Restoring Balance to the Debate over Executive Privilege: A Response to Berger

Mark J. Rozell
RESTORING BALANCE TO THE DEBATE OVER EXECUTIVE PRIVILEGE: A RESPONSE TO BERGER

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In this Essay, Professor Rozell responds to Raoul Berger’s Executive Privilege: A Constitutional Myth. Berger’s work claims that executive privilege does not have a constitutional basis. Addressing Berger’s textual, historical, and structural arguments, Professor Rozell argues contrarily that executive privilege is a legitimate power when exercised properly and that to view executive privilege as a constitutional absolute is improper. As such, Professor Rozell recognizes the limits of executive privilege and suggests that it may be subject to a balancing test when weighed against demands for information. He argues that presidents should not use this power to protect information that is merely embarrassing or politically damaging but rather should reserve this power for the most compelling reasons—such as protecting certain national security needs or preserving White House confidentiality when it is in the public interest to do so. Professor Rozell argues that the separation of powers doctrine can resolve executive privilege dilemmas, as the political branches settle informational disputes between themselves, with limited judicial intervention. Finally, he proposes that each administration should adopt guidelines that provide members of the executive branch with formal procedures for handling and resolving executive privilege issues.

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INTRODUCTION

The Clinton scandal of 1998-1999 reinvigorated the national debate over executive privilege. Much like President Richard M. Nixon’s actions in the Watergate scandal, President Clinton’s aggressive and improper use of executive privilege brought disrepute to this constitutional power. Of course, the improper use of a constitutional power by one or even a number of presidents does not render that power illegitimate. Yet, during the Nixon period, a single work of scholarship on executive privilege loomed large and seemed to lend credibility to the view that this presidential power lacked a constitutional foundation: Raoul Berger’s Executive

Privilege: A Constitutional Myth. It was a monumental study many years in the making that fortuitously was published during a period of intense national debate over executive privilege.¹

Berger’s thesis dovetailed nicely with the widespread sentiment of the time that executive privilege was an unconstitutional vehicle for presidential abuse of power.² Nonetheless, Berger’s analysis was flawed. His book surely had the markings of an impressively documented lawyer’s brief against executive privilege, but it lacked the crucial scholarly component of being a balanced presentation of evidence and analysis.

Berger’s study was hugely influential in its time and it remains a fixture in legal and scholarly analyses today. With the current revival of the debate over executive privilege, it is an appropriate time to review and critique his analysis. As Clinton’s presidency draws to an end, there is a clear need to bring an appropriate balance to the study and the exercise of executive privilege.

To be sure, in critiquing Berger’s analysis, I am not championing the opposite view—that executive privilege is an unlimited presidential prerogative. Rather, executive privilege is a legitimate power when it is exercised properly. Any claim of executive privilege is open to challenge and, as with other governmental powers, it may be subject to a balancing test when weighed against demands for access to information.

I. BERGER ON EXECUTIVE PRIVILEGE

The Constitution never explicitly grants to the Executive the power to withhold information. Berger maintains that a determination of the scope of the executive power requires a strict reading of the Constitution.³ He does not accept the idea of an implied power of executive privilege.⁴ Rather, he believes that the constitutional Framers did not give the Executive the power to withhold information.⁵ Quite simply, had the Framers intended for the Executive to have the power of executive privilege, they would have granted it in Article II. Therefore, Berger proclaims executive privilege “a constitutional myth.”⁶

To make a convincing case against executive privilege requires much more than an assertion that such a power lacks a specific constitutional provision. Throughout history, presidents have exercised formidable powers not explicitly granted by the

² See id. at 5-9.
³ See id. at 51 (examining the definition of “executive power” in Article II of the U.S. Constitution).
⁴ See id. at 12.
⁵ See id. (“And we should be slow to import into the words ‘executive power’ an implication which curtails an established legislative power.”).
⁶ Id.
Constitution. Congress has done so as well. Accordingly, critics of executive privilege also must show that the Framers clearly did not intend for such a power to be exercised and that the Framers created impediments to prevent such a power from ever being adopted.

Berger believes that the Framers made Congress the supreme player in the making of foreign policy and never intended the Executive to play the lead role. Because many claims of executive privilege center around national security and foreign policy, this argument potentially undermines a frequently cited justification for executive privilege—that the Executive possesses prerogative powers that are especially compelling in the international realm.

Berger is not alone in rejecting the existence of prerogative powers. For example, Harold Hongju Koh wrote, "[T]he constitutional system of checks and balances is not suspended simply because foreign affairs are at issue." In addition, Louis Henkin agreed that "[c]onstitutionalism implies limited government. For our subject, that means that the Constitution should be expounded so that there can be no extraconstitutional government, that, in principle and in effect, no activity of government is exempt from constitutional restraints, not even foreign affairs . . . ." Therefore, by implication, critics argue that executive privilege cannot be legitimate, because to make a claim for its legitimacy would be tantamount to arguing that the Executive has the authority to act without congressional consent or even knowledge.

Furthermore, Berger contends that the President is always accountable to Congress; yet, Congress need not be accountable to the President. An 1860 report of the House of Representatives stated, "The conduct of the President is always subject to the constitutional supervision and judgment of Congress; while he, on the contrary, has no such power over either branch of that body." According to Berger, the Framers recognized the need for secrecy in government and gave that power to Congress. As support, he cites Article I, Section 5(3) of the Constitution: "Each

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7 War powers and executive agreements are two examples. See id. at 74 (noting that the presidential decision to send "armed forces to repel invasion of Korea or Vietnam" lacked constitutional support).

8 Creating independent regulatory agencies is an example.

9 See BERGER, supra note 1, at 35 & n. 124.


12 See BERGER, supra note 1, at 10 (noting that the "scope of the congressional power . . . can not be diminished by presidential fiat").

13 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1044 (1907) (quoting H.R. REP. NO. 36-394 (1860)).

14 See Executive Privilege: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong. 245 (1971) (statement of Raoul Berger) [hereinafter Executive Privilege].
House shall keep a Journal of its proceedings, and from time to time, publish the same excepting such parts as may in their judgement require secrecy.'

Because no such mention of secrecy is made in Article II, Berger maintains that "in the Constitution the Framers provided for limited secrecy by Congress alone, thereby excluding executive secrecy from the public."

A former special counsel to the U.S. Attorney General, George C. Calhoun attributes much of the interbranch conflict over executive privilege to the "belief of many in the government that each branch owns the information it develops." According to Berger, Congress possesses not only its own information but also the Executive's. He maintains that the Framers "patently modeled" the U.S. Congress after the British Parliament and thereby made Congress the nation's "Grand Inquest." Consequently, the President has no constitutional authority to resist Congress' demands for information. As Berger explained to the Subcommittee on Separation of Powers, "there is no word in the Constitution that expresses any intention whatsoever to curtail the normal attribute of the legislative power ... [and] there is not a single word in any one of the conventions expressing any intention to curtail the legislative power of investigation."

Berger maintains that the Executive's accountability to Congress also is guaranteed by the Article II, Section 4 provision for impeachment: "The President ... shall be removed from Office on Impeachment for and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors."

To properly conduct an impeachment proceeding, the House of Representatives must have complete access to the executive branch's information. In support of this argument, Berger notes an 1843 House Report, which stated the following: "The House of Representatives has the sole power of impeachment ... a power which

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15 U.S. CONST. art. I, § 5, cl. 3.
18 See Raoul Berger, Executive Privilege vs. Congressional Inquiry, 12 UCLA L. REV. 1043, 1056 (1965) ("The first one in line for interrogation ... is properly the official himself.") [hereinafter Berger, Congressional Inquiry].
19 Id. at 1058-60 (citing Coke, 4 Inst. 11; Howard v. Gossett, 10 Q.B. 359, 379-80, 116 Eng. Rep. 139, 147 (1845)).
20 Executive Privilege, supra note 14, at 245 (statement of Raoul Berger). Article I, Section 6, clause 1 of the Constitution provides that "for any speech or debate in either House [members] shall not be questioned in any other place." U.S. CONST. art. I, § 6, cl. 1. Berger notes that there is no comparable guarantee in Article II against anyone else examining the Executive. See Executive Privilege, supra note 14, at 245 (statement of Raoul Berger).
implies the right of inquiry on the part of the House to the fullest and most unlimited extent." If this interpretation of the House's inquiry power is correct, then the case for executive privilege is weakened. Obviously, the House cannot investigate the Executive if the President can withhold any information that he chooses.

Berger argues that the Article II, Section 3 provision for a presidential delivery to Congress of information on the state of the Union also repudiates executive privilege: "He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." Berger believes that this constitutional duty of presidents is yet another measure of Congress' absolute power of inquiry. The original provision presented at the Constitutional Convention allowed the President little discretion in determining the kind of information he could exclude from a congressional inquiry. In the rejected version, the Framers established "his duty to inform the Legislature of the Condition of the U.S. so far as may respect his Department." The final, adopted version, Berger believes, did not limit the President's duty to supply Congress with information. In fact, the President's duty to provide information "from time to time," according to Berger, "is the reciprocal of the familiar legislative power to inquire."

Finally, Berger cites the Article II, Section 3 provision that the President "shall take care that the laws be faithfully executed" as evidence that the Executive must be accountable to the legislative branch. He asks, "Who has a more legitimate interest in inquiring whether a law has been faithfully executed than the lawmaker?" Executive privilege remains dubious if Congress has an absolute, unlimited power of inquiry.

