential to the functioning of the government).

presidential confidentiality was found to be derived from the separation of powers doctrine.⁸⁶ Chief Justice Burger acknowledged that there was no explicit reference to any confidentiality privilege in the Constitution.⁸⁷ Nevertheless, he decided that "to the extent [confidentiality] relates to the effective discharge of a President's powers, it is constitutionally based."⁸⁸ The Court established that this need for confidentiality flows from the President's powers under article II of the Constitution.⁸⁹

Although the Court was willing to recognize a need for confidentiality, it was not willing to recognize an absolute executive privilege:

[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances [T]he very important interest in confidentiality of Presidential communications is [not] significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.⁹⁰

The Court felt that reading into article II an absolute executive privilege based on a general claim of preserving confidentiality in presidential communications, when a subpoena is issued for evidence in a criminal matter would disrupt the balance of power and the courts' ability to perform their article III duties.⁹¹ Accordingly, the Supreme Court held that confidentiality justifies only a "presumptive privilege."⁹²

United States v. Nixon also marked the adoption by the Supreme Court of a balancing test to determine the validity of an executive privilege claim.⁹³ The test requires weighing "the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."⁹⁴ The Court concluded that when a specific need for subpoenaed evidence is balanced

86. *United States v. Nixon*, 418 U.S. at 705. The opinion 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." *Id.*

87. *Id.* at 711.

88. *Id.*

89. *Id.* at 705.

90. *Id.* at 706.

91. *Id.* at 707.

92. *Id.* at 708. This presumptive privilege calls for the courts to give the President's claim for withholding information great deference when assessing whether disclosure is appropriate. *See id.*

93. *Id.* at 711-12.

94. *Id.* (footnote omitted). In using this balancing test, the Court was concerned only with the President's interest in confidentiality and the need for relevant evidence in criminal trials. The Court was not concerned with balancing the confidentiality interest and congressional demands for information. *Id.* at 712 n.19.

against a presumptive privilege, “[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”⁹⁵

The Supreme Court’s balancing test has both strengths and weaknesses. One strength of the test lies in its flexibility.⁹⁶ Balancing allows the needs of the executive and judiciary to be considered on a case-by-case basis.⁹⁷ This is certainly more desirable than a hard and fast rule either recognizing or denying an absolute privilege. Another strength of the test is the incorporation of the President’s presumptive privilege which conforms to the separation of powers doctrine by showing deference to the executive branch.⁹⁸

The chief weakness of the test is in its mechanical application.⁹⁹ Before the Court balances, the party seeking the information must comply with the evidentiary requirements for obtaining a subpoena, such as showing relevance and materiality.¹⁰⁰ If the President then invokes the executive privilege, the party must overcome the President’s presumptive privilege.¹⁰¹ This is often difficult because meeting the evidentiary requirements usually exhausts the party’s knowledge of the requested information.¹⁰² An additional weakness lies in the judge’s ability to balance.¹⁰³ The test presumes that the judge will be in a position to realistically weigh the importance to the President of confidentiality against the importance to the public of the prosecution of wrongdoers.¹⁰⁴

B. *Legislative Proceedings*

Executive privilege may be asserted not only against the judiciary, but also against the legislature. During the Watergate investigations, the

95. *Id.* at 713. The grand jury’s desire for the subpoenaed tapes arose from (1) contradictory testimony of witnesses on matters likely to be of great importance to a trial on the merits, *Nixon v. Sirica*, 487 F.2d at 718, and (2) the substantial probability that the privilege was being used as a shield for criminal wrongdoing. *In re Subpoena to Nixon*, 360 F. Supp. at 12. President Nixon showed very little justification for his confidentiality claim. He stated that he would not invoke the executive privilege if there were suspicion of misconduct. *Nixon v. Sirica*, 487 F.2d at 717. In addition, presidential advisors had already testified about the tapes, so they were no longer confidential. *Id.* at 718. The court of appeals also applied the balancing test and found for the grand jury. *Id.* at 716-18.