A. The Framers' Fear of Tyranny

Fearing that a strong Executive might at some time be transformed into a tyrannical ruler, the Framers sought to devise a governmental system of limited powers. Given the colonial experiences with the abuses of power by King George III, the Framers were determined that the American constitutional system should preempt

22 3 HINDS, supra note 13, at 183.
23 See BERGER, supra note 1, at 37.
24 See id.
25 Id. at 37 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 158 (Max Farrand ed., 1966)).
26 See id.
27 Id. at 38 (quoting U.S. CONST. art. II, § 3).
28 U.S. CONST. art. II, § 3.
29 BERGER, supra note 1, at 3.
the possibility of ever having an arbitrary and tyrannical Executive.30 The Framers also made the Legislature the supreme lawmaking branch. In his statement to the Senate Subcommittee on Separation of Powers, Berger noted that James Madison, the chief constitutional architect, explained, "'[I]n republican government, the legislative authority necessarily predominates.'"31

According to this view, the Framers so feared executive power that they made the Legislature the supreme branch of government in all policy areas, even in foreign affairs. Specifically, the Constitution grants to the President two exclusive powers: to receive ambassadors and to act as Commander in Chief of the armed forces.32 The President must share with the Senate the treaty-making power as well as the power to appoint ambassadors.33 Congress possesses such formidable powers as declaring war and regulating commerce.34 Berger maintains that the President cannot be the director of foreign policy and that the reality of executive preeminence in that area is due to a gradual presidential usurpation of power.35

According to Berger, a telling example of presidential usurpation of congressional authority is the treaty-making power. He cites the provision of Article II, Section 2 of the Constitution that states, "He shall have power, by and with the advice and consent of the Senate, to make treaties,"36 to substantiate the argument that presidents have been acting unconstitutionally.37

The Senate, according to Berger, has the right to participate in the negotiation and formulation of treaties, as well as in their ratification.38 From his study of the Constitutional Convention, Berger concludes that the Framers intended the treaty-making power to have belonged to the Senate.39 "It was the President ... who was finally made a participant in the treaty-making process, which had been initially lodged—after the pattern of the Continental Congress—in the Senate alone."40 Berger believes there is no presidential privilege to withhold information on the development of treaties and he explained his position in the following manner to a congressional committee:

30 See id. at 13.
31 Executive Privilege, supra note 14, at 278 (statement of Raoul Berger).
33 See U.S. CONST. art. II, § 2, cl. 2.
35 See BERGER, supra note 1, at 119 (noting the "all but total takeover of foreign relations by the President").
36 U.S. CONST. art. II, § 2.
37 See BERGER, supra note 1, at 120-21.
38 See id. at 122.
39 See id. at 126-27.
40 Id. at 127.
How can you help “make” a treaty if you don’t know a thing about how it is being negotiated? How can the Senate “advise” as to the “making” of a treaty if it is kept in the dark? That doesn’t mean that you have to play strip poker in full view of the public. The alternative to operation in a gold fish bowl is not necessarily a darkroom.\(^4\)

Despite the Framers’ fear of a tyrannical Executive and notwithstanding their efforts to constrain presidential power, even in foreign policy, the ascendance of the President in foreign policymaking has become widely accepted. Nonetheless, echoing an argument by Berger, former Senator J. William Fulbright (D-Ark.) once countered, “[U]surpation is not legitimized simply by repetition, nor is a valid power nullified by failure to exercise it.”\(^4\)\(^2\) Berger maintains that presidents have usurped such authority, in contravention of the constitutional scheme.\(^4\)\(^3\) In essence, he argues that the Framers—who sought to limit and control executive authority—could not have possibly accepted such a broad-based, independent power as the right to withhold information. He asserts that, logically, a Chief Executive who is subservient to the will of the Legislature has no such right.

B. The “Right” and the Need to Know

In a democratic society, a premium is placed on the values of open government and freedom of information. For our democracy to properly function, both Congress and the public must be fully informed of the activities of the Executive Branch.\(^4\)\(^4\) Congress must have adequate information to carry out its primary functions and a well-informed citizenry cannot be kept in the dark about its government’s actions. The executive branch is an essential source of information for Congress. In order to best know how to appropriate funds for the military and assistance to foreign governments, to oversee the bureaucracy, and to review treaties and executive agreements, Congress needs access to executive branch information. Without adequate information, members of Congress are unable to weigh alternatives, to estimate costs and benefits, and to develop strategies to improve government policies. Congress often must rely on executive branch information to determine whether public policies are being executed faithfully. For Berger, Congress, the “Grand Inquest” of the nation, can never legitimately be denied access to executive branch information.\(^4\)\(^5\) Berger looks to constitutional support for this view, including one

\(^{41}\) Executive Privilege, supra note 14, at 283 (statement of Raoul Berger).
\(^{42}\) Id. at 31 (statement of J. William Fulbright).
\(^{43}\) See Berger, supra note 1, at 118-21.
\(^{44}\) See id. at 2 & n.6 (citing W.P. Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A. J. 941 (1953)).
\(^{45}\) See Berger, Congressional Inquiry, supra note 18, at 1058-60.
leading Supreme Court case, *McGrain v. Daugherty*.\(^{46}\) In *McGrain*, Justice Willis Van Devanter offered the following judgment:

> In actual legislative practice power to secure needed information by such [investigative] means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution. . . . \(^{47}\)

From this perspective, congressional access to executive branch information not only is a practical necessity, but is legally required. In Berger's view, the executive branch never really loses "control" over information because it does not own that information.

Members of Congress reasonably maintain that executive branch information not only must be available, but also must be received in a timely fashion.\(^{48}\) Most legislators want timely information so that they can play a substantive role in the early stages of decision-making.\(^{49}\) To be precise, they prefer being "consulted" to merely being "informed."\(^{50}\) Divulging previously withheld information after a decision has been made does little to advance Congress's role in the policy process. A 1981 House of Representatives Report on Congress and foreign policymaking stated the dilemma well: "Unless consultation is timely, it loses a good deal of its impact and 'effective' relations are of only symbolic value."\(^{51}\)

A strong argument against executive privilege is that decision-makers benefit from exposure to numerous viewpoints. Irving Janis' classic study, *Groupthink*, shows that, from a policymaker's perspective, it is important to avoid conformity, to seek out different opinions, and to resist isolation from outside opinions.\(^{52}\) Janis illustrates the disastrous consequences of decisions made by like-minded groups of individuals who resisted different points of view.\(^{53}\) Consequently, an Executive may withhold information at his peril from people whom he knew would disagree with his position. Members of Congress believe they are particularly well-situated to provide the Executive with diverse opinions.

The 1981 House Report on Congress and foreign policy also noted an important obstacle to the Executive seeking out diverging viewpoints: a lack of trust in Congress. The Report quoted a White House official who agreed that presidents need

\(^{46}\) 273 U.S. 135 (1927).

\(^{47}\) *Id.* at 161.


\(^{49}\) *See id.*

\(^{50}\) *See id.*

\(^{51}\) *Id.* at 30.

\(^{52}\) *See Irving L. Janis, Groupthink* 172 (2d ed. 1982).

\(^{53}\) *See id.* at 178-86.
constructive advice from members of Congress. Yet, the Executive instead often keeps secrets because “even when the President has stressed the sensitivity of an issue Members of Congress have walked outside and talked to the press on the White House grounds.”

Berger disputes the fears of public disclosure of sensitive information. Moreover, he argues that the public has a right to know everything about the operations of the executive branch in a democratic system of government. Executive privilege can only hinder the free flow of information and ideas.

Executive privilege indeed appears difficult to accommodate in a government based on accountability. It is dubious to assume that executive branch officials can be held accountable for their actions when the public and Congress do not know what these officials are doing.

Perhaps most ironic is the following quotation from former President Richard M. Nixon, made just three months prior to the Watergate break-in: “[W]hen information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”

C. Misuses of the Privilege

Presidents and their staffs have invoked executive privilege to cover-up illegal or unethical governmental activities. They have used executive privilege to hide embarrassing information or to maintain an advantage in policy debates with congressional opponents.

Concerns about government misuse of executive privilege are certainly well-founded. Indeed, there are numerous examples of executive branch officials concealing information of minimal security value to cover-up governmental misconduct. For example, during the Nixon administration, President Nixon refused to allow certain aides to testify when called to appear before congressional committees. The President attempted to use executive privilege to conceal wrongdoing by members of his administration. He believed that he had an absolute

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55 See id.
56 See BERGER, supra note 1, at 289.
57 See Berger, Incarnation, supra note 16, at 16 (“[T]he Framers provided for limited secrecy by Congress alone, thereby excluding executive secrecy from the public.”).
59 See BERGER, supra note 1, at 254.
60 See id. at 254-55.
power of executive privilege—one that could be claimed on behalf of the entire executive branch of government.\textsuperscript{61}

More recently, President Clinton has made extensive use of executive privilege in circumstances that do not warrant the exercise of that power. His attempts to resist legitimate inquiries from the Office of Independent Counsel by using executive privilege gave additional ammunition to critics who charge that such a presidential power naturally leads to abuses.\textsuperscript{62}

Given these abuses of executive privilege, it is no wonder that critics such as Berger perceive any such claim of that presidential power as suspect.\textsuperscript{63} For many critics of executive privilege, the evils of nondisclosure clearly outweigh any potential evil that may result from executive disclosure of sensitive information.\textsuperscript{64} For those who accept the need for a balancing test, their scale always tips decisively in favor of candor and openness. In Berger's opinion, there is no need for a balancing test because executive privilege always is illegitimate. He argues, "Against the debatable assumption that fear of disclosure to Congress may inhibit 'candid interchange' and impair administration, there is the proven fact that such exchanges have time and again served as the vehicles of corruption and malversation . . . ."\textsuperscript{65}

II. A RESPONSE TO BERGER

Berger maintains that government secrecy is undemocratic and leads to abuses of power.\textsuperscript{66} Nonetheless, the weight of the evidence in many instances tilts in favor of executive privilege. Berger's detailed presentation is impressive; yet, he clearly overstates his case. For example, although the Framers wanted to preserve liberty by

\textsuperscript{61} See Berger, Incarnation, supra note 16, at 4.

\textsuperscript{62} See Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon's Shadow, 83 MINN. L. REV. 1069, 1124-25 (1999) (noting that Clinton's misuse of executive privilege did more to undermine and discredit it than reestablish its legitimacy) [hereinafter Rozell, Nixon's Shadow].

\textsuperscript{63} See, e.g., id. at 11, 21, 26-27, 29 (discussing other examples of abuses of executive privilege); Norman Dorson & Shattuck, Executive Privilege: The President Won't Tell, in NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA, 27-60 (Norman Dorson & Stephen Gillers eds., 1975) (arguing against "discretionary" executive privilege); Note, Military and State Secrets Privilege, 91 YALE L.J. 570, 579 (1982) (criticizing the use of executive privilege for information of "minimal security value" to counter allegations of misconduct).

\textsuperscript{64} See BERGER, supra note 1, at 8 (agreeing with Senator Fulbright's statement that "secrecy and subterfuge are themselves more dangerous to democracy than the practices they conceal").

\textsuperscript{65} Berger, Incarnation, supra note 16, at 26.

\textsuperscript{66} See id. at 4-5, 24 (noting the corrupt use of government secrecy during the Nixon Administration).
limiting power, they never set out to cripple executive power. Any power can be used for either good or bad purposes. The Framers devised institutional mechanisms to avoid the abuse of power, but they never intended to destroy executive power altogether as a means of protecting liberty.

When exercised under the appropriate circumstances, executive privilege has clear constitutional, political, and historical underpinnings. The American separation of powers system provides for executive privilege, but not without limitations. Executive privilege is legitimate when exercised for necessary and compelling reasons. The exercise of that power is always open to challenge by those with compulsory power. Many claims of executive privilege fail the balancing test because, in a democratic system, the presumption generally should be in favor of openness. Unfortunately, one defense of executive privilege is based on the false claim that this power is an absolute, unlimited prerogative. This claim is as misguided as the belief that the Framers rejected for all times and under all circumstances any such exercise of presidential power.

A. The Constitutional Period

Berger points to the Framers' fear of tyranny as proof that the Constitution provides for a subordinate executive power. He identifies the colonial experiences under King George III as the key points of reference for the Framers in creating the executive power.

The argument that the Framers sought to devise a weak Executive because of their experience under King George's rule neglects the true point of reference for these Constitution-makers—their governing experiences under the Articles of Confederation. During that period, most of the states had extraordinarily weak governors with terms of office as brief as six months or one year, no power to reelect the incumbent, and no powers independent of the state legislatures. The most telling exception was New York, which had an independent executive with full administrative powers, a three-year term, and unlimited eligibility for reelection. Of the state governments during the Articles of Confederation, New York could claim the most efficient, competent administration.

At the national level, no single executive existed under the Articles of Confederation. The Continental Congress, a deliberative assembly, had authority

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67 See THE FEDERALIST NOS. 68-77 (Alexander Hamilton).
68 See id.
69 See id. at 50.
70 See id.
72 See id.
73 See id. at 14-16.
74 See J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION
for governing the separate states. The failures of governance under this system precipitated the 1787 Constitutional Convention in Philadelphia, where the Framers set forth a new governing plan. Because of the inability of the separate sovereign states to raise a national militia, to carry out interstate commerce, and to conduct a coherent foreign policy, the Framers established a new constitutional system, which included an independent, single-member Executive with substantial powers.

Contrary to Berger, that executive privilege is mentioned nowhere in the Constitution does not preclude the exercise of that power. Recall his interpretation that Article I, Section 5, clause 3 of the Constitution provides for an exclusive legislative privilege to keep secrets. No comparable provision exists in Article II, leading Berger to conclude that the Framers intentionally excluded the President from exercising secrecy.

This narrow reading of the Constitution is not credible. First, this raises the question of how Berger can oppose executive privilege because of the lack of an explicit grant in the Constitution and yet favor the congressional power of inquiry, which also is nowhere mentioned in the document. In practice, both the executive and the legislative branches exercise a vast array of powers not expressly provided in the Constitution.

Second, Berger claims that the fact that the phrase "executive privilege" did not exist until 1958 means that such a presidential power cannot be grounded in our constitutional scheme. This argument fails, however, because all presidents going back to George Washington have practiced what we today call "executive privilege." Whether that phrase was a part of the common language at a particular time is irrelevant. The logic of Berger's argument would lead to the rejection of judicial review, congressional investigations, and many other legitimate powers.

Third, judging from the writings of the leading Framers who frequently stressed the needs for "secrecy" and "despatch" in government, it is hard to imagine that these same people believed that secrecy was so evil that it had to be excluded from the executive article. The Framers understood secrecy as so obvious an executive power—and a judicial one as well—that there was no need for a specific grant of that power in the Constitution. Perhaps, the Framers specified such a grant of power in Article I because secrecy could not be assumed to have resided in a legislature. Several selections from the Federalist Papers indeed support executive branch secrecy.

75 See id.
76 See id. at 10-11.
77 See BERGER, supra note 1, at 1-2.
78 See supra note 57.
79 See BERGER, supra note 1, at vii-viii.
80 See THE FEDERALIST NO. 64 (John Jay).
81 See THE FEDERALIST NO. 64 (John Jay), NO. 70 (Alexander Hamilton).
Furthermore, *Federalist No. 64* contradicts Berger’s interpretation of the Senate’s role in treaties. From the Article II, Section 2 “Advice and Consent” Clause, Berger concludes that the Framers precluded the exercise of executive privilege because the Senate cannot give advice on matters over which it is not informed. John Jay maintained that there are circumstances under which a President may have to resort to secret measures in treaty-making. Berger assigns the Senate the preeminent role in treaty-making. Jay portrayed the President and Senate as making substantial contributions of their own based on their particular institutional strengths.

Nonetheless, a President who includes the Senate in the negotiation stage acts prudently; otherwise, he threatens rejection of the treaty. Still, to suggest that presidents should involve the Senate at each stage of the treaty-making process is not to conclude that such action is required in every case. There are occasions when presidents must deliberate with foreign leaders in secret over the development of treaties. Executive privilege may support the exercise of such secretive negotiations in certain circumstances. Refusing a Senate request for information on the development of a treaty may be exceptional and it may be imprudent in most cases; but notwithstanding the latter, such a refusal is not illegal.

Central to Berger’s argument is the view that the Framers made Congress preeminent in foreign policymaking. He asserts that, logically, the subordinate branch of government cannot keep secrets from the preeminent one. The evidence, however, supports a different view. The key members of the Committee of Style at the Constitutional Convention—Alexander Hamilton, Rufus King, and Governeur Morris—shaped the language of Article II to allow the Executive to exercise vast powers. The Vesting Clause, the lack of any enumeration of duties in the Commander in Chief Clause, and many silences about such powers as war, diplomatic powers, and control over executive departments all left the President with a vast reserve of unspecified authority. Michael Foley explains that the U.S. Constitution contains many such silences—what he calls “constitutional

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82 THE FEDERALIST NO. 64 vol. 2, at 12 (John Jay) (Tudor Publ’g Co. ed. 1937).
83 See BERGER, supra note 1, at 128-29.
84 See THE FEDERALIST NO. 64, supra note 82, vol. 2, at 12-13 (John Jay).
85 See BERGER, supra note 1, at 13.
86 See THE FEDERALIST NO. 64, supra note 82, vol. 2, at 12-13 (John Jay).
87 See id.; THE FEDERALIST NO. 75 (Alexander Hamilton) (refuting the belief that the Constitution assigns to the Senate the preeminent role in treaty-making). Hamilton wrote, “To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations.” THE FEDERALIST NO. 75, supra note 82, vol. 2, at 82 (Alexander Hamilton).
88 See BERGER, supra note 1, at 127.
89 See U.S. CONST. art. II, § 1.
90 See U.S. CONST. art. II, § 2.
abeyances”—that allow for the discretionary exercise of authority according to circumstances. Jack W. Peltason writes that Article II “gives the President a power that has never been defined or enumerated and, in fact, cannot be defined since its scope depends largely upon circumstances.”

In Berger's view, in a system based on legislative supremacy, there is no constitutional basis for executive privilege. Recall that he cites the Article II, Section 4 provision for impeachment as proof of this position. Berger believes that the Framers “patently modeled” the U.S. Congress after the British Parliament. He points out that, historically, both the colonial legislatures and the British Parliament were able to compel disclosure of executive information. For Berger, “History, the traditional index of constitutional construction, discloses that a sweeping power of legislative inquiry had been exercised by Parliament and by the colonial legislatures.” Berger concludes that Congress must have the same limitless power of inquiry as entrusted to the British Parliament.

The problem is that Berger equates the power of the Executive in a presidential system with that of a parliamentary system. Yet, as James W. Ceaser writes, “Under a presidential system the essential executive force is never extinguished or in doubt; under a parliamentary system the executive force cannot be guaranteed (and in practice has not been).”

Berger's argument rests upon the belief that the power of inquiry in a governmental system based on the separation of powers is as unquestioned and extensive as the power of inquiry in a system that rejects the concept of separation of powers. A system of separated powers by its nature does not elevate one branch to supreme status. The Supreme Court has ruled that the congressional power of inquiry has limits. The Court also has determined that, in cases of inquiry into possible criminal actions, the Executive has to release pertinent information.

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93 See Berger, supra note 1, at 4.
94 See Berger, Congressional Inquiry, supra note 18, at 1058-60.
95 See id.
96 Id. at 1117.
97 See Berger, supra note 1, at 10-11.
99 See Berger, supra note 1, at 10-11.
100 See, e.g., Watkins v. United States, 354 U.S. 178 (1957) (holding invalid a petitioner's conviction for refusing to answer questions as to whether he had known that certain persons were members of the Communist Party).
Congress does not possess a complete, unlimited power of inquiry. Neither does the Executive possess an unfettered power to withhold any and all information from Congress.

Congress certainly has a very strong claim to any germane executive branch information in cases of impeachment and investigations into executive branch corruption. That the presumption is strongly in favor of Congress' demands for information in those circumstances does not bolster Berger's argument that the legislative power of inquiry is therefore absolute. It means merely that the balancing test shifts decisively in Congress's favor.

Berger's interpretation of Article II, Section 3, of the Constitution—"He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient"—is misleading. Referring to the original version proposed at the Constitutional Convention—rather than the just-recited adopted version—Berger argues that the Framers intended to limit the discretion of the President to present information in the State of the Union address. Therefore, Berger's argument rests on the assumption that historians should look primarily to the original provision for Article II, Section 3, introduced at the Convention, to understand the meaning of that provision in its adopted form. The adopted version means the opposite of what Berger suggests. In practice, presidents have used the State of the Union address to present information that they wanted to reveal to Congress, not information that Congress compelled them to present.