96. Note, *supra* note 1, at 426.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 427.

103. Nathanson, *supra* note 81, at 74.

104. *Id.*

courts were called upon for the first time¹⁰⁵ to determine the executive's power to withhold information from Congress.¹⁰⁶ The first suit of the Senate Select Committee on Presidential Campaign Activities¹⁰⁷ against President Nixon¹⁰⁸ was dismissed upon jurisdictional grounds after Judge Sirica ruled that none of the existing statutes authorized a federal court to consider a Senate committee's action to enforce a subpoena.¹⁰⁹ Congress responded to Judge Sirica's ruling by enacting a statute which vested such jurisdiction in the District Court for the District of Columbia.¹¹⁰ The Senate Select Committee did not, however, fare much better in the second suit in the district court which was begun after the statute's enactment. Judge Gesell, writing for the court, stated that the balancing test was applicable, but he did not use it.¹¹¹ Instead, the decision was based on the effects which disclosure of the subpoenaed material might have on the pending criminal trial.¹¹² Because disclosure might result in an undue risk of prejudicial pre-trial publicity, the court dismissed the suit without ruling on the underlying question of privilege.¹¹³ The court of appeals affirmed the district court's ruling because the committee failed to show that the subpoenaed evidence was "demonstrably critical to the responsible fulfillment of the Committee's functions."¹¹⁴ The suit was dis-

105. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973), was a case of first impression. See Gard, *supra* note 9 at 811 n.11.

106. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

107. The committee was empowered to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election in 1972 and "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974) (quoting S. Res. 60, 93d Cong., 1st Sess. § 1(a) (1973)).

108. The suit arose because President Nixon failed to comply with the committee subpoena for the Watergate tapes. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 53-55 (D.D.C. 1973).

109. *Id.* at 61. The Senate Select Committee attempted to use 28 U.S.C. § 1361, which compels an officer of the United States to perform his duties, as a basis for jurisdiction. Judge Sirica said that there was nothing in the Constitution that makes it an official duty of the President to comply with a congressional subpoena. 366 F. Supp. at 57. He noted that the President's "obligation to produce unprivileged evidence was 'more akin to a ministerial duty' than to a discretionary one, 'if indeed it concerns official duties at all.'" *Id.* at 57 n.13 (quoting *In re Subpoena to Nixon*, 360 F. Supp. 1, 8 n.21 (D.D.C. 1973)) (emphasis added by Sirica, J.).

110. Pub. L. No. 93-190, 87 Stat. 736 (1973) (codified at 28 U.S.C. § 1364 (1976 & Supp. V 1981)).

111. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 522 (D.D.C. 1974). The court attempted to extend the balancing test to deal with matters involving presidential confidentiality and congressional demands for information.

112. *Id.* at 523.

113. *Id.* at 524.

114. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d at 731.

missed prior to the balancing test stage.¹¹⁵ Altogether, the three decisions afford little insight into the executive's power to withhold information from Congress.

IV. THE ENVIRONMENTAL PROTECTION AGENCY HEARINGS

A. Background

In 1980, Congress created a "Superfund" for cleaning hazardous waste sites.¹¹⁶ The Environmental Protection Agency (EPA) was given the money and authority to purge these sites.¹¹⁷ Criticism of the EPA's administration of Superfund prompted two congressional subcommittees to "investigat[e] charges that the EPA had made 'sweetheart' deals with polluting companies and delayed cleanup for political reasons."¹¹⁸ Both subcommittees issued subpoenas to the EPA's administrator, Anne Gorsuch Burford,¹¹⁹ requesting documents relating to the utilization of the Superfund.¹²⁰ President Reagan invoked the executive privilege in response to these subpoenas and directed Mrs. Burford to refrain from releasing the requested documents.¹²¹ Her refusal to comply with the subpoenas prompted the House of Representatives, in an unprecedented act, to cite her for contempt of Congress.¹²² After the contempt citation, the Justice Department filed a suit asking the federal district court to declare the House subpoenas unconstitutional because the documents were pro-

The court gave two reasons for its decision: (1) The committee's oversight needs for the tapes were merely cumulative since the House Committee on the Judiciary already had the tapes and had begun impeachment proceedings, and (2) the task of legislating does not require exact information relating to witnesses' testimony. *Id.* at 732.

115. The balancing test is used only after the party seeking information has successfully rebutted the President's presumptive privilege. See Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. 747, 782 (1975). Here, the Senate Select Committee was not successful in its rebuttal. See *supra* note 108.

116. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9615 (Supp. V 1981)) [hereinafter cited as Superfund].

117. Superfund, *supra* note 116, § 9615.

118. *Superfund, Supermess*, TIME, Feb. 21, 1983, at 14.

119. Anne Gorsuch Burford was married during these hearings. Hereinafter she will be referred to as Mrs. Burford.

120. The House Public Works Oversight Subcommittee had been investigating the EPA's handling of Superfund for several months and on October 14, 1982, issued a subpoena for documents relating to cleanup efforts at 160 Superfund sites. The House Oversight and Investigations Subcommittee was investigating charges by EPA officials that the agency was withholding a \$6.1 million grant to clean Stringfellow, a California site, until after the November congressional election to prevent Governor Jerry Brown from taking credit for the cleanup in his Senate campaign. The subcommittee issued a subpoena on November 22, 1982, for information pertaining to the charges. *Superfund, Supermess, supra* note 118, at 14-15.