Therefore, there is much evidence that executive privilege is, in many instances, a legitimate, not usurped, power. The exercise of a presidential power creates a strong presumption of validity, especially when the coordinate branches of government accept the legitimacy of such authority.

B. Executive Privilege and the Early Presidents

To understand the Framers' view of executive branch secrecy requires an examination of governmental decision-making in the early republic. The intentions of the Framers are illuminated by how they put constitutional principles into practice. As Berger writes, an analysis of the early years of the republic is "more nearly contemporaneous with the forging of the Constitution."

The first presidential administration established the most important precedents for the exercise of executive power. George Washington understood the crucial role conversations with aides and advisers).
he played in establishing precedents for the future. As he wrote on May 5, 1789, to James Madison, "As the first of every thing, in our situation will serve to establish a precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles."\(^\text{106}\)

Washington established important precedents for executive privilege. The first concerned a congressional request to investigate the failure of a 1791 military expedition by General Arthur St. Clair against American Indians.\(^\text{107}\) The House of Representatives established an investigative committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries."\(^\text{108}\) The committee requested from the President documents regarding St. Clair's expedition.\(^\text{109}\)

Washington convened his Cabinet to determine how to respond to this first-ever request for presidential materials by a congressional committee.\(^\text{110}\) He wanted to discuss whether any harm would result from public disclosure and, most pertinently, whether he could rightfully refuse to submit documents to Congress.\(^\text{111}\) Along with Hamilton, Knox, and Edmund Randolph, Thomas Jefferson attended the meeting. He later recalled:

We had all considered and were of one mind 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, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the [committees] nor House has a right to call on the head of a [department], who & whose papers were under the [President] alone, but that the [committee] [should] instruct their chairman to move the house to address the President.\(^\text{112}\)

Washington eventually determined that disclosing the information would not harm the national interest and that it was a necessary action in order to vindicate St. Clair.\(^\text{113}\) Although Washington chose to negotiate with Congress over the committee's request and eventually decided to turn over relevant information, he had taken an affirmative position on the executive branch's right to withhold information.

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\(^{107}\) See 3 ANNALS OF CONG. 493 (1792).

\(^{108}\) Id.

\(^{109}\) See id.

\(^{110}\) See Berger, Congressional Inquiry, supra note 18, at 1079.

\(^{111}\) See id.

\(^{112}\) 1 THE WRITINGS OF THOMAS JEFFERSON, 1760-1775, at 189-90 (Paul Ford ed., 1892).

\(^{113}\) See BERGER, supra note 1, at 167.
Importantly, Washington determined that he had the right to withhold information if disclosure would injure the public. He did not believe that it was appropriate to withhold embarrassing or politically damaging information.\textsuperscript{114} Unfortunately, this distinction between exercising secrecy in the public interest as opposed to doing so out of self-interest would be lost on some of Washington’s successors.

In 1794, the Senate directed Secretary of State Edmund Randolph, “‘to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France, [Gouverneur Morris] and said Republic, and between said Minister and the office of Secretary of State.’”\textsuperscript{115} The Senate later amended the motion to address the President instead of Minister Morris.\textsuperscript{116} The amended version also “requested” rather than “directed” that such information be forwarded to Congress.\textsuperscript{117} Believing that disclosure of the correspondence would be inappropriate, Washington sought the advice of his cabinet.\textsuperscript{118} Three cabinet members expressed their opinions:

“General Knox is of the opinion, that no part of the correspondences should be sent to the Senate:

Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the President may choose to withhold:

Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the President thinks is improper, should not be sent.”\textsuperscript{119}

The Attorney General William Bradford wrote separately: “‘it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.’”\textsuperscript{120}

Washington responded as follows to the Senate’s request:

“After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, which, in my judgment, for public considerations, ought not to be communicated.

\textsuperscript{114} See id.
\textsuperscript{115} Abraham Sofaer, Executive Privilege: An Historical Note, 75 COLUM. L. REV. 1319 (1975) (quoting 4 ANNALS OF CONG. 38 (1794)) [hereinafter Sofaer, Executive Privilege].
\textsuperscript{116} See id.
\textsuperscript{117} See id.
\textsuperscript{118} See id.
\textsuperscript{119} Id. (quoting Cabinet Opinion, Jan. 28, 1794, \textit{in 4} THE WORKS OF ALEXANDER HAMILTON 505-06 (J.C. Hamilton ed., New York, C.S. Francis 1851)).
\textsuperscript{120} Id. at 1320 (quoting Letter of William Bradford to President Washington, \textit{in 4} THE WORKS OF HAMILTON, \textit{supra} note 119, at 494-95).
These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential. 121

Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. 122 He believed that information damaging to the “public interest” could be withheld from Congress. 123 The Senate never challenged his action. 124

In 1796, John Jay had completed U.S. negotiations with Great Britain over unsettled issues from the American Revolution. 125 Because many considered the settlement unfavorable to the United States, Congress took a keen interest in the administration’s actions in the negotiations. 126 Not only did the Senate debate ratification of the Jay Treaty, but the House also set out to conduct its own investigation. The House passed a resolution requesting from Washington information concerning his instructions to the U.S. Minister to Britain regarding the treaty negotiations. 127 Washington refused to comply with the House request and replied:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. 128

121 Id. (quoting American State Papers, 1 FOREIGN RELATIONS 329 (1833)).
122 See id. at 1321.
123 See id.
124 Id.; see also Abraham Sofaer, Executive Power and Control Over Information: The Practice Under the Framers, 1977 DUKE L.J. 1, 8 (citing 4 ANNALS OF CONG. 56 (1794)) [hereinafter Sofaer, Executive Power and Control].
125 See Sofaer, Executive Power and Control, supra note 124, at 8.
126 See id.
127 See 5 ANNALS OF CONG. 760-62 (1796).
Washington explained that "the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office... forbids a compliance with your request."129

The House debated the propriety of Washington's action.130 The House took no substantive action other than passing two non-binding resolutions: one asserting that Congress need not stipulate any reason for requesting information from the Executive;131 and the other proclaiming that the House had a legitimate role in considering the expediency with which a treaty was being implemented.132 The chief constitutional architect, James Madison, who was then a Representative, disagreed in part with Washington's action and defended the House's "right" to request information from the President.133 Madison also proclaimed, however, on the House floor, "that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time."134

During ratification, the Senate voted to keep the treaty secret, as Hamilton wrote, "because they thought [the secrecy] the affair of the President to do as he thought fit."135 The Senate minority opposed to ratification listed seven objections to the treaty.136 None cited Washington's decision not to seek advice from the Senate.137

Thomas Jefferson recognized the legitimacy of executive branch secrecy. As President, he classified his correspondence as either public or secret.138 He withheld correspondence deemed secret from both the public and Congress.139 For example, in 1807, President Jefferson denied a congressional request to provide information about the Aaron Burr conspiracy.140 Burr had been involved with a secessionist conspiracy, resulting in treason charges.141 Most relevant to the executive privilege debate was a January, 1807 House resolution requesting that the President "lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed."142 Congress clearly had acknowledged the President's right to exercise his discretion to withhold information. Jefferson replied to the congressional resolution by announcing Burr's guilt and
asserting a need to withhold information about the other alleged conspirators: "In this state of the evidence, delivered sometimes, too, under the restrictions of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question."\(^{143}\) Jefferson also had written to the U.S. District Attorney conducting the Burr prosecution that it was "the necessary right of the President of the [United States] to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom."\(^{144}\)

The principal author of the Constitution, James Madison, also withheld information from Congress during his presidency.\(^{145}\) He purposefully withheld information about French trade restrictions against the United States that eventually led to widespread support for war against Great Britain.\(^{146}\) Madison, and later President James Monroe, withheld information from Congress regarding the U.S. takeover of the Florida territory.\(^{147}\) On February 15, 1816, the Senate Committee on Foreign Relations issued a report stating:

> If it be true that the success of negotiations is greatly influenced by time and accidental circumstances, the importance to the negotiative authority of acquiring regular and secret intelligence can not be doubted. The Senate does not possess the means of acquiring such intelligence. It does not manage the correspondence with our ministers abroad nor with foreign ministers here. . . .
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> The President . . . manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.\(^{148}\)

Although numerous presidents have exercised executive privilege, not all have done so judiciously. As with all other grants of authority, the power to do good is also the power to do bad. The only way to avoid the latter—and consequently eliminate the ability to do the former—is to strip away authority altogether.

The evidence for the legitimacy of executive privilege in many instances is convincing. Critics of executive privilege take too narrow a view of the Constitution. They also have an unrealistic understanding of how our governing system should

\(^{143}\) COMPILATION, supra note 128, at 400.

\(^{144}\) Letter from Thomas Jefferson to George Hay (June 12, 1807), in 9 THE WRITINGS OF JEFFERSON, supra note 112, at 55.


\(^{146}\) See id.

\(^{147}\) See id. at 28-45.

work. Executive privilege not only is constitutional, occasionally it is necessary to the effective discharge of the President’s duties.

The Supreme Court has struck down important legislative control devices, expanding the scope of the President’s powers. The Court has determined that secrecy is a necessary condition for the President to carry out many of his constitutional duties, especially in foreign affairs.

Under U.S. law, the power to classify information is given to the Executive, not to the Legislature. Congressional decision-making is purposefully slow and indecisive. Congress may be out of session sometimes when foreign policy problems arise. One argument stated often in favor of executive privilege is that Congress does not always maintain secrets. Although true, Congress certainly is not unique in that regard. The executive branch does not always maintain secrets either. Once sensitive information is turned over to any large group of officials, there is no guarantee that someone will not divulge what he or she knows for policy, partisan, or personal reasons. For that reason, executive privilege may be necessary occasionally to substantially limit the circle of individuals with access to sensitive information, especially when national security is at stake.

The preservation of national security sometimes requires secrecy. Under certain circumstances, the right to exercise executive privilege is a necessary precondition for the Chief Executive to achieve national security aims. Additionally, the Chief Executive needs sound staff advice, and the quality of his counsel depends ultimately on the degree of its candor.

C. The Need for Candid Advice

The President’s constitutional duties necessitate that he be able to consult with advisers without fear of public disclosure of their advice. If officers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would be seriously damaged. Indeed, it would be difficult for advisers to be completely honest and frank in their discussions if their every word might someday be disclosed to partisan opponents or to the public. Averell Harriman

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149 See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (holding that powers vested in the Comptroller General under a legislative provision violated the Constitution’s command that Congress play no direct role in the execution of the laws); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (striking down a congressional veto provision that operated to overrule the Attorney General and mandate deportation of an alien).

150 See Chicago and S. Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that final orders regarding a citizen carriers’ application to engage in overseas and foreign air transportation embody presidential discretion beyond the competence of the courts to adjudicate).


testified to Congress, "[T]he President is entitled to receive the frank views of his advisers and therefore must be able to protect the personal or confidential nature of their communications with him." William P. Bundy also testified, "[I]f officers of an administration should come to feel that their confidential advice would be disclosed, short of a period of many years, I do believe that the consequences in terms of honesty, candor, courage, and frankness within the executive branch could be very serious indeed." Executive privilege recognizes this common sense notion. Indeed, in *United States v. Nixon*, the Supreme Court not only recognized the constitutionality of executive privilege, but the occasional need for secrecy in the operation of the presidency:

The valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. . . . [T]he confidentiality of Presidential communications has . . . constitutional underpinnings. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

In 1979, the Court iterated its support of executive privilege based on the need for candid interchange among advisers: "[D]ocuments shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinion."

The Court has recognized that the need for candid interchange is an important basis for executive privilege. Although it is well recognized that Congress needs access to executive branch information to carry out its oversight and investigative duties, it does not follow that Congress must have full access to the details of every executive branch communication. Congressional inquiry, like executive privilege, has limits. That is not to suggest that presidents can claim the need for candid advice to

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153 *Executive Privilege, supra* note 14, at 353 (statement of Averell Harriman).
154 *Id.* at 320-21 (statement of William P. Bundy).
156 *Id.* at 705-06, 708.
restrict any and all information. In fact, Congress’ power of inquiry trumps a claim of executive privilege unless the President can make a showing of need for secrecy.158

D. Limits on Congressional Inquiry

Congress’ power of inquiry, though broad, is not unlimited.159 Berger’s claim that the Constitution granted Congress an absolute power of inquiry is unfounded, as there is nothing in Article I, or in any part of the Constitution, that substantiates that claim. The debates at the Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the Framers intended to confer such authority on Congress. The legitimacy of the congressional power of inquiry is indeed unquestioned.160 Berger’s argument that this power is unlimited simply goes too far.

Regarding the power of inquiry, a distinction must be drawn between sources of information generally and those necessary for the legislative branch to perform its legislative and investigative functions.161 There is a strong presumption of validity to a congressional request for information relevant to these functions.162 The presumption weakens in the case of a congressional “fishing expedition”—a broad, sweeping quest for any and all executive branch information that is of interest to Congress for no specified reason.163 Indeed, Congress itself has recognized that there are limits on its power of inquiry.

159 See, e.g., Wilkinson v. United States, 365 U.S. 399 (1961) (upholding a conviction for not admitting before Congress to being a member of the Communist party); Watkins v. United States, 354 U.S. 178 (1957) (reversing a conviction for the giving of information about members of the Communist Party).
160 See, e.g., Sinclair v. United States, 279 U.S. 263 (1929) (upholding the conviction of a witness who refused to testify before a committee); McGrain v. Daugherty, 273 U.S. 135 (1927) (holding that the authority of Congress to require pertinent disclosures in aid of its own constitutional power is not abridged because the information also may be of use in pending legal suits).
161 See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (1974) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s functions.”).
162 See id.
163 Nonetheless, as Louis Fisher observes, the courts consistently have ruled that the congressional power of investigation is available, even for pursuit down “blind alleys.” See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 187 (4th ed. 1997); see also Eastland v. United States Servicemen’s Fund, 421 U.S. 491 (1975) (holding that congressional inquiry into activities of respondent organization to determine whether they were potentially harmful to the morale of the U.S. Armed Forces was within the legitimate legislative sphere). In a balancing test between a seemingly strong presidential claim to executive privilege and a blind congressional pursuit, the inquiry power of Congress may have to yield to the executive branch.
Nonetheless, Berger believes that Congress has an absolute, unlimited power to compel disclosure of all executive branch information. His view has been echoed by Representative John Dingell (D-Mich.) who said that members of Congress "have the power under the law to receive each and every item in the hands of the government." This expansive view of congressional inquiry is as wrong as the belief that the President has the unlimited power to withhold all information from Congress. There are inherent constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry has been whether the requested information was vital to Congress' lawmaking and oversight function. It is ironic that Berger maintains that executive privilege lacks validity because it is not specifically granted by the Constitution and then argues that Congress possesses an absolute, unlimited inquiry power despite a similar lack of such a constitutional grant.

E. The Other Branches Exercise Confidentiality

Executive privilege also can be defended on the basis of accepted practices of secrecy in the other branches of government. Members of Congress receive candid, confidential advice from committee staff and legislative assistants. Congressional committees meet on occasion in closed session to "mark-up" legislation. Congress is not obligated to disclose information to another branch. A court subpoena will not be honored without a vote of the legislative chamber concerned. Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for their official behavior, particularly regarding speech, anywhere but in Congress. As with the Executive, this privilege does not extend into the realm of criminal conduct.

Secrecy also is found in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. David O'Brien refers to secrecy as one of the "basic institutional norms" of the Supreme Court. "Isolation from the Capitol and the close proximity of the justices' chambers within the Court promote secrecy, to a degree that is remarkable . . . . The

164 See BERGER, supra note 1, at 4.
168 See id. at 612
169 See id. at 615.
norm of secrecy conditions the employment of the justices’ staff and has become more important as the number of employees increases. Members of the Judiciary claim immunity from having to respond to congressional subpoenas. The norm of judicial privilege also protects judges from having to testify about their professional conduct.

It is inconceivable that secrecy, so common to the legislative and judicial branches, should not be exercised by the executive branch. The executive branch regularly is engaged in a number of activities that are secret in nature. George C. Calhoun explains that the executive branch presents ... matters to grand juries; assembles confidential investigative files in criminal matters; compiles files containing personal information involving such things as census, tax, and veterans information; and health, education and welfare benefits to name a few. All of these activities must, of necessity, generate a considerable amount of confidential information. And personnel in the executive branch ... necessarily prepare many more confidential memoranda. Finally, they produce a considerable amount of classified information as a result of the activities of the intelligence community.

In the cases of legislative, judicial, and executive branch secrecy, a common purpose is being served: to arrive at more prudent policy decisions than those that would be determined through an open process. In each case, the end result is what will be subject to scrutiny. Indeed, accountability is built into secretive decision-making processes. The elected public officials must justify the end result at some point.

F. Restoring the Balance

The post-Watergate period has witnessed a breakdown in the proper exercise of executive privilege. Because of Nixon’s abuses, Presidents Ford and Carter kept executive privilege at a distance and resorted to other constitutional and statutory means to preserve executive branch secrecy. President Reagan tried to restore executive privilege as a presidential prerogative but ultimately failed when

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171 Id. at 150-51.
172 See Nixon v. Sirica, 487 F.2d 700, 738-40 (1973) (Mackinnon, J., concurring in part and dissenting in part) (summarizing Congress’s claim of “absolute privilege to decide itself whether its members or employees should respond to subpoenas”).
173 See id. at 740.
175 Calhoun, supra note 17, at 174.
176 See Rozell, Nixon’s Shadow, supra note 62, at 1072-94.
congressional committees threatened administration officials with contempt citations and adopted other retaliatory actions to compel disclosure.\textsuperscript{177} President Bush, like Ford and Carter before him, avoided executive privilege when possible and used other means to preserve secrecy.\textsuperscript{178} President Clinton has exercised executive privilege more often than all of the other post-Watergate presidents combined, often times improperly.\textsuperscript{179} In the post-Watergate era, therefore, presidents either have avoided uttering the words "executive privilege" and have protected secrecy through other sources of authority (Ford, Carter, Bush), or they have tried to restore executive privilege and failed (Reagan, Clinton).

Clinton's aggressive use of executive privilege at least served to revive the national debate over this presidential power. Therefore, now is the appropriate time to discuss how to restore a sense of balance to the executive privilege debate.

The dilemma of executive privilege is that it is troubling to permit governmental secrecy in a political system predicated on leadership accountability. On the surface, the dilemma is a complex one to resolve: it is questionable whether the public can hold democratically elected leaders accountable when such leaders are able to deliberate in secret or to make secretive decisions.

Under certain circumstances, presidential exercise of executive privilege fits comfortably within the embrace of our constitutional system. Nonetheless, in recent years, executive privilege has fallen into disrepute because of the abuses of that power by presidents seeking to conceal wrongdoing. The modern pattern of (1) executive branch recriminations that suggest that legislators and independent counsels unnecessarily meddle in the affairs of the executive branch; and (2) accusations that the executive branch's failure to divulge all information constitutes criminal activity, has been unhealthy to our governing system. Currently, there appears to be a lack of recognition by the political branches of each other's legitimate powers and interests in the area of governmental secrecy. To restore some sense of balance to the modern debate over executive privilege, the following must be recognized.

First, when used under appropriate circumstances, executive privilege is a legitimate constitutional power. The weight of the evidence refutes the assertion that the executive privilege is a "constitutional myth."\textsuperscript{180} Consequently, presidential administrations should not be devising schemes for achieving the ends of executive privilege while avoiding any mention of the constitutional doctrine. Furthermore, Congress and judicial entities must recognize that the executive branch, like the legislative and judicial branches, has a legitimate need to deliberate in secret and that

\textsuperscript{177} See id. at 1094-103.
\textsuperscript{178} See id. at 1103-18.
\textsuperscript{179} See id. at 1118-26.
\textsuperscript{180} The phrase "Constitutional Myth" was coined by Raoul Berger. See BERGER, supra note 1, at 1.
not every assertion of executive privilege is automatically a devious attempt to conceal wrongdoing.