121. N.Y. Times, Dec. 18, 1982, at 1, col. 5.

122. *Id.*

tected by the executive privilege and because the subcommittees failed to demonstrate a specific need for the documents.¹²³ The court dismissed the suit and urged the President and Congress to compromise.¹²⁴ After allegations of wrongdoing were made against the EPA,¹²⁵ President Reagan abandoned his claim of executive privilege and released all of the subpoenaed documents to the House subcommittees.¹²⁶

B. *The Executive Privilege Claim*

When President Reagan invoked the executive privilege to withhold "enforcement sensitive" documents from Congress,¹²⁷ he was extending the scope of any executive privilege previously invoked. In *United States v. Nixon*, the Supreme Court recognized the existence of a presumptive privilege for materials used in advising the President.¹²⁸ Here, however, the EPA's "enforcement sensitive" documents were neither prepared for the President nor viewed by him before he invoked the privilege.¹²⁹

The President advanced the arguments of sensitivity and interference with pending agency investigations as justifications for withholding the documents.¹³⁰ While sensitivity may justify secrecy from the public, it does not justify secrecy from Congress.¹³¹ Congress' article I, section 5, clause 2 powers under the Constitution insure the confidentiality of classified information.¹³² An executive privilege claim based on interference with pending agency investigations could be raised at any point in congressional investigations,¹³³ such claims, however, would severely hamper

123. *Id.*

124. *Id.*, Feb. 6, 1983, § 4, at 7, col. 4.

125. See *Extra! Extra! Shredder Update*, TIME, Feb. 28, 1983, at 17 (allegations that EPA employees shredded subpoenaed documents and assistant administrator Rita Lavelle violated conflict-of-interest laws).

126. N.Y. Times, Mar. 10, 1983, § A, at 1, col. 4.

127. *Id.*, Feb. 17, 1983, § A, at 1, col. 6 (the documents were "enforcement sensitive" because they discussed strategy against specific companies and would hinder cleanup efforts).

128. 418 U.S. 683, 708 (1974).

129. N.Y. Times, Mar. 11, 1983, § A, at 1, col. 1. The documents included information pertaining to the government attorneys' analysis of weaknesses in their own cases, lists of witnesses, figures on how the EPA would be willing to settle cases, and names of informers. *Id.*, Feb. 18, 1983, § A, at 1, col. 6. The documents also contained a memo written by a law clerk in connection with "federal and California laws regarding the settlement of civil tort actions" and form letters sent to companies informing them of a meeting with the EPA to discuss liabilities. Anderson, *EPA Documents May Not Mean A Trip to Jail*, Wash. Post, Jan. 31, 1983, § C, at 23, col. 4.

130. See N.Y. Times, Feb. 17, 1983, § A, at 1, col. 6.

131. Gard, *supra* note 9, at 834.

132. U.S. CONST. art. I, § 5, cl. 2.

133. See Morrison, *Executive Privilege Has Its Place*, Wall St. J., May 27, 1983, at 22, col. 4 (argument of inhibiting investigations could also be made for fraud claims involving defense contractors, ABSCAM-like investigations, and espionage).

Congress' exercise of its article I powers.¹³⁴

President Reagan's voluntary release of the subpoenaed documents to Congress cannot be taken as implying an abandonment of the claim of executive privilege to withhold enforcement sensitive documents. The President relinquished this particular claim of executive privilege to avoid any suspicion that it was being used to shield wrongdoing at the EPA.¹³⁵ The claim of executive privilege for enforcement sensitive documents was not disavowed; rather, its use was foreclosed by allegations of wrongdoing.

C. *The Judiciary's Role*

When the federal district court dismissed the Justice Department's suit, it failed to decide one of the issues courts have historically claimed to be within their jurisdiction — the scope of the executive privilege.¹³⁶ The court's action showed its preference for political rather than judicial determination of the rights and privileges of the executive and legislative branches.¹³⁷

Many reasons have been advanced for the court's hands-off approach. One is that it has never been the function of the judiciary to define "the rights and privileges of the Congress and President *inter sese* in the legislative process."¹³⁸ Rather, the judiciary's familiar role is that of determining the executive's legal obligations.¹³⁹ Another reason is that the court's experience lies in weighing the need for specific evidence in judicial proceedings, not in weighing Congress' legislative needs against the public interest in maintaining presidential confidentiality.¹⁴⁰ Furthermore, congressional demands for information are so numerous that any limitation would hamper Congress' powers under article I.¹⁴¹

Resolving disputes through the political process would allow Congress to use its authority to deny appropriations in order to compel the production of information from the executive branch.¹⁴² With the enormous increase in the size of the executive branch, "there is little risk of legislative

134. See *supra* notes 15-24 and accompanying text.

135. N.Y. Times, Feb. 18, 1973, § A, at 1, col. 6.

136. See *supra* text accompanying notes 41-43, 49-50. By failing to determine whether the executive privilege applied to enforcement sensitive documents, the court avoided answering questions such as: (1) What is the definition of "enforcement sensitive"? (2) If the executive privilege does apply to these documents, is it a presumptive privilege? (3) Is the balancing test to be applied?