Second, executive privilege is not an unlimited, unfettered presidential power. Executive privilege should be exercised only rarely and for the most compelling reasons. Congress has the right, and often the duty, to challenge presidential assertions of executive privilege. Congress should make challenges, especially when such assertions clearly are not related to the two primary categories: (1) protecting certain national security needs; or (2) protecting the privacy of White House deliberations when it is in the public interest to do so.

Third, there are no clear, precise constitutional boundaries that determine, a priori, whether any particular claim of executive privilege is legitimate. The resolution to the dilemma of executive privilege is found in the political ebb and flow of the separation of powers system. There is no need for any precise definition of the constitutional boundaries surrounding executive privilege. Such a power cannot be subject to precise definition because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power. A return to the traditional separation of powers theory provides the appropriate resolution to the dilemma of executive privilege and democratic accountability.

III. RESOLVING THE DILEMMA: THE SEPARATION OF POWERS

In response to the constitutional dilemma posed by the presidential use of executive privilege, it is often tempting to try to devise a remedy that would eliminate any potential future conflict. Berger believes there is just one answer to the question of how to resolve this constitutional dilemma: eliminate the source of power from which the dilemma originates. In his view, “Secrecy in the operations of government is an abomination.” Berger concludes that actions during the Nixon presidency proved that point. During the Nixon presidency, Berger writes, “‘Confidentiality’ was the vehicle for the cover-up of criminal acts and conspiracies by [Nixon’s] aides, an instrument he repeatedly employed for the obstruction of justice.”

Berger accurately describes Nixon’s exercise of executive privilege. In addition, one easily could add the more recent actions of the Clinton administration to the list of presidential misuse of executive privilege. Yet, many of the critiques of executive privilege focus on the incredible abuses of one or a few administrations. Generalizing from these abuses of power, many critics of executive privilege maintain that there

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181 See Peterson, supra note 166, at 613.
183 Id. at 29.
184 Id.
must be completely open deliberations within the executive branch of government—a position never adopted, even by the "open" presidencies of Gerald R. Ford or Jimmy Carter. These critics, while having identified an undeniable problem, call for a simplistic, blanket solution: if a power such as the executive privilege potentially can be abused, then it must be eliminated in favor of completely open, public deliberations. Such critics perceive openness as the only means by which to assure accountability from the executive branch.

Underlying this argument against executive privilege is the view that, given the need for democratic accountability and the specific powers conferred upon the legislative branch by Article I of the Constitution, Congress always must be supreme in the lawmaking process. Berger that there should be no exceptions to that rule.

Yet, as James W. Ceaser argues, the belief that Congress must always be supreme in the lawmaking process "is based on a narrow and legalistic understanding of the Constitution and on a failure to recognize the real purpose for which the founders adopted the theory of separation of powers." The failure to understand or to accept the Founders' theory of the separation of powers has resulted in a quest for absolutes on the issue of executive privilege. Dogmatically opposed to executive privilege under any circumstance, Berger and others want to eliminate such a power because of past abuses and the real potential for future abuses. Yet, this remedy elevates the exception—the abuse of power—into the rule, leading to the call for a broad, sweeping, and ultimately an impractical solution.

Many of President Nixon's defenders, on the other hand, elaborated the equally suspect argument that Congress and the public have no authority to limit and constrain the exercise of executive powers. Nixon took this viewpoint to the extreme, claiming that any action undertaken by the President is legitimate. Nixon's attorneys argued that the manner in which executive privilege is exercised "is a matter of presidential judgment alone." In *United States v. Sirica*, Judge George MacKinnon expressed best of all the notion of an unlimited executive privilege:

[I]n my opinion an absolute privilege exists for presidential communications. . . . [S]trict confidentiality is so essential to the

187 See *BERGER*, supra note 1, at 14.
188 See Ceaser, supra note 98, at 190.
189 See supra Pts. I-II.
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deliberative process that it should not be jeopardized by any possibility of disclosure.\textsuperscript{192}

Neither dogmatic view of executive privilege presents an accurate assessment of the separation of powers system. Neither outlook provides a workable resolution to the dilemma of executive privilege. Only a proper understanding of the separation of powers can help resolve the inherent conflict between governmental secrecy and the “right to know.”

The alternative proposed by Berger and his followers—completely open executive branch deliberations—is worse than the danger they seek to eliminate. Any power can be abused once it has been created. Because secrecy is occasionally vital to the proper functioning of the presidency, periodic attempts to abuse this power may be an unavoidable price that must be accepted. To demand that presidents exercise their powers fully to advance an activist policy agenda, that they strictly conform to the letter of every legal and constitutional provision in the exercise of their powers, and that they remain fully subordinate to the legislative authority in all areas, is to expect nothing less than an ideal world—one in which the trustworthiness of chief executives is never at issue; in which the legal and constitutional provisions pertaining to the presidency are unmistakably clear, consistent, and do not unduly constrain the exercise of presidential authority; and in which legislators are concerned only with high-minded matters of policy and the public good. As the Founders understood so well, such a state of affairs never will exist given the undeniable foibles of human beings. There are better ways to check the potential abuse of power than elimination of the source of power altogether. The dilemma of executive privilege can be resolved by means other than eliminating that authority altogether or effectively trying to do so through the use of onerous legalistic constraints.

Furthermore, the pro-imperial presidency view—the one in which the Chief Executive exercises his authority unfettered by congressional constraints, Congress defers to executive fiat, and the only check on presidential power takes place on election day—also misunderstands the separation of powers doctrine. The resolution to the dilemma of executive privilege is not simply to allow the President to determine for himself the scope and limits of his own authority. As Louis W. Koenig has written, “John Locke would have been flabbergasted” by Nixon’s assertion that any action undertaken by the President is legal.\textsuperscript{193}

A proper understanding of the separation of powers is rooted in the founding period and the early years of the Republic. The Founders recognized an implied constitutional prerogative of presidential secrecy, a power they believed was occasionally necessary and proper.\textsuperscript{194} The leading Founders either exercised or

\textsuperscript{192} \textit{Id.} at 742.
\textsuperscript{193} \textsc{Louis W. Koenig, The Chief Executive} 11 (5th ed. 1986).
\textsuperscript{194} \textit{See} \textsc{Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and}
acknowledged the right of executive branch secrecy in the early years of the Republic. In devising the American constitutional system, they sought to limit the Executive’s powers to reduce the threat of tyranny. Yet, this perceived need to limit power never implied either weak government or a subordinate executive branch. As political scientist L. Peter Schultz has written, “[T]he separation of powers constitutes an attempt to solve one of the major problems of government, that of providing for both reasonable government and forceful government without sacrificing either.”

It is well recognized that the leading Founders exercised considerable foresight in establishing a constitutional system capable of adapting to the needs of changing times. That foresight has been especially useful to the conduct of foreign policy, an area in which some claims of executive privilege are especially compelling. When it came to writing the articles of the Constitution concerning the executive branch, the Framers exercised great care not to constrain all executive power with constitutional exactitude.

A proper understanding of the separation of powers is founded also on the notion that there are inherent limitations on the prerogative powers of the presidency. The eventual resolution of the Nixon Administration’s scandals shows that Congress and the Judiciary, when given good reason to believe that the claim of privilege is being abused, have institutional mechanisms that can be used to compel the President to divulge information. The separation of powers provides the vital mechanisms by which the other branches of government can challenge executive claims of privilege.

The answer to the question of how executive privilege can be properly exercised and constrained is found in an examination of the roles of the other branches in ensuring that the executive branch does not abuse its powers.

A. Role of Congress

One solution to the dilemma of executive privilege that is proposed occasionally is to establish a statutory definition of that power, specifying the circumstances under which executive privilege can be exercised. Fortunately, no such legislative solution to the dilemma has been enacted. Any a priori “solution” is bound to fail, given the impossibility of determining all of the circumstances under which executive privilege may be exercised in the future. As former Attorney General Edward Levi...
has explained, "[T]he lesson of history is that the reasonableness of an assertion of confidentiality cannot be determined in advance on the basis of neat categories."

Congress already has the institutional capability to challenge claims of executive privilege by means other than eliminating the right to withhold information or attaching statutory restrictions on the exercise of that power. For example, if members of Congress are not satisfied with the response to their demands for information, they have the option of retaliating by withholding support for the President's agenda or his executive branch nominees. In one famous episode during the Nixon Administration, the Senate Judiciary Committee threatened the confirmation of Richard Kleindienst to the office of Attorney General until a separate access-to-information dispute had been resolved. That action resulted in President Nixon ceding to the Senators' demands. If information can be withheld only for the most compelling reasons, it is not unreasonable for Congress to attempt to force the President's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence over pending legislation or a presidential appointment. If not, there must be little justification for withholding the information in the first place.

Congress possesses numerous other means by which it can compel presidential compliance with requests for information. First, Congress maintains control over the governmental "purse-strings," a formidable power over the executive branch. Additionally, Congress often relies on the subpoena power or a contempt of Congress charge to compel release of withheld information. It is not merely the exercise of these powers that matters, but the threat that Congress may resort to such powers. During the Reagan/Bush years, Congress had a great deal of success at compelling executive branch disclosure of information through the subpoena and contempt of Congress powers.

In the extreme case, Congress also has the power of impeachment—the ultimate weapon with which to threaten the Executive. Clearly, this congressional power cannot be routinely exercised as a means of compelling disclosure of information and consequently will not constitute a real threat in commonplace information disputes. Nonetheless, in the case of a scandal of Watergate-like proportions, in which other
remedies have failed, Congress can threaten to exercise its ultimate power over the President. For a time in 1998, Congress considered an impeachment article against President Clinton for his abuse of presidential powers, including executive privilege. Ultimately, Congress dropped that particular article.  

In the vast majority of cases, it can be expected that the President will comply with requests for information rather than withstand retaliation from Congress. Presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges.

If certain members of Congress believe that the executive privilege power is too formidable, the remedy resides not in crippling presidential authority, but in exercising the vast array of powers already at Congress’ disposal. Sotirios A. Barber contends that presidential preeminence in foreign policymaking “cannot be explained by comparing that executive and legislative powers are enumerated in the Constitution.” Barber correctly explains that Congress possesses formidable powers, but at times has failed to exercise them fully. Over three decades ago, Senator J. William Fulbright (D-Ark.) argued that Congress acquiesced too often to presidential authority in foreign affairs and charged his colleagues not to allow the Chief Executive to act unilaterally in foreign policy or in a secretive fashion: “I conclude that when the president, for reasons with which we can all sympathize, does not invite us into his high-policy councils, it is our duty to infiltrate them as best we can.”

Nonetheless, Louis Koenig refutes the oft-stated belief that the presidency has become imperial while Congress’ powers have atrophied. Koenig cites the example of the Nixon Presidency as proof that Congress has both possessed and exercised formidable powers when it wanted to so:

The imperial presidency thesis excessively downgrades Congress and misstates the historical experience of the presidency. Time and again, Congress prevailed over Nixon. Congress ended his once secret war in Cambodia by cutting off its funds. His claims of massive powers to impound funds or abolish programs were rejected both by Congress and

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205 See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES 274 (1999).
206 See id.
207 See FISHER, supra note 199, at 15-18 (noting the failed assertions of executive privilege by Presidents Reagan and Clinton).
209 See id. at 233.
the courts. His modest program proposals were rejected by Congress more frequently than any other contemporary president. Ultimately, Nixon's certain impeachment by the House of Representatives drove him from the presidency. . . . [The presidency] contains substantial weaknesses of power which the imperial thesis obscures.211

The resolution of executive-legislative disagreements over withheld information need not occur through such combative techniques. Rooted in the separation of powers is the notion that the potential stalemate that results from the executive branch's refusal to release information can be overcome by mutual accommodation and compromise. I disagree with the assessment of the former Attorney General William French Smith, who argued that there are inherent problems with holding any members of Congress in confidence regarding sensitive information.212 The divulging of sensitive information to a few trusted and highly respected members of Congress has succeeded in the past. For example, during the Second World War, President Franklin Delano Roosevelt frequently confided sensitive national security information to trusted members of Congress, and they respected the sanctity of that information. In times of great uncertainty over the appropriateness of withholding information, the President can, in secret chambers, discuss the problem with a few members of Congress who are highly trusted within their own institution.

The circumstances surrounding treaty negotiations is particularly complex because of the obvious need for the Executive to keep discussions confidential combined with the Senate's constitutional authority of "advice and consent."213 In diplomatic negotiations, to publicly divulge negotiating positions before an agreement has been reached is highly imprudent. The flexibility of negotiating positions is compromised by such revelations, making highly difficult the achievement of an agreement between or among the parties. Chief Justice William Rehnquist has argued that the use of private discussions between the President and some members of Congress can satisfy both Congress' right to know and the needs of diplomatic negotiations:

Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of Congress without making the same information prematurely available throughout the world. The end is not secrecy as to the end product—the treaty—which of course should

211 See Koenig, supra note 193, at 11-12.
213 U.S. Const. art. II, § 2.
be exposed to the fullest public scrutiny, but only the confidentiality as to the negotiations which lead up to the treaty.\textsuperscript{214}

A statutory resolution to the dilemma of executive privilege is not needed. Congress already possesses the constitutional means by which to challenge the executive branch when it withholds information.\textsuperscript{215} Congress has had substantial success using its existing powers to compel disclosure of withheld information. In fact, Congress appears to have gained the upper hand in its disputes with the executive branch over information policy. When it comes to executive privilege, there is no convincing evidence for the view that the President is imperial, capable of doing whatever he wants.

B. Role of the Courts

In the realms of foreign affairs and national security policymaking, the courts generally have been deferential to the so-called “political branches.” The Judiciary’s role in the separation of powers is not regarded as one of arbitrating conflicts between the political branches over how foreign policy should be conducted. On many occasions, courts have recognized that the judicial branch may not be best suited for deciding complex matters of foreign affairs, national security and intelligence policy.\textsuperscript{216} Louis Fisher explains the usual judicial response to congressional attempts

\textsuperscript{214} Executive Privilege, supra note 14, at 434 (statement of Justice William Rehnquist).

\textsuperscript{215} See supra notes 3-29 and accompanying text.

\textsuperscript{216} See, e.g., New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring) (upholding the denial of an injunction the United States government sought against the publication by the New York Times of the contents of a classified study entitled History of U.S. Decision-Making Process on Viet Nam Policy); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that the Civil Aeronautics Act, which provides that orders of the Civil Aeronautics Board that grant or deny applications by citizens to engage in overseas and foreign air transportation, which are subject to the approval of the President, creates an implied exception to the provision of the Act for the judicial review of the Board’s orders other than those “in respect of any foreign air carrier subject to the approval of the President.”); Coleman v. Miller, 307 U.S. 433, 453-55 (1939) (upholding a judgment of the Supreme Court of Kansas denying a writ of mandamus, applied for in that court by senators of the State and members of its house of representatives for the purpose of compelling the Secretary of the Senate to erase an endorsement purporting to show that a resolution for the ratification of the proposal to amend the federal Constitution had passed the Senate, and to restrain the officers of the Senate and the other house of the legislature from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (holding that the seizure and sale in Mexico, as a military contribution, of property at the time owned and in the possession of a Mexican citizen, by a duly commissioned military commander of what must be accepted by the courts as the legitimate government of Mexico, in the progress of a
at posing constitutional challenges to the President’s national security decisions:

Congress must be prepared, and willing, to exercise the ample powers within its arsenal. When it acquiesces to executive initiatives, the record clearly shows that legislative inaction will not be cured by judicial remedies. Four times during the Reagan administration, members of Congress filed suit in federal court to have President Reagan’s military actions in El Salvador, Nicaragua, Grenada, and the Persian Gulf held unconstitutional and illegal. Four times the federal courts gave Congress the same message: if you fail to challenge the president, don’t come to us. Justice Lewis Powell put it well in the treaty termination case of Goldwater v. Carter (1979): “If the Congress chooses not to confront the President, it is not our task to do so.” Congress has the constitutional power. It needs also the institutional courage and constitutional understanding to share with the president the momentous decision to send U.S. forces into combat.217

This recognition of the limitations on the role of the courts does not preclude a role for the Judiciary in arbitrating constitutional, rather than policy, disputes. As the Supreme Court affirmed in United States v. Nixon, the separation of powers does not guarantee an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President’s need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad,

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undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.\textsuperscript{218}

The Court clarified that when a claim of privilege is made to protect national security or foreign policy deliberations, such a claim often is difficult for another branch to overcome in a balancing of constitutional powers.\textsuperscript{219} Yet, while upholding the "constitutionally based" nature of the privilege, the Court also made it clear that the privilege may, at times, have to defer to the constitutionally-based powers of a coordinate branch of government.\textsuperscript{220} Although the Court did not specify the exact balance of powers between the branches, it did affirm that the judicial branch has the authority to compel production of information when needed in a criminal case:

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.\textsuperscript{221}

Other court cases have affirmed that it is appropriate to apply a balancing test of competing interests when disputes arise over executive branch information policies.\textsuperscript{222} In \textit{United States v. Nixon}, the Supreme Court exhibited the capacity of the Judiciary to pose as a viable check on presidential abuses of executive privilege.\textsuperscript{223} There also is considerable legal precedent for \textit{in camera} review of sensitive information by the courts.\textsuperscript{224} Rather than simply compelling disclosure of privileged

\textsuperscript{219} See \textit{id.} at 706, 710.
\textsuperscript{220} See \textit{id.} at 707.
\textsuperscript{221} \textit{Id.} at 713.
\textsuperscript{223} See \textit{Nixon}, 418 U.S. at 706.
\textsuperscript{224} See, \textit{e.g.}, Farnsworth Cannon, Inc. \textit{v.} Grimes, 635 F.2d 268, 275-76 (4th Cir. 1980) (suggesting that the parties waive a jury trial in favor of an \textit{in camera} disposition of a tort action involving sensitive naval documents); United States \textit{v.} Boyce, 594 F.2d 1246, 1252 (9th Cir. 1979) (examining classified materials \textit{in camera} to determine if they contained exculpatory evidence useful to accused spy Christopher Boyce); United States \textit{v.} Lyon, 567 F.2d 777, 783 (8th Cir. 1977) (examining \textit{in camera} the testimony of two C.I.A. representatives made under oath); \textit{Nixon v. Sirica}, 487 F.2d 700, 707-08 (D.C. Cir. 1973) (holding that the \textit{in camera} examination of presidential tape recordings was "necessary and appropriate" to identify relevant evidence); United States \textit{v.} Jolliff, 548 F. Supp. 229, 231-
information for open court review, it may be appropriate for the executive branch to convince the court, in secret chambers, of the necessity of nondisclosure. The courts repeatedly have affirmed their right to decide in particular cases whether the necessity of protecting sensitive information outweighs the need for evidence in criminal justice matters. Little evidence exists to support the claim that the Judiciary does not administer this duty carefully and prudently. As Chief Justice John Marshall asserted in *United States v. Burr,* the President has the right to protect privileged information, but this right does not override the authority of the judiciary to review protected documents:

The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. . . . I can readily conceive that the president might receive a letter which it would be improper to exhibit in public. . . . The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. . . . Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.

The Judiciary clearly plays a less active role than the Congress in resolving executive privilege disputes. Institutional conflict between the political branches usually should resolve informational controversies. Constant judicial intervention in such controversies is neither practical nor desirable. Nonetheless, the courts may get involved in those conflicts in which they are a party and in disputes that the political branches cannot resolve without judicial intervention.

**CONCLUSION**

The dilemma of executive privilege cannot be resolved with constitutional exactitude. To try to do so would be to attempt to impose a solution that is


225 See, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 791 (D.C. Cir. 1971) (upholding a conservation group's discovery request for nuclear testing information after the redacting of military and diplomatic statements); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (holding that a document concerning an advisory opinion of a subordinate to an agency head was privileged).