137. See *supra* text accompanying note 124.

138. Cox, *supra* note 26, at 1425.

139. *Id.*

140. *Id.* at 1425-26.

141. *Id.* at 1426.

142. Nathanson, *supra* note 81, at 77.

tyranny over the Executive."¹⁴³ However, there is a great capacity for congressional harassment and abuse. Multiple congressional committees have oversight authority over one executive agency.¹⁴⁴ If an executive agency had to comply with every request for information from every congressional committee, the agency might spend more time responding to requests than performing its administrative duties. Congress does not need every piece of information to formulate legislation; fact finding should be directed toward predicting consequences of possible legislation, not reconstructing past events.¹⁴⁵ Moreover, the executive branch and the legislative branch are frequently controlled by different political parties. Thus, Congress may have motives other than legislating when it demands information from the executive. The power struggle between the two branches requires judicial mediation.

There is also a constitutional obstacle which must be overcome before the political process can be allowed to determine the use of the executive privilege in a civil suit.¹⁴⁶ In *United States v. Nixon*, the Supreme Court observed that the executive privilege was "constitutionally based" to the extent that it was related to "the effective discharge of a President's powers."¹⁴⁷ If these phrases imply that the executive privilege "is secured by the Constitution" and inferred from the President's article II powers,¹⁴⁸ then the judicial branch, not the legislative branch, must determine the applicability of the executive privilege.¹⁴⁹ However, the words of article II and the language of the Supreme Court in *United States v. Nixon* are not decisive on this point.¹⁵⁰ Chief Justice Burger used the phrase "constitutionally based," not "constitutionally secured" or "guaranteed by the Constitution."¹⁵¹ His choice of words was not random.¹⁵² The opinion also contained the phrase "rooted in the separation of powers under the Constitution."¹⁵³ Moreover, the assertion that the executive privilege is "constitutionally based" is qualified by the phrase "to the extent this interest relates to the effective discharge of a President's powers."¹⁵⁴ Congress may often authorize actions that affect the President's discharge of his

143. Cox, *supra* note 26, at 1433.

144. *Storm Over the Environment*, NEWSWEEK, Mar. 7, 1983, at 16, 17 (44 congressional committees have oversight authority over the EPA).

145. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

146. Cox, *supra* note 26, at 1434.

147. *United States v. Nixon*, 418 U.S. at 711.

148. Cox, *supra* note 26, at 1434.

149. *Id.*

150. *Id.* at 1435.

151. *Id.*

152. *Id.*

153. *United States v. Nixon*, 418 U.S. at 708.

154. *Id.* at 711.

powers, as, for example, those involving appropriations.¹⁵⁵ It is possible that "the Supreme Court, if squarely confronted with the question, might explain away the assertions in *United States v. Nixon*"¹⁵⁶

The EPA hearings really shed no new light on the executive's power to withhold information from Congress. It remains to be seen how long the power struggle between the executive branch and the legislative branch will continue before the courts decide the location of the authority which will determine the validity and scope of the executive privilege when the President and Congress are the parties.

V. CONCLUSION

History and the Constitution do not support the use of an executive privilege to justify withholding information from Congress and the courts. In fact, quite the contrary appears to be true. The courts and Congress have the power to demand information from the President.¹⁵⁷

"[T]he claim of executive privilege [seems to be] simply an unwarranted attempt to aggrandize the power of the Executive Branch."¹⁵⁸ The Supreme Court's decision in *United States v. Nixon* established that when the President asserts the executive privilege against judicial demands for information, the judiciary will always prevail.

However, the power struggle between the executive and legislative branches continues. The courts' decisions in *Senate Select Committee on Presidential Campaign Activities v. Nixon* and the EPA hearings do not resolve the issues of the scope and validity of the executive privilege when the privilege is asserted in response to congressional demands for information. The intense power struggle seen in the EPA hearings indicates that the judiciary, not the political process, must ultimately decide who has the authority to determine the scope and validity of the executive privilege when Congress and the President disagree.

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155. Cox, *supra* note 26, at 1435.

156. *Id.* See *supra* notes 83-92 and accompanying text.

157. Gard, *supra* note 9, at 835.

158. *Id.*