226 25 F. Cas. 187 (1807).

227 Id. at 190, 191-92.
antithetical to the American constitutional culture. The dilemma can best be resolved on a case-by-case basis, through the normal ebb-and-flow of politics as envisioned by the Framers of the governing system in the United States. Exactitude cannot be achieved in a government that must accommodate ever-changing circumstances. The genius of the American constitutional system is its enormous capacity to maintain its legitimacy and stability by accommodating changing circumstances without sacrificing the fundamental values that underlie the system.

The search for constitutional absolutes—e.g., that executive privilege is a myth or that executive privilege is an unfettered prerogative—is misguided. Our constitutional system cannot guarantee certitude with regard to how every informational policy dispute in government will be resolved, nor should it. Two executive privilege claims that, on the surface, appear equally valid, may be treated very differently from one another given different circumstances—e.g., the political composition of Congress, the membership of a particular investigating committee, the popularity of the President, and the like. In the Bush Administration, one presidential claim of executive privilege that had little to do with national security concerns prevailed in part because of the popularity of a Cabinet member who might otherwise have been held in contempt of Congress, and in part because the chair of the committee in charge of the investigation failed to vigorously pursue the matter. On numerous other occasions in the modern presidency, Congress has prevailed over administration claims of privilege either because of its vigorous challenges to those actions or due to the unwillingness of some post-Watergate presidents to resist congressional demands.

It is implausible that a strict, legalistic definition of executive privilege could have determined in advance the appropriate resolution to each controversy. What is problematic in the post-Watergate years is the delegitimization of executive privilege due to Nixon’s, and more recently Clinton’s, abuses of power.

Many advocates of the strong presidency now decry the so-called “imperial Congress” and the Legislature’s propensity to solve informational disputes through the use of narrow legalisms. Rather than an appropriate exercise of the separation of powers mechanism moderating presidential power, more often intransigent positions are adopted by members of the political branches. This development

228 See Rozell, Dilemma of Secrecy, supra note 194, at 134-35.
229 See Rozell, Nixon’s Shadow, supra note 62, at 1069-126.
230 See Terry Eastland, Energy in the Executive: The Case for a Strong Presidency (1992) (arguing for a strong presidency in order to achieve what the constitutional Framers saw as good government); The Fettered Presidency: Legal Constraints on the Executive Branch (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (compiling essays critical of legislative intrusions on executive powers); The Imperial Congress (Gordon S. Jones & John A. Marini eds., 1988) (compiling essays that recall the original purposes of the separation of powers, how it has been undermined, and ways to restore it).
represents a regrettable deviation from the Framers' notion of the separation of powers and from the traditional dynamic that occurred between the political branches over executive branch secrecy until the Nixon years. Through the normal political process of confrontation, compromise, and accommodation, the coordinate branches usually had resolved satisfactorily their differences over executive privilege matters. We cannot solve our modern dilemma by resorting to the solution that was rejected by the Framers—that is, by demanding constitutional certitude.

Michael Foley makes the point that constitutional dogmatism could have the effect of dangerously exposing the unresolvable elements of the separation of powers and the inconsistencies of the constitutional system. He correctly explains that certain constitutional problems are not amenable to definitive solutions. In fact, an advanced constitutional culture is one that tolerates and even cultivates the existence of what he calls "abeyances," defined as, "those constitutional gaps which remain vacuous for positive and constructive purposes." Foley's thesis is most germane to the analysis of how to resolve the dilemma of executive privilege:

There is simply more to be gained by cultivating and protecting abeyances and in preventing political issues and institutional differences from inciting intransigent divisions and entrenched constitutional dogmatism. In not extending claims to their logical but provocative conclusions; in not seeking to maximize advantages irrespective of their repercussion; and in promoting "comity" by which positions are acknowledged and honored in the cause of achieving a means of cooperation within a context brooding with adversity, political participants can transform immobilism into productive interplay. The unremitting dissonance of a separated powers system, therefore, can condition those who work within it to the need to strive continuously against a background of conflict and dispute, in order to achieve any sense of common purpose.

Nonetheless, critics of executive privilege make the case that such a power potentially is dangerous, thereby requiring either elimination of that power or the imposition of severe legal constraints on its exercise. Such resolutions to the dilemma of executive privilege are antithetical to the nature of a constitutional system that tolerates and cultivates abeyances. Those resolutions demonstrate a lack of understanding of a separation of powers system in which the exercise of executive

231 See FOLEY, supra note 91, at 77.
232 Id. at xi.
233 Id. at 76.
234 See BERGER, supra note 1, at 58 (finding that a president's powers are only those strictly enumerated by the founding fathers, and that "lacking an 'enumerated' power, action is illegal").
privilege is sometimes necessary. Caesar makes the point that the exercise of prerogative powers is appropriate for unusual circumstances and that "the exception or extreme case need not define the rule." In creating the separation of powers system, the Framers did not envision the resort to strict legalisms as the means to resolve customary inter-branch disputes. Caesar's explanation of the Framers' theory of the separation of powers is germane to this analysis:

[T]he executive power, although it cannot always be subject to precise limitations, can still be watched, checked, and supervised by other institutions possessing an equal or greater regard among the people. Following this theory, the founders placed the greater part of the law-making power in Congress, thereby reducing the prospect that the prerogative power would ever be carried over into normal governance. Moreover, the very presence of institutions as powerful as the Congress and the Supreme Court could serve to check the executive power. Finally, there is a sense in which the founders made the legislative power supreme not so much by giving it the law-making power as by giving it the power to impeach and convict the president. By this means the legislature can dismiss the person exercising the executive power, even though it cannot exercise that power itself.

Many critics of executive privilege too readily assume that any invocation of that power is, by definition, suspect—that no one wants to refuse to disclose information unless he or she has "something to hide." To avoid future Watergate-like scandals and to resolve the dilemma of executive privilege, they offer solutions that are more troublesome than the problems they wish to eliminate. The resolution to the dilemma of executive privilege is, in a sense, right before our eyes. The Founders' theory of separation of powers offers the necessary mechanisms by which prerogative powers can be exercised, challenged, and constrained.

Although there is no need for any statutory definition of, or limitations on, executive privilege, the post-Watergate years demonstrate that it is prudent for each presidential administration to adopt a set of procedures on how it will exercise executive privilege. The failure to do so in the Ford and Carter Administrations—though perhaps necessitated by the political environment of the mid-to-late 1970s—resulted in a great deal of confusion both within each administration and between the political branches. There is no small irony to the fact that these two presidencies—predicated on promises to be "open" and in every possible way unlike the Nixon Administration—in failing to adopt their own

235 Caesar, supra note 98, at 176.
236 Id.
237 See ROZELL, DILEMMA OF SECRECY, supra note 194, at 83-141.
executive privilege guidelines operated officially under the guidelines established in the Nixon memorandum. President Reagan adopted new executive privilege guidelines in 1982, which remained in effect throughout the Reagan/Bush years. The Bush Administration routinely did not abide by those guidelines. The Clinton Administration adopted revised executive privilege guidelines in 1994 and the President clearly violated some of the new procedures during the Monica Lewinsky scandal investigation.

To avoid confusion regarding the exercise of executive privilege, it would be eminently sensible for each new administration to promulgate a set of guidelines on the use of that power. These guidelines need not diverge substantially, or even at all, from one administration to the next. Yet, each administration should issue a presidential directive to make unmistakably clear how members of the executive branch are to handle executive privilege matters. Each administration should not pose its guidelines in the form of legalisms, but rather, should outline the formal procedures of the administration for handling and resolving executive privilege issues. The guidelines also should identify only broad categories of areas in which issues of executive privilege might arise. The traditional categories are national security, confidential deliberations, enforcement of criminal justice, and privacy of executive branch officials. Specific cases of executive privilege should be dealt with as they arise, as all such cases cannot be anticipated in advance.

Regardless of how the guidelines are set up—whether, for example, the President personally must assert executive privilege, or the use of that power must be approved by the Attorney General—responsibility for the exercise of that prerogative resides ultimately with the President. Consequently, accountability is not compromised by the exercise of executive privilege because the President will have to justify his use of that power to the electorate or to one or both of the coordinate branches of government. To accept the legitimacy of a properly constrained executive privilege power in the system of separated powers is to place an important trust in the President that he will exercise this power prudently and in the public interest, and to know that the American populace can hold him accountable for the manner in which he discharges such constitutional authority.

When properly exercised, executive privilege clearly is constitutional. Despite the evidence, executive privilege remains mired in controversy. Much of the
controversy can be attributed to the fact that—as with other constitutional powers—not every president has exercised executive privilege prudently or properly. Executive privilege became most controversial during the Watergate era and then later on during the Clinton scandal. Regarding President Nixon’s actions, Berger explains that “‘confidentiality’ was the vehicle for the cover-up of criminal acts and conspiracies by his aides, an instrument he repeatedly employed for the obstruction of justice.”

Berger’s description of governmental secrecy in the Nixon White House is indisputable. Similarly harsh judgments can be made legitimately regarding President Clinton’s aggressive use of executive privilege to thwart inquiries from the Office of Independent Counsel.

Nonetheless, it is important not to generalize from the abuses of any particular administration that “[s]ecrecy in the operations of government is an abomination.” It is no more valid to argue against the legitimate exercise of executive privilege because of the abuses of that power by Presidents Nixon and Clinton than it is to dismiss the legitimate exercise of legislative inquiry because of the abuses of that power by Senator Joseph McCarthy (R-Wis.) in the 1950s.

In certain circumstances, executive privilege is a necessary and proper power that is open to challenge. Like other governmental powers, it may be subject to a balancing test when weighed against demands for information. Presidents should not lightly exercise this power. They should reserve executive privilege for the most compelling reasons—such as protecting certain national security needs or preserving White House confidentiality when it is in the public interest to do so. Executive privilege never should be used to protect an administration from revealing embarrassing or politically damaging information. Past attempts to do so have given executive privilege a bad name. Restoring the good name of executive privilege is ultimately important to the effective discharge of presidential responsibilities.

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244 Berger, Incarnation, supra note 16, at 29.
245 Id.